



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

2275/A
JW

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 9 April 2009

**THE PROSECUTOR
v.
ELIÉZER NIYITEGEKA**

Case No. ICTR-96-14-R75

OR:
ENG

15R-96-14-R75
09-04-2009
(2275/A-2279/A)

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON RECONSIDERATION OF ELIÉZER NIYITEGEKA'S MOTION
FOR DISCLOSURE OF CLOSED SESSION TESTIMONY AND EVIDENCE
UNDER SEAL PURSUANT TO THE APPEALS CHAMBER DECISION OF 23
OCTOBER 2008**

Rule 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Mr. Hassan Bubacar Jallow

Counsel for the Defence:
Mr. Nyabirungu Mwene Songa
Mr. Richard Kazadi Kabimba

The Applicant:
Mr. Eliézer Niyitegeka

INTRODUCTION

1. On 18 July 2007, Mr. Eliézer Niyitegeka filed a request before President Dennis Byron for access to closed session materials in relation to the testimony of Witness DD, a protected witness in the *Muhimana* proceedings.¹ The closed session transcripts of Witness DD's testimony are protected by a Decision which ordered the non-disclosure by the parties of documents or information that could reveal the identity or location of a protected Defence witness.²

2. On 15 November 2007, President Byron designated this Chamber to determine the Motion.³ On 14 February 2008, the Chamber denied the Motion ("Impugned Decision").⁴

3. On 2 July 2008, Niyitegeka filed a consolidated appeal challenging the Impugned Decision.⁵ On 23 October 2008, the Appeals Chamber granted, in part, Niyitegeka's Consolidated Appeal against the Impugned Decision. It found that the Trial Chamber had "committed a discernible error, based on an incorrect interpretation of the governing law" by failing to first consider whether Niyitegeka had shown a legitimate forensic purpose for accessing the closed session material before exercising its discretion to strike a balance between the protection and integrity of the closed session material and Niyitegeka's right to have access to it. The Appeals Chamber found that it was only as a

¹ *The Prosecutor v. Mika Muhimana*, Case No. ICTR-95-1B-T, Requête urgente de Mr. Eliézer Niyitegeka (ICTR-96-14-R) aux fins de communication du procès-verbal de l'audience à huis-clos et d'une pièce déposée sous scellée lors de la déposition du témoin DD, signed 17 July 2007 and filed 18 July 2007. ("Motion")

² *Muhimana*, Decision on Defence Motion for Protective Measures for Defence Witnesses (TC), 6 July 2004 ("*Muhimana* Defence Protective Measures Decision").

³ *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R75, Designation of a Trial Chamber to Consider the Request for Disclosure of Closed Session Transcripts (President), 15 November 2007. The designated Trial Chamber heard the original testimony of Witness DD and granted the relevant protective measures. See *Muhimana* Defence Protective Measures Decision.

⁴ *Niyitegeka*, Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence under Seal, 14 February 2008.

⁵ *Niyitegeka*, Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008 respectivement, sur les requêtes d' Eliézer Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al. , signed 30 June 2008 and filed 2 July 2008 ("Consolidated Appeal"). See also *Niyitegeka*, Prosecutor's Response to Niyitegeka's "Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008, respectivement, sur les requêtes d'Eliziér Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al.", 11 July 2008; *Niyitegeka*, Addendum à « l' Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008 respectivement, sur les requêtes d'Eliziér Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al. », 14 July 2008; *Niyitegeka*, Réplique à la "Prosecutor's Response to Niyitegeka's « Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008, respectivement, sur les requêtes d'Eliziér Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al. »", signed 17 July 2008 and filed 21 July 2008; *Niyitegeka*, Prosecutor's Response to Niyitegeka's Addendum, 24 July 2008.

second step that the Trial Chamber should have exercised this discretion, having first considered whether Niyitegeka had shown a legitimate forensic purpose for accessing the material which it failed to do. As a result, the Appeals Chamber remanded the matter to the Trial Chamber, and directed it to reconsider Niyitegeka's request "in accordance with the governing law."⁶

DISCUSSION

Rule 75

4. Rule 75 (F) (i) provides that once protective measures have been ordered in respect of a witness in any proceedings before the Tribunal (the first proceedings) such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the second proceedings) unless and until they are rescinded, varied or augmented.

5. Rule 75 (G) provides that a party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

- (i) to any Chamber, however constituted, remaining seised of the first proceedings; or
- (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

Rule 81 (B)

6. Niyitegeka also bases his Motion on Rule 81 (B), which authorises the Trial Chamber to "order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist." The Chamber repeats its finding in the Impugned Decision that "Niyitegeka does not actually argue that the reasons for ordering the non-disclosure of records of closed proceedings in the *Muhimana* case – the reason being the protection of witnesses' identities – no longer exist. There is therefore no basis upon which the Chamber can be satisfied that the reasons for ordering non-disclosure of closed proceedings have changed. Rule 81 (B) is not applicable to the present circumstances."⁷

Applicable law regarding disclosure of confidential material from another case

7. The law governing the disclosure of confidential material from another case is well established. As stated in the Appeals Chamber Decision, the test to be applied by this Trial Chamber is as follows:⁸

⁶ *Niyitegeka, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-R75, Decision on Eliézer Niyitegeka's Appeal Concerning Access to Confidential Materials in the Muhiman and Karemera et al. Cases, 23 October 2008 ("Appeals Chamber Decision").

⁷ Impugned Decision, para. 8.

⁸ Appeals Chamber Decision, para. 21.



2272/A

"a party is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case.⁹ Where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose for accessing it must be demonstrated.¹⁰ Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.¹¹ A Chamber must be satisfied that the requesting party has established that this material is likely to assist its case materially, or that there is at least a good chance that it would.¹² Once it is determined that confidential material filed in another case may materially assist an applicant, the Chamber shall determine which protective measures shall apply to the material, as it is within the Chamber's discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and integrity of confidential information."¹³

⁹ Appeals Chamber Decision, para. 21 citing: *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du procureur et nécessaires à la défense de l'appellant et aux fins d'assistance du greffe pour accomplir des investigations complémentaires en phase d'appel*, 8 December 2006 ("*Nahimana et al. Decision*"), para. 12; See also *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on "Motion by Mićo Staničić for Access to all Confidential Materials in the Krajišnik Case", 21 February 2007, ("*Krajišnik Decision*") page 4; *The Prosecutor v. Mladen Naletilić, aka "TUTA" and Vinko Martinović, aka "ŠTELA"*, Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, ("*Natetilić and Martinović Decision*"), page 5; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagic and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 23 January 2003, ("*Kordić and Čerkez Decision*"), page 3; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003, (*Kvočka et al.*, Decision), para. 5; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaškić*, 16 May 2002 ("*Blaškić Decision*"), para. 14.

¹⁰ Appeals Chamber Decision citing: *Nahimana et al. Decision*, para. 12; See also *Krajišnik Decision*, page 4; *Natetilić and Martinović Decision*, page 5; *Kordić and Čerkez Decision*, page 3; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003, *Kvočka et al.*, Decision, para. 5; *Blaškić Decision*, para. 14.

¹¹ Appeals Chamber Decision citing: *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaškić*, 16 May 2002, para. 15.

¹² Appeals Chamber Decision citing: *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the *Blagojević and Jokić* Case, 18 January 2006 ("*Blagojević and Jokić Decision*"), para. 4; See also *Krajišnik Decision*, pages 4 -5; *Naletilić and Martinović Decision*, page 6; *Kvočka et al.*, Decision, para. 5; *Blaškić Decision*, para. 14.

¹³ Appeals Chamber Decision citing: *Naletilić and Martinović Decision*, page. 7; *Blagojević and Jokić Decision*, para. 7.



2271/A

(i) Have the materials been specifically identified?

8. Niyitegeka has specifically identified the material he requests as the closed session transcripts of Witness DD's testimony on 17 August 2004 and Exhibit D43, the Personal Information Sheet of Witness DD, entered into evidence under seal during his testimony.¹⁴ He has requested these documents with a view to eventually requesting a review of the judgement in his case under Rule 120 on the basis that a new fact has been discovered.¹⁵

(ii) Has a legitimate forensic purpose for accessing the materials been demonstrated and is the Chamber satisfied that the requesting party has established that this material is likely to assist its case materially, or that there is at least a good chance that it would?

9. The Chamber must consider whether Niyitegeka has demonstrated a legitimate forensic purpose for seeking access to the closed session material. The Chamber must be satisfied that he has established that the closed session testimony of Witness DD is likely to assist his case materially, or that there is at least a good chance that it will. Niyitegeka submits that Witness DD is a Tutsi who fled the massacres in 1994. The Witness hid in Mubuga church in Gishyita commune from 12 April 1994 for three days before fleeing to the Bisesero hills. Niyitegeka submits that Witness DD knew Witness DAF very well as they lived on neighbouring hills. He submits that Witness DD's testimony in the Muhimana proceedings raises doubt on the credibility of the testimony of Witness DAF which formed the basis of the Trial Chamber's conviction of Niyitegeka for the crime of murder. He observes that the Appeals Chamber held that the Trial Chamber had not erred in finding Witness DAF credible.¹⁶

10. The Chamber observes that Witness DAF was the sole witness on whose testimony Niyitegeka was convicted for the murder of a girl of 13-15 years of age in Bisesero by the Gisovu-Kibuye Road on 20 May 1994.¹⁷ In evaluating the Witnesses' credibility in respect of this incident, the Trial Chamber recalled its finding that Witness DAF was found to be a credible witness in relation to a finding that the Accused was one of the leaders of a large scale attack at Muyira Hill, Bisesero against Tutsi refugees on 13 May 1994.¹⁸ The Appeals Chamber upheld the finding regarding Witness DAF's credibility.¹⁹

11. The Chamber further notes that Niyitegeka was convicted of two crimes of murder as crimes against humanity, the murder of the young girl on 20 May 1994 stated above and the murder of two civilian Tutsi on 18 June 1994. Niyitegeka's conviction for the latter murders was not based on any testimony from Witness DAF.²⁰

¹⁴ Motion, para. 1.

¹⁵ Motion, para. 4.

¹⁶ Motion, paras. 2-3.

¹⁷ Niyitegeka Judgement, 16 May 2003, ("Niyitegeka Judgement"), paras. 292-302.

¹⁸ Niyitegeka Judgement, para. 293.

¹⁹ Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, 9 July 2004, paras.167-173.

²⁰ Niyitegeka Judgement, paras. 269-272, 443.



2270/A

12. The Chamber has reviewed the material sought and notes that the only information contained in the closed session transcripts and the exhibit that was not disclosed in the open session material in relation to Witness DAF was his full personal particulars. Accordingly, in the Chamber's view, Niyitegeka has failed to demonstrate a legitimate forensic purpose for accessing the closed session materials and the Chamber is not satisfied that the information sought is likely to assist Niyitegeka's case materially, or that there is at least a good chance that it would.

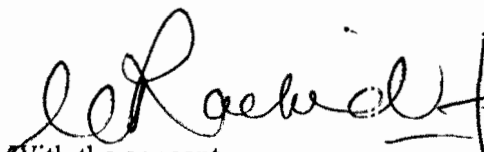
FOR THESE REASONS, the Chamber

DENIES the Motion.

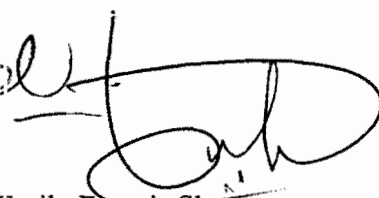
Arusha, 9 April 2009



Khalida Rachid Khan
Presiding Judge



With the consent
and on behalf of
Lee Gacuiga Muthoga
Judge



Emile Francis Short
Judge

