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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Case No. ICTR-98-44-T

ENGLISH
Original: FRENCH

Before Judges: Dennis C. M. Byron, presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 3 September 2009

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THE PROSECUTOR

v.

ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE
JOSEPH NZIRORERA

DECISION FOR REFERRAL PURSUANT TO THE APPEALS CHAMBER'S
DECISION OF 23 OCTOBER 2008

(Articles 75(F) and (G) of the Rules of Procedure and Evidence)

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INTRODUCTION

1. On 16 May 2003, the Trial Chamber sentenced Eliézer Niyitegeka to imprisonment for the remainder of his life for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, as well as for murder, extermination and other inhumane acts constituting crimes against humanity.¹ The Appeals Chamber affirmed the sentence.²

2. In August 2007, Eliézer Niyitegeka filed a third request for review of the Appeal Judgement affirming his sentence pursuant to Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence ("Rules"), and requested the Appeals Chamber to admit as evidence excerpts from Witness AMM's closed session testimony in *The Prosecutor v. Édouard Karemera, Joseph Nzirorera and Matthieu Ngirumpatse* ("*Karemera et al.*").³ The Appeals Chamber refused to admit the said transcripts of the hearing because they had been obtained in violation of protective measures for witnesses ordered by the Chamber in *Karemera et al.* The Chamber also ordered the Prosecutor to conduct investigations pursuant to Rule 77(C)(i) of the Rules.⁴

3. On 25 February 2008, the Chamber dismissed Eliézer Niyitegeka's Motion for Disclosure of Closed Session Transcripts of Witness AMM's Testimony in *Karemera et al.*⁵

4. On 17 April 2008, Eliézer Niyitegeka again filed a motion with the Appeals Chamber for clarification of the Chamber's Decision of 25 February 2008.⁶ Following the Appeals Chamber's Decision,⁷ he appealed the Decision of 25 February 2008.⁸ Noting that the Trial Chamber had committed an obvious error in its application of the relevant law, the Appeals Chamber referred the matter back to the Trial Chamber⁹ on 23 October 2008.

¹ *The Prosecutor v. Eliézer Niyitegeka* ("*Niyitegeka*"), Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("Judgement").

² *Niyitegeka*, Appeal Judgement, 9 July 2004.

³ Motion for Review of Appeals Chamber Judgement Rendered on 9 July 2005 or, alternatively, for an Order to Investigate the False Testimony of Prosecution Witnesses, filed on 22 August 2007 ("*Third Request for Review*").

⁴ *Niyitegeka*, *Decision on Third Request for Review* (Appeals Chamber), 23 January 2008, para. 9.

⁵ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Eliézer Niyitegeka's Urgent Motion for Disclosure of Closed Session Transcripts of the Testimony of Witness AAM, ("Decision on Niyitegeka's Urgent Motion") paras. 7 to 9.

⁶ Request for clarification of the interpretation of "Niyitegeka's Decision on 3rd Request for Review", 14 April 2008.

⁷ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, "Decision on Motion for Clarification", 20 June 2008, para. 16.

⁸ Consolidated Appeal against the Decisions rendered by Trial Chamber III on 14 February 2008 and 25 February 2008, respectively on Eliézier Niyitegeka's Motions for Disclosure of Closed Session Transcripts on the Testimony of Witness DD in *Muhimana*, and Witness AMM in *Karemera et al.*, 11 July 2008.

⁹ *Niyitegeka v. The Prosecutor*, Case No. ICTR-98-44-R75, "Decision on Eliézier Niyitegeka's Appeal concerning Access to Confidential Materials in the *Muhimana* and *Karemera et al.* Cases", 23 October 2008 ("Decision on Niyitegeka's Request for Review"), paras. 24 and 25.

5. Pursuant to an order from the said Chamber,¹⁰ Eliézer Niyitegeka filed more precise submissions to explain how the transcripts he was seeking to access could materially assist him in his defence.¹¹ Joseph Nzirorera and Édouard Karemera supported Eliézer Niyitegeka's position¹² while the Prosecutor opposed the submissions.¹³

DELIBERATIONS

6. Once protective measures have been ordered in respect of a victim or a witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures: (i) shall continue to have effect *mutatis mutandis* in any other proceedings (the "second proceedings") unless and until they are rescinded, varied or augmented.¹⁴ 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.¹⁵

7. A party seeking to obtain confidential material from another trial must prove that there is a legal forensic purpose to do so.¹⁶ The relevance of the request may be determined by showing the existence of a nexus between the applicant's case and the case from which such

¹⁰ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Order pursuant to Eliézer Niyitegeka's Urgent Motion for Disclosure of Transcripts of Closed session and of the Appeals Chamber's Decision of 23 October 2008 concerning Niyitegeka's Request for Review, of 2 July 2009.

¹¹ Eliézer Niyitegeka's Submissions following Trial Chamber III's Order rendered on 2 July 2009, filed on 8 July 2009 ("Niyitegeka's submissions").

¹² Joseph Nzirorera's Joinder in Niyitegeka Motion for Access, filed on 9 July 2009; Édouard Karemera's confidential submissions following Trial Chamber III's Order of 2 July 2009 "Order pursuant to Eliézer Niyitegeka's Urgent Motion for Disclosure of Closed Session Transcripts..." filed on 13 July 2009.

¹³ Prosecutor's Submissions Pursuant to The Trial Chamber's Order of 2 July 2009 Requesting the Prosecutor to make his Observations on "Eliézer Niyitegeka's Urgent Motion for Disclosure of Transcripts of Closed Session and to the Appeals Chamber's Decision of 23 October 2008 concerning Niyitegeka's Request for Review", filed on 14 July 2009 ("Prosecutor's submissions").

¹⁴ Rule 75(F) of the Rules.

¹⁵ Rule 75(G) of the Rules.

¹⁶ "Decision on Niyitegeka's Request for Review", para. 12; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on 'Motion by Miko Staničić for Access to all Confidential Materials in Krajišnik Case' 21 February 2007 ("Decision on Krajišnik"), para. 4; *Prosecutor v. Mladen Naletetić, and Vinko Martinović*, Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletetić and Martinović* and Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access" ("Decision on Naletetić and Martinović"), 13 June 2005, para. 5; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, "Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Materials, Transcripts and Exhibits in the *Kordić and Čerkez* Case" ("Decision on Kordić and Čerkez"), 23 January 2003, p. 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 (hereinafter, "Decision on Kvočka and consorts"), 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 *Prosecution v. Blaškić* Case", 23 January 2003 ("Decision on Blaškić"), 16 May 2002, para. 14; "Decision on Blaškić", para. 14.

material is sought.¹⁷ The applicant must prove to the Chamber that access to such material is likely to substantially assist him in presenting his case or, at least, that there is a good chance that it would.¹⁸

8. Eliézer Niyitegeka submits that during his trial Witness AMM, who testified under the pseudonym GGH, stated that he saw him (a) in the afternoon of 10 April 1994 in Gisovu with firearms which he handed over to Jean Sabahire; (b) on 13 April 1994 in Rugarama with some attackers whom he had encouraged to kill the Tutsi; and (c) on 13 May 1994 at *Kucyapa* leading the attack against Tutsi refugees. Eliézer Niyitegeka stated that Witness GGH's testimony was not corroborated and that the Chamber assessed Witness GGH's credibility only on the events of 10 April 1994 and subsequently applied its findings to the assessment of all the other incidents the witness testified about¹⁹ and that he was convicted of incitement to commit genocide based on Witness GGH's testimony.²⁰

9. Eliézer Niyitegeka contends that on 20 June 2007, Witness GGH/AMM testified in *Karemera et al* that on 10 April 1994, he took refuge at his godfather's house, wherefrom he subsequently proceeded to a tea plantation and remained there for four days before heading to the house of one of his close relations where he stayed until May 1994.²¹ Thus, Eliézer Niyitegeka infers that even if Witness GGH/AMM had gone to Gisovu on 10 April 1994, he could neither have seen him nor what was loaded onto his vehicle, and could not have seen him in Rugarama on 13 April 1994. Therefore, Eliézer Niyitegeka concludes that Witness GGH/AMM's testimony is "a new fact" which proves that the witness gave false testimony and that the Trial Chamber erred in law by basing its findings on the incorrect allegations made by Witness GGH/AMM, and that the Appeals Chamber affirmed the erroneous findings.²² It is on the basis of this information that Eliézer Niyitegeka requests disclosure of the transcripts of the closed session testimony of Witness AMM in *Karemera et al* to support his Request for Review.²³

10. The Chamber notes that in *Niyitegeka* it found the testimony of Witness GGH/AMM to be credible and relied thereon to find Eliézer Niyitegeka guilty of incitement to commit genocide.²⁴ The Chamber is of the opinion that Eliézer Niyitegeka's recourse for review is legitimate and is a right under Article 25 of the Statute and Rule 120 of the Rules of the Tribunal. Nonetheless, the Chamber recalls that, after examining the closed session transcripts, the Appeals Chamber has already found Witness AMM's testimony in *Karemera*

¹⁷ "Decision on Niyitegeka's Request for Review", para. 12, which refers to "Decision on *Blaškić*", para. 15.

¹⁸ "Decision on Niyitegeka's Request for Review", para. 21, 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 Jović* Case", 18 January 2008 ("Decision on *Blagojević and Jović*"), para. 5; see also, "Decision on *Krajišnik*", para. 4-5; "Decision on *Naletilić and Martinović*" para. 6; "Decision on *Kvočka et al.*," para. 5; "Decision on *Blaškić*" para. 14.

¹⁹ Niyitegeka's submissions, para. 9.

²⁰ *Idem*.

²¹ *Ibid.*, para. 11.

²² *Ibid.*, para. 18. *Ibid.*,

²³ Niyitegeka's submissions, para. 18.

²⁴ *Niyitegeka* Judgement, paras. 66, 432, 435 and 436. See also *Niyitegeka*, Appeal Judgement, para. 117.

et al to be consistent with his testimony in *Niyitegeka*,²⁵ that Witness AMM's testimony does not constitute a new fact for the purposes of review and that, even if it did, Witness AMM's testimony could not have been a decisive factor in reaching the original decision which found Eliézer Niyitegeka guilty.²⁶ Given the circumstances, after a careful consideration of the parties' submissions, the Chamber concludes that granting Eliézer Niyitegeka access to the materials in question is unlikely to substantially assist him in presenting his case and that it is not likely that it would in the instant case.²⁷ Consequently, the Chamber finds that Eliézer Niyitegeka has failed to prove that there is a legitimate forensic purpose justifying his access to the closed session testimony of Witness AMM in *Karemera et al.*

11. The Prosecutor prays the Chamber to investigate the means by which Niyitegeka made the inferences as to the identity of Witness AMM and to sanction him if he is found to be in violation of protective measures which he had purportedly undertaken to respect.²⁸ The Chamber reiterates its disapproval of Eliézer Niyitegeka's unauthorized access to the closed session transcripts and recalls that investigations into the matter are already being carried out by the Appeals Chamber. Consequently, the Chamber considers it unnecessary to order yet another investigation.

FOR THE FOREGOING REASONS, THE CHAMBER

I. DISMISSES Eliézer Niyitegeka's Motion in its entirety; and also

II. DISMISSES the Prosecutor's request for investigation.

²⁵ *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, "Decision on Fourth Request for Review" (Public Redacted Version) ("Decision on Fourth Request for Review"), 12 March 2009, para. 34.

²⁶ The Appeals Chamber found that: "Witness AMM's testimony in the *Karemera et al.* case does not constitute a new fact for the purposes of review" (para. 33) and that "Even if Witness AMM's testimony [*sic*], the Appeals Chamber is of the view that it could not have been a decisive factor in reaching the original decision", "Decision on Fourth Request for Review" (para. 34), *Niyitegeka*, "Decision on Fourth Request for Review", paras. 34 and 35.

²⁷ "Decision on Niyitegeka's Request for Review", para. 21; 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 Jović* Case", 18 January 2008, para. 5; see also, "Decision on *Krajišnik*", paras. 4 and 5; "Decision on *Naletilić and Martinović*", para. 6; "Decision on *Kvočka et al.*," para. 5; "Decision on *Blaškić*", para. 14.

²⁸ Prosecutor's submissions, para. 20.

Done at Arusha on 3 September 2009, in French

[Signed]

Dennis C. M. Byron
Presiding

[Signed]

Gberdao Gustave Kam
Judge

[Signed]

Vagn Joensen
Judge

[Seal of the Tribunal]
