



Tribunal pénal international pour le Rwanda

International Criminal Tribunal for Rwanda

2293/H

UX

ICTR-96-14-R

21<sup>st</sup> April 2009

{2293/H – 2276}

**IN THE APPEALS CHAMBER**

**Before:**

Judge Liu Daqun, Presiding  
Judge Mohamed Shahabuddeen  
Judge Fausto Pocar  
Judge Theodor Meron  
Judge Carmel Agius

**Registrar:**

Mr. Adama Dieng

**Decision of:**

12 March 2009

ICTR Appeals Chamber  
Date: 21<sup>st</sup> April 2009  
Action: R-*Sumo?*  
Copied To: *Conciliated Judges, SLOs, LOs, ALOs, PALS, CMS, ESS.*  
*Jun/Jul 09*

**Eliézer NIYITEGEKA**

v.

**THE PROSECUTOR**

*Case No. ICTR-96-14-R*

JUDICIAL RECORDS/ARCHIVES  
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**Public Redacted Version**

**DECISION ON FOURTH REQUEST FOR REVIEW**

**The Applicant**

Mr. Eliézer Niyitegeka, *pro se*

**Office of the Prosecutor**

Mr. Hassan Bubacar Jallow  
Mr. Alex Obote-Odora  
Mr. George Mugwanya  
Ms. Inneke Onsea

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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SIGNATURE: *[Signature]* DATE: *21 April 2009*

2292/H

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of the "Fourth Request for Review of the Judgement Rendered by the Appeals Chamber on 9 July 2004, and for Legal Assistance" filed on 25 November 2008 ("Fourth Request for Review" or "Request") by Eliézer Niyitegeka ("Niyitegeka"). On 19 December 2008, the Prosecution filed its confidential response together with a request to place the Fourth Request for Review under seal.<sup>1</sup> Niyitegeka filed his reply on 14 January 2009.<sup>2</sup>

### I. PROCEDURAL BACKGROUND

2. On 16 May 2003, Trial Chamber I of the Tribunal ("Trial Chamber") convicted Niyitegeka, the former Minister of Information in the Rwandan Interim Government in 1994, of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder, extermination, and other inhumane acts as crimes against humanity, and sentenced him to imprisonment for the remainder of his life.<sup>3</sup> In its Judgement of 9 July 2004, the Appeals Chamber dismissed Niyitegeka's appeal against his convictions and affirmed his sentence.<sup>4</sup>

3. On 27 October 2004, Niyitegeka filed his First Request for Review,<sup>5</sup> which the Appeals Chamber dismissed on 30 June 2006 ("First Review Decision").<sup>6</sup> On 27 September 2006, the Appeals Chamber dismissed Niyitegeka's request for reconsideration of the First Review Decision.<sup>7</sup> On 8 December 2006, Niyitegeka filed his Second Request for Review,<sup>8</sup> which the Appeals Chamber denied on 6 March 2007 ("Second Review Decision").<sup>9</sup> On 17 April 2007, the Appeals Chamber denied Niyitegeka's request for clarification of the Second Review Decision on the

<sup>1</sup> Prosecutor's Response to Niyitegeka's Fourth Request for Review and Prosecutor's Request to Place the Fourth Request for Review Under Seal, confidential, 19 December 2008 ("Prosecution Response").

<sup>2</sup> Brief in Reply to "Prosecutor's Response to Niyitegeka's Fourth Request for Review and Prosecutor's Request to Place the Fourth Request for Review under Seal", faxed on 13 January 2009, filed on 14 January 2009 ("Reply").

<sup>3</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 ("Trial Judgement"), paras. 420, 429, 437, 447, 454, 467, 480, 502.

<sup>4</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("Appeal Judgement"), para. 270.

<sup>5</sup> Request for Review, 26 October 2004 ("First Request for Review"), which was supplemented with additional briefing, including written submissions from assigned counsel.

<sup>6</sup> Decision on Request for Review, 30 June 2006 ("First Review Decision"), paras. 1, 76.

<sup>7</sup> Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006.

<sup>8</sup> *Requête en révision de l'Arrêt rendu par la Chambre d'appel le 9 juillet 2004 et, subséquemment, de la décision de la Chambre d'appel du 30 juin 2006*, 8 December 2006 ("Second Request for Review").

<sup>9</sup> Decision on Request for Review, 6 March 2007, para. 31 ("Second Review Decision").

2291/H

ground that the request was a veiled attempt to seek reconsideration of the final Appeal Judgement as well as the subsequent First and Second Review Decisions.<sup>10</sup>

4. Niyitegeka filed a Third Request for Review on 22 August 2007,<sup>11</sup> which the Appeals Chamber denied on 23 January 2008 ("Third Review Decision").<sup>12</sup> In particular, the Appeals Chamber declined to examine the excerpts of the closed session testimonies of Witness DD in the *Muhimana* case and Witness AMM in the *Karemera et al.* case,<sup>13</sup> which Niyitegeka alleged to be new facts warranting review, on the ground that Niyitegeka had not been granted access to this confidential material.<sup>14</sup>

5. Niyitegeka's requests to access the relevant closed session transcripts in the *Muhimana* and *Karemera et al.* cases were denied on 14 February 2008 and 25 February 2008, respectively (collectively, "Trial Chambers' Decisions Denying Access"), by the Bench of Trial Chamber III designated by the President of the Tribunal to rule on Niyitegeka's request to access closed session material from the *Muhimana* case ("*Muhimana* Trial Chamber") and by the Bench of Trial Chamber III seized of the *Karemera et al.* case ("*Karemera et al.* Trial Chamber").<sup>15</sup> His requests for reconsideration of the Trial Chambers' Decisions Denying Access and his alternative requests for certification to appeal were subsequently denied.<sup>16</sup>

6. On 17 April 2008, Niyitegeka filed a motion for clarification before the Appeals Chamber related, *inter alia*, to the Trial Chambers' Decisions Denying Access.<sup>17</sup> By decision of 20 June 2008, the Appeals Chamber found *proprio motu* that Niyitegeka was entitled to challenge on appeal the Trial Chambers' Decisions Denying Access.<sup>18</sup> Subsequently, Niyitegeka filed a

<sup>10</sup> Decision on Request for Clarification, 17 April 2007, paras. 4, 5.

<sup>11</sup> *Requête aux fins d'une révision de l'Arrêt rendu par la Chambre d'appel le 09 juillet 2004 ou, alternativement, aux fins d'une ordonnance d'enquête sur les faux témoignages des témoins de l'Accusation*, confidential, 22 August 2007 ("Third Request for Review").

<sup>12</sup> Decision on Third Request for Review, 23 January 2008 ("Third Review Decision"), paras. 9, 33.

<sup>13</sup> *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T.

<sup>14</sup> Third Review Decision, paras. 9, 33.

<sup>15</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R75, Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence under Seal, 14 February 2008; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Décision sur la Requête urgente d'Eliézer Niyitegeka aux fins de communication des procès-verbaux des audiences à huis-clos de la déposition du témoin AMM*, 25 February 2008.

<sup>16</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence under Seal, or Alternatively for Certification to Appeal, 13 May 2008; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Décision relative à la Requête d'Eliézer Niyitegeka en réexamen de la Décision du 25 février 2008*, 1 April 2008.

<sup>17</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, *Requête aux fins d'une Clarification sur l'interprétation de "Niyitegeka's Decision on 3<sup>rd</sup> Request for Review"*, 17 April 2008.

<sup>18</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, para. 16.

2290/H

consolidated appeal against the Trial Chambers' Decisions Denying Access.<sup>19</sup> On 23 October 2008, the Appeals Chamber partly granted Niyitegeka's Consolidated Appeal and remanded the cases to the respective Trial Chambers, directing them to reconsider Niyitegeka's requests for closed session material in accordance with the governing law.<sup>20</sup> Neither Trial Chamber has yet issued a decision on the matter.

7. In his Fourth Request for Review Niyitegeka requests the Appeals Chamber to: (i) admit as "new facts" excerpts of the testimonies of Witness DD in the *Muhimana* case and Witness AMM in the *Karemera et al.* case along with six statements from individuals designated as R-9, R-10, R-11, R-12, R-13, and R-14 whose identities are not disclosed ("Additional Statements"); (ii) find that certain factual findings made by the Trial Chamber in his case, and affirmed by the Appeals Chamber, are erroneous; and (iii) decide to review the Appeal Judgement.<sup>21</sup> Niyitegeka also requests that he be assigned counsel to assist him.<sup>22</sup>

## **II. PRELIMINARY MATTERS**

8. Prior to addressing the substance of the Fourth Request for Review, the Appeals Chamber will consider whether Niyitegeka's Reply was validly filed and the merits of the Prosecution's request to have the Fourth Request for Review placed under seal.<sup>23</sup>

### **A. Admissibility of the Reply**

9. Rule 120(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides that any brief in reply to a request for review shall be filed within fifteen days of the filing of the response. In this case, the Prosecution filed its Response on 19 December 2008. Accordingly, Niyitegeka's reply, which was filed on 14 January 2009, should have been filed no later than 5 January 2009.

10. The Appeals Chamber notes, however, that in his Reply Niyitegeka states that he only received the Prosecution Response on 8 January 2009, after enquiring as to whether the Prosecution

<sup>19</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Consolidated Appeal against Decisions rendered by Trial Chamber III on 14 February 2008 and 25 February 2008 respectively on Eliézer Niyitegeka's Motions for Disclosure of Closed Session Transcripts of Witness DD in *Muhimana* and Witness AMM in *Karemera et al.*, 2 July 2008 ("Consolidated Appeal").

<sup>20</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75 and *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-R75, Decision on Eliézer Niyitegeka's Appeal Concerning Access to Confidential Materials in the *Muhimana* and *Karemera et al.* Cases, 23 October 2008, para. 26.

<sup>21</sup> Fourth Request for Review, para. 65(ii), (iii), (v), (vi).

<sup>22</sup> Fourth Request for Review, para. 65(iv).

<sup>23</sup> Prosecution Response, para. 8.

had filed a response and, if so, requesting said filing.<sup>24</sup> The Registry confirmed that Niyitegeka was provided with the Prosecution Response only on 8 January 2009.<sup>25</sup> In these circumstances, where Niyitegeka received the Response late due to the fault of the Registry, the Appeals Chamber considers that there is good cause to consider the Reply as validly filed.

11. The Appeals Chamber considers it necessary to remind the Registrar of his obligation to ensure efficient communication with detainees and convicted persons, even after they have been transferred to a State in which their sentence is to be served, so as to ensure that they may exercise their rights provided for under the Statute and the Rules in full.<sup>26</sup>

#### **B. The Prosecution's Request to Place the Fourth Request for Review under Seal**

12. The Prosecution requests that the Appeals Chamber order the Registrar to place the Fourth Request for Review under seal on the ground that it reveals information contained in closed session transcripts.<sup>27</sup> It also requests that the Appeals Chamber sanction Niyitegeka's "inappropriate use of closed session material which may put the security of witnesses at a risk."<sup>28</sup> In particular, the Prosecution refers to the information that Witness GGH/AMM stayed with his father-in-law until May 1994 and to the details regarding "Mukiga" at whose house Witness DAF hid during the genocide.<sup>29</sup>

13. Niyitegeka responds that the Prosecution's request is unfounded, arguing that he only relies on open-session material from the *Karemera et al.* and *Muhimana* cases in his Request.<sup>30</sup> He further refutes that any of the specific information identified by the Prosecution breached the orders granting protective measures for these witnesses.<sup>31</sup>

14. While the Appeals Chamber considered that the Prosecution's request was not well founded and, as such, did not require immediate action, due to other concerns the Appeals Chamber

<sup>24</sup> Reply, paras. 2, 3.

<sup>25</sup> E-mail from Félicité Talon, Registry Coordinator, dated 9 February 2009; Copy of Proof of Service to Detainees, 9 January 2009. Niyitegeka was transferred to the Republic of Mali on 6 December 2008. Yet, the Registrar sent the Prosecution's Response to the United Nations Detention Unit in Arusha, Tanzania. Only after Niyitegeka inquired into the Response and requested that it be sent to him at the detention facility at Koulikoro, Republic of Mali, where he is currently serving his sentence, did the Registry send the Response. The Appeals Chamber recalls that, under Rule 33(A) of the Rules, the Registrar is responsible "for the administration and servicing of the Tribunal and shall serve as its channel of communication." Here, the Registrar failed to do just that. By failing to timely provide Niyitegeka with the Prosecution's Response, the Registrar prevented him from timely filing his Reply.

<sup>26</sup> See *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndindabahizi's Motion of 1 December 2008, 17 December 2008, pp. 3, 4.

<sup>27</sup> Prosecution Response, para. 8.

<sup>28</sup> Prosecution Response, para. 8.

<sup>29</sup> Prosecution Response, fns. 6, 7.

<sup>30</sup> Reply, para. 7(a).

<sup>31</sup> Reply, para. 7(b) and (c).

2288/H

requested the Registry to remove from the public domain both the Fourth Request for Review and the Reply until further direction from the Appeals Chamber. The Appeals Chamber now turns to explain its reasons.

15. Upon review of the relevant transcripts from the *Karemera et al.* and *Muhimana* cases which were the basis of the Prosecution's request to place Niyitegeka's Request under seal, the Appeals Chamber notes that the following information referred to by Niyitegeka indeed stems from closed-session material:

- that Witness AMM took refuge at his father-in-law's house until May 1994;<sup>32</sup>
- that Mukiga, at whose house Witness DAF hid during the genocide, was "an ethnic Hutu businessman who lived and still lives in the centre of Ryaruhanga, more than [ten] kilometers from Bisesero".<sup>33</sup>

16. The Appeals Chamber considers that the information as to how long Witness AMM stayed at his father-in-law's house does not reveal his identity or endanger his privacy. Likewise, the Appeals Chamber is of the opinion that the details disclosed regarding Mukiga do not divulge information likely to endanger the privacy or security of Witness DAF.<sup>34</sup>

17. Considering Niyitegeka's right to public proceedings<sup>35</sup> and the fact that the closed-session information identified by the Prosecution does not endanger the privacy or security of those it refers to, the Appeals Chamber finds that the Prosecution's request to place the Fourth Request for Review under seal and for sanctions lacks merit.

18. Nevertheless, the Appeals Chamber is concerned that *other* information disclosed by Niyitegeka in his Request may lead to the identification of protected witnesses. [Redacted] The Appeals Chamber finds that these disclosures may endanger the privacy and security of Witnesses DAF and GGV and, therefore, deems it necessary to remove this information from the public domain by placing it under seal.

19. The Appeals Chamber notes that there is nothing to suggest that Niyitegeka may have had a malicious intent in revealing any of this information. Given Niyitegeka's efforts [redacted] it

<sup>32</sup> Fourth Request for Review, paras. 24, 25(a); *Karemera et al.*, T. 20 June 2007 p. 6 (closed session).

<sup>33</sup> Fourth Request for Review, paras. 28, 33 (emphasis added); *Musema*, T. 17 August 2004 p. 14 (closed session).

<sup>34</sup> Incidentally, the Appeals Chamber notes that the information on Mukiga's whereabouts was publicly disclosed by the Prosecution in its response to Niyitegeka's Third Request for Review: Prosecutor's Response to Niyitegeka's "*Requête aux fins d'une Révision de l'Arrêt rendu par la Chambre d'appel le 09 Juillet 2004 ou, alternativement, aux fins d'une ordonnance d'enquête sur les faux témoignages des témoins [sic] de l'Accusation (Articles 20 et 25 du Statut; Articles 68, 91, 107 et 120 du Règlement)*", 1 October 2007, para. 14.

<sup>35</sup> See Article 20(2) of the Statute of the Tribunal.

2287/H

appears that the disclosure was nothing more than an unfortunate oversight. In light of these circumstances, the Appeals Chamber considers that imposing sanctions on Niyitegeka for disclosing information that may have potentially endangered protected witnesses would be inappropriate.

20. In sum, while the reasons put forth by the Prosecution do not justify that the Fourth Request for Review be placed under seal or that sanctions be imposed, the Appeals Chamber considers that the disclosure of information that may reveal the identity of protected witnesses does require that the Request be kept under seal. Given that Niyitegeka's Reply may similarly lead to the identification of Witness DAF, the Appeals Chamber considers that it should also be kept under seal.<sup>36</sup>

### III. DISCUSSION

#### A. Request for Review

##### 1. Standard of Review

21. The Appeals Chamber recalls that review proceedings are governed by Article 25 of the Statute of the Tribunal ("Statute") and Rules 120 and 121 of the Rules. The Appeals Chamber strongly emphasizes that review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.<sup>37</sup> In order for review to be granted, the moving party must show that: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the original proceedings; (iii) the lack of discovery of that new fact was not the result of a lack of due diligence by the moving party; and (iv) the new fact could have been a decisive factor in reaching the original decision.<sup>38</sup> In wholly exceptional circumstances, the Appeals Chamber may nonetheless grant review, even where the new fact was known to the moving party at the time of the original

<sup>36</sup> See Reply, paras. 7(c), 9.

<sup>37</sup> Third Review Decision, para. 13; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("Rutaganda Review Decision"), para. 8. See also First Review Decision, paras. 5-7; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 43.

<sup>38</sup> Third Review Decision, para. 13; *Rutaganda Review Decision*, para. 8; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007, para. 8; First Review Decision, paras. 5-7. See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 ("Blaškić Review Decision"), para. 7; *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Defence Request for Review, 31 October 2006, paras. 9-11; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review under Rule 119, 25 August 2006, para. 8; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Request for Review, 30 July 2002 ("Tadić Review Decision"), para. 20.

2286/H

proceedings or the lack of discovery of the fact was the result of a lack of due diligence by the moving party, if ignoring the new fact would result in a miscarriage of justice.<sup>39</sup>

22. The Appeals Chamber further recalls that the term “new fact” refers to new evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings.<sup>40</sup> The requirement that the fact was not in issue during the proceedings means that “it must not have been among the factors that the deciding body could have taken into account in reaching its verdict.”<sup>41</sup> Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.<sup>42</sup>

## 2. Alleged New Facts

23. Niyitegeka alleges that the testimony of witnesses in other trials before the Tribunal and six new statements recently obtained reveal inconsistencies in the evidence submitted at his trial. Specifically, Niyitegeka argues that excerpts of the testimonies of Witnesses AMM in the *Karemera et al.* case and DD in the *Muhimana* case and the Additional Statements should be regarded as new facts warranting review.<sup>43</sup> The Prosecution requests that the Appeals Chamber dismiss Niyitegeka’s request for review in its entirety.<sup>44</sup>

### (a) Witness AMM’s Testimony in the *Karemera et al.* Case

24. Niyitegeka alleges that the testimony of Witness AMM in *Karemera et al.* shows that the allegations made by the witness when testifying under the pseudonym GGH in Niyitegeka’s own case are unfounded.<sup>45</sup> Niyitegeka submits that while the witness testified in the present case that he saw Niyitegeka in Gisovu on 10 April 1994 and in Rugarama on 13 April 1994,<sup>46</sup> in *Karemera et al.* he gave evidence that, on 7 April 1994, he sought refuge in the house of his godfather, from where he went to a tea plantation for about four days, before taking refuge in the house of his father-in-law where he stayed until May 1994.<sup>47</sup> Niyitegeka submits that the witness could not have seen him in Gisovu on 10 April 1994 and in Rugarama on 13 April 1994 because during those times

<sup>39</sup> Third Review Decision, para. 13; *Rutaganda* Review Decision, para. 8; *Blaškić* Review Decision, para. 8; *Tadić* Review Decision, paras. 26, 27.

<sup>40</sup> Third Review Decision, para. 14; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, paras. 14, 15; *Tadić* Review Decision, para. 25.

<sup>41</sup> Third Review Decision, para. 14; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, paras. 14, 15;

*Tadić* Review Decision, para. 25; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, paras. 14, 15.

<sup>43</sup> Fourth Request for Review, para. 65(ii) and (iii).

<sup>44</sup> Prosecution Response, para. 8.

<sup>45</sup> Fourth Request for Review, para. 25.

<sup>46</sup> Fourth Request for Review, para. 20, referring to Trial Judgement, paras. 54-68.

<sup>47</sup> Fourth Request for Review, para. 24, referring to *Karemera et al.*, T. 20 June 2007 pp. 8-10.



2285/H

the witness was in hiding at his godfather's house, the tea plantation, or at his father-in-law's house.<sup>48</sup> Niyitegeka argues that, had this new information been discovered and put to the witness in his trial, it would have undermined the witness's credibility and led to different conclusions from those reached by the Trial Chamber and affirmed by the Appeals Chamber with respect to the events of 10 and 13 April and 13 May 1994.<sup>49</sup>

25. In response, the Prosecution submits that the alleged new information includes information from closed session material to which Niyitegeka has not yet been granted access. The Prosecution argues that this approach is impermissible and that Niyitegeka's request to admit Witness AMM's testimony in *Karemera et al.* as a new fact should be rejected on this basis alone.<sup>50</sup> Alternatively, the Prosecution submits that, although Witness AMM's testimony is of an evidentiary nature, it does not constitute a new fact since it relates to his credibility as Witness GGH in Niyitegeka's case and to Niyitegeka's alibi for 10 April and 13 May 1994, which are matters that were already considered at trial and on appeal. The Prosecution further submits that Niyitegeka fails to demonstrate that Witness AMM's testimony could have been a decisive factor in reaching the original decision.<sup>51</sup>

26. With respect to the alleged use of closed session material, Niyitegeka replies that the failure of the *Muhimana* and *Karemera et al.* Trial Chambers to reconsider his requests for access to confidential material causes him prejudice.<sup>52</sup> He adds that, "out of patience", he resolved to rely only on open-session material.<sup>53</sup> As regards the merits of his Request, Niyitegeka replies that Witness AMM's testimony is a "new fact" since it introduces a new version of events, which was never mentioned in his case. He reiterates that, had the Trial Chamber been aware of this new fact, it would have formed a different opinion in its assessment of the witness's credibility.<sup>54</sup>

27. First, the Appeals Chamber clarifies that, contrary to what Niyitegeka suggests in his Request,<sup>55</sup> it did not order the *Karemera et al.* and *Muhimana* Trial Chambers to grant Niyitegeka access to Witnesses AMM and DD's closed-session testimonies. Instead, the Appeals Chamber directed these Chambers to reconsider Niyitegeka's requests for closed session material in

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<sup>48</sup> Fourth Request for Review, paras. 20, 25. See also Reply, para. 12.

<sup>49</sup> Fourth Request for Review, para. 26, referring to Trial Judgement, paras. 411, 413, 418, 432, 435, 436, 446, 451, 453, 466, 489, and Appeal Judgement, para. 117. See also Reply, paras. 8, 12, 13.

<sup>50</sup> Prosecution Response, para. 3.

<sup>51</sup> Prosecution Response, para. 4.

<sup>52</sup> Reply, para. 7(a).

<sup>53</sup> Reply, para. 7(a).

<sup>54</sup> Reply, para. 13.

<sup>55</sup> Fourth Request for Review, para. 18.

**2284/H**

accordance with the governing law.<sup>56</sup> The fact that the Trial Chambers have not yet rendered their decisions does not entitle Niyitegeka to rely on the confidential material that should not have been in his possession.

28. In support of his contention that Witness AMM/GGH could not have seen him in Gisovu on 10 April 1994 and in Rugarama on 13 April 1994, Niyitegeka relies, among other things, on the witness's testimony in *Karemera et al.* that he took refuge at his father-in-law's house until May 1994.<sup>57</sup> The information that the witness stayed at the house of his father-in-law "until May 1994" stems from the witness's closed-session testimony to which Niyitegeka has not been granted access.<sup>58</sup> In its Third Review Decision, the Appeals Chamber made clear that the submission of material obtained in direct violation of Trial Chamber's orders seriously undermines the integrity of the Tribunal's proceedings and decided not to examine the confidential material submitted by Niyitegeka which should not have been in his possession.<sup>59</sup> Despite the Appeals Chamber's decision, Niyitegeka again submits information coming from that very same confidential material obtained in violation of a protective measures order.<sup>60</sup> The Appeals Chamber considers that Niyitegeka's reliance on this confidential information would justify a summary dismissal of his request for review based on Witness AMM's testimony.

29. However, in the particular circumstances of this case, the Appeals Chamber has nonetheless elected to explain why Niyitegeka's request for review based on this alleged new information would fail on the merits.

30. At Niyitegeka's trial, Witness GGH testified that: (i) on 10 April 1994, he was having a drink in Gisovu when he saw Niyitegeka transporting guns;<sup>61</sup> (ii) on 13 April 1994, he was hiding in a bush near the road at Rugarama in Bisesero when he saw Niyitegeka inciting attackers to launch an attack against Tutsi refugees;<sup>62</sup> and (iii) on 13 May 1994, he was hiding at a place known as Sakufe Hill when he saw Niyitegeka participating in massacres at Muyira Hill.<sup>63</sup> Having considered Niyitegeka's challenges to the witness's credibility, the Trial Chamber found

<sup>56</sup> 23 October 2008 Appeal Decision, para. 26.

<sup>57</sup> Fourth Request for Review, paras. 24, 25(a).

<sup>58</sup> See *supra* paras. 6, 15.

<sup>59</sup> Third Review Decision, para. 9.

<sup>60</sup> See Third Review Decision, para. 9.

<sup>61</sup> Trial Judgement, para. 54.

<sup>62</sup> Trial Judgement, para. 235.

<sup>63</sup> Trial Judgement, para. 145.

2283/H

Witness GGH credible<sup>64</sup> and relied on his testimony to find Niyitegeka guilty of genocide, direct and public incitement to commit genocide, and extermination as a crime against humanity.<sup>65</sup>

31. On appeal, the Appeals Chamber dismissed Niyitegeka's submissions that the Trial Chamber had erred in accepting and relying on the evidence of Witness GGH concerning the events of 10 and 13 April 1994.<sup>66</sup>

32. In his First Request for Review, Niyitegeka submitted that the transcript of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 was a new fact which demonstrated that Witness GGH had provided false testimony at trial regarding Niyitegeka's presence in Rugarama on 10 April 1994.<sup>67</sup> The Appeals Chamber found that the transcript related to "the alibi of Niyitegeka's participation in the Cabinet Meeting of 10 April 1994 in relationship with the credibility of Prosecution Witness GGH, both being matters that were already considered at trial".<sup>68</sup> For this reason, the Appeals Chamber found that the transcripts did not amount to a new fact for purposes of review.<sup>69</sup>

33. Niyitegeka again attempts to challenge Witness GGH's credibility. The Appeals Chamber reiterates that Witness GGH's credibility was in issue both during trial and appeal proceedings. Accordingly, the Appeals Chamber finds that Witness AMM's testimony in the *Karemera et al.* case does not constitute a new fact for purposes of review.

34. In any event, the Appeals Chamber observes that although his testimony in *Karemera et al.* reveals certain confusion on the part of the witness as to dates, it does not contradict his testimony in Niyitegeka's own case. Even if Witness AMM's testimony had constituted a new fact, the Appeals Chamber is of the view that it could not have been a decisive factor in reaching the original decision.

(b) Witness DD's Testimony in the *Muhimana Case*

35. Niyitegeka alleges that Witness DD's testimony in *Muhimana* places Witness DAF's credibility in his trial at issue since Witness DD testified that, between April and July 1994, Witness DAF did not take refuge in the hills of Bisesero but in the home of a certain Mukiga in

<sup>64</sup> Trial Judgement, para. 66. *See also ibid.*, paras. 176, 236.

<sup>65</sup> Trial Judgement, paras. 411, 413, 418 (genocide), 432 (direct and public incitement to commit genocide), 451 (extermination).

<sup>66</sup> Appeal Judgement, paras. 108-117.

<sup>67</sup> *See First Review Decision*, para. 11.

<sup>68</sup> *First Review Decision*, para. 12.

<sup>69</sup> *First Review Decision*, para. 12.

2282/H

Ryaruhanga, more than ten kilometres from the hills of Bisesero.<sup>70</sup> Niyitegeka argues that it was therefore impossible for Witness DAF to see him in Kucyapa on 13 May 1994 and in Bisesero on 20 May 1994, as the Trial Chamber concluded.<sup>71</sup> Niyitegeka contends that, had Witness DD's testimony been known in his case, the Trial Chamber would not have found Witness DAF credible and would not have relied on his testimony to find Niyitegeka guilty.<sup>72</sup>

36. In response, the Prosecution submits that the alleged new information includes information from closed session material to which he has not yet been granted access. The Prosecution argues that this approach is impermissible and that Niyitegeka's request to admit Witness DD's testimony as a new fact should be rejected on this basis alone.<sup>73</sup> Alternatively, the Prosecution argues that, although the testimony of Witness DD could be regarded as evidentiary information related to the credibility of Witness DAF that has implications for Niyitegeka's alibi, this information is not a new fact since this issue was already pleaded and considered during the proceedings in this case. The Prosecution also argues that even if Witness DD's testimony was considered a new fact, it could not have been a decisive factor in reaching the original decision.<sup>74</sup>

37. Niyitegeka replies that he relies only on open-session material. He further submits that Witness DD's testimony constitutes a new fact since it provides information that was not previously provided to the Trial Chamber or the Appeals Chamber.<sup>75</sup>

<sup>70</sup> Fourth Request for Review, paras. 28-30, 33, referring to Trial Judgement, paras. 139, 162-168, 292-302; *Muhimana*, T. 17 August 2004 n. 19. ~~44~~ 44 referring to Trial Judgement, paras. 139, 162-168, 292-302, 311-315. Judgement, para. 169.

<sup>72</sup> Fourth Request for Review, para. 34.

<sup>73</sup> Prosecution Response, para. 3.

<sup>74</sup> Prosecution Response, para. 4.

<sup>75</sup> Reply, paras. 7, 9.

## 2281/H

38. The Appeals Chamber observes that Niyitegeka does rely on closed-session material in this instance.<sup>76</sup> While the information that Witness DAF hid at Mukiga's house stems from Witness DD's public testimony, the details as to Mukiga's whereabouts are extracted from the witness's closed-session testimony, to which Niyitegeka has not been granted access.<sup>77</sup> Recalling its finding in the Third Review Decision that the submission of material obtained in direct violation of Trial Chamber's orders seriously undermines the integrity of the Tribunal's proceedings,<sup>78</sup> the Appeals Chamber finds Niyitegeka's approach unacceptable. As a result, the Appeals Chamber considers that his request for review on this basis should be dismissed without regard to its merits. However, as with Niyitegeka's request concerning Witness AMM's testimony, the Appeals Chamber has nevertheless elected to explain why Niyitegeka's request for review based on this alleged new information would fail on the merits.

39. The Trial Chamber rejected Niyitegeka's challenges to Witness DAF's credibility<sup>79</sup> and relied on his testimony<sup>80</sup> to find Niyitegeka guilty of genocide as well as murder and extermination as crimes against humanity.<sup>81</sup> Niyitegeka's challenges to the Trial Chamber's finding on Witness DAF's credibility were dismissed on appeal.<sup>82</sup>

40. In his First Request for Review, Niyitegeka sought review of the Appeals Chamber's finding with regard to Witness DAF's credibility by introducing the affidavit of a potential defence witness. The Appeals Chamber found that, although the affidavit was "new" material, it did not constitute a "new fact" warranting review since it was related to issues that had already been examined at trial and on appeal, namely Niyitegeka's alibi for 20 May 1994 and Witness DAF's credibility.<sup>83</sup>

41. Niyitegeka again seeks review of the Appeals Chamber's finding on Witness DAF's credibility. The Appeals Chamber finds that Witness DD's testimony in the *Muhimana* case does not amount to a new fact for purposes of review since Witness DAF's credibility was already in issue during the trial and appeal proceedings.

<sup>76</sup> Fourth Request for Review, paras. 28-30, 33, referring to Trial Judgement, paras. 139, 162-168, 292-302; *Muhimana*, T. 17 August 2004 p. 19.

<sup>77</sup> See *supra* paras. 6, 15.

<sup>78</sup> Third Review Decision, para. 9.

<sup>79</sup> See Trial Judgement, paras. 162-167.

<sup>80</sup> Trial Judgement, paras. 292, 302.

<sup>81</sup> Trial Judgement, paras. 413 (genocide), 444, 447 (murder), 451 (extermination).

<sup>82</sup> Appeal Judgement, paras. 164, 173.

<sup>83</sup> First Review Decision, para. 25.

2280/H

42. In any event, the Appeals Chamber finds that Witness DD's evidence is not such as to disturb the Trial Chamber's finding on Witness DAF's credibility, a finding that was confirmed on appeal.<sup>84</sup> Indeed, the Appeals Chamber notes that Witness DD simply testified that he did not see Witness DAF in any of the places where he took refuge and heard after the war that Witness DAF took refuge at Mukiga's house in Ryaruhanga, without ever actually seeing him there.<sup>85</sup> Thus, even assuming that Witness DD's testimony could constitute a new fact, the Appeals Chamber is not satisfied that it could have been a decisive factor in reaching the original decision.

(c) Additional Statements

43. Niyitegeka submits that the information contained in the Additional Statements calls for a re-examination of the findings made on the basis of Witness GGV's testimony.<sup>86</sup> He alleges that the Additional Statements rebut the existence of the meetings of 10, 17, and 18 June 1994 in Kibuye *préfecture* and of the attack on 18 June 1994 in Kiziba which Witness GGV testified about and that they prove that Witness GGV fabricated evidence against him.<sup>87</sup> Niyitegeka argues that the Additional Statements are new facts since they provide information which impinges on Witness GGV's credibility.<sup>88</sup> Had this information been available during trial or appeal proceedings, he adds, Witness GGV would not have been found credible and his evidence would not have been relied upon by the Trial Chamber.<sup>89</sup> In his view, the Additional Statements provide *prima facie* evidence that is "largely" sufficient to convince the Appeals Chamber that there are grounds for reviewing the Appeal Judgement.<sup>90</sup>

44. The Prosecution responds that since Niyitegeka did not attach the alleged Additional Statements to his application, it is not in a position to analyze and verify the "new facts" which allegedly place the credibility of Witness GGV in issue. The Prosecution submits that Witness GGV's credibility is a matter that has been extensively litigated throughout the proceedings in this case and that, consequently, the Additional Statements do not amount to "new facts" for purposes of review.<sup>91</sup>

<sup>84</sup> Appeal Judgement, para. 169.

<sup>85</sup> *Muhimana*, T. 17 August 2004 p. 24.

<sup>86</sup> Fourth Request for Review, paras. 36, 52, 54, 57.

<sup>87</sup> Fourth Request for Review, paras. 49, 52, 54, 59.

<sup>88</sup> Fourth Request for Review, para. 51. Niyitegeka also submits that that he has already presented "new facts" to the Appeals Chamber showing that Witness GGV's allegations were false: Fourth Request for Review, paras. 45, 46, referring to First Request for Review and Second Request for Review.

<sup>89</sup> Fourth Request for Review, paras. 47, 51, 53.

<sup>90</sup> Fourth Request for Review, para. 62.

<sup>91</sup> Prosecution Response, para. 5.

2279/H

45. In reply, Niyitegeka explains that he has not disclosed the Additional Statements because he intends to give them first to his assigned counsel, so that he or she can analyze them, contact their authors if necessary, and file a brief supplementing the Request.<sup>92</sup> He also claims that it is legitimate for him to protect his potential witnesses by not disclosing their statements prematurely.<sup>93</sup> Niyitegeka nonetheless indicates that, in case the Appeals Chamber were to order that he disclose the Additional Statements and the identity of their authors at this stage of the proceedings, he would comply with such an order immediately.<sup>94</sup> Moreover, Niyitegeka refutes the Prosecutions' arguments that the Additional Statements do not constitute new facts by providing details of some of the statements.<sup>95</sup>

46. The Appeals Chamber is not in a position to properly assess the merits of Niyitegeka's request regarding the Additional Statements since he did not provide them. In the absence of the relevant material, the Appeals Chamber is not only unable to fully assess whether they constitute "new facts", but is also unable to order their admission into the record. While an applicant may have legitimate concerns regarding the security of potential witnesses, those concerns are not justified when it comes to disclosing information to the Appeals Chamber. As regards disclosures to the Prosecution, the Appeals Chamber reminds Niyitegeka that he could have requested the application of protective measures by the Appeals Chamber pursuant to Rule 75 of the Rules prior to filing his Request.<sup>96</sup> Further, Niyitegeka elected not to attach the Additional Statements to his request on the additional ground that he intended to first give the material to his assigned counsel. In doing so, Niyitegeka hindered the Appeals Chamber's ability to provide a thorough analysis of his claim that the Additional Statements constitute "new facts" and thwarted his own request to have the statements admitted for purposes of review. Similarly, Niyitegeka prevented the Appeals Chamber from considering his claim that the Prosecution violated its disclosure obligations under Rule 68 of the Rules and his related request for disciplinary action.<sup>97</sup>

47. This being said, the Appeals Chamber does not find it necessary to order Niyitegeka to file the Additional Statements or information concerning the identity of their authors. Niyitegeka makes clear that, in his view, the information contained in the Additional Statements reveals that Witness

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<sup>92</sup> Reply, para. 15.

<sup>93</sup> Reply, paras. 15-17.

<sup>94</sup> Reply, paras. 17, 30. In response to the Prosecution, Niyitegeka affirms that the authors of the Additional Statements designated as R-9, R-10, R-11, R-12, R-13, and R-14 are not fictitious characters. Reply, paras. 19, 20.

<sup>95</sup> Reply, paras. 25-29.

<sup>96</sup> The Appeals Chamber recalls that a request for protective measures pursuant to Rule 75 of the Rules must demonstrate a real likelihood that the person may be in danger or at risk. See *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Order, 2 June 2004, p. 2 and decisions cited therein.

<sup>97</sup> Reply, para. 23.

2278/H

GGV was not credible.<sup>98</sup> The Appeals Chamber notes that Witness GGV's credibility is a matter that was litigated at trial and on appeal.<sup>99</sup> While the Additional Statements may constitute material of an evidentiary nature, in light of what Niyitegeka discloses of their content they do not constitute "new facts" within the meaning of Article 25 of the Statute. Accordingly, Niyitegeka's attempt to have them admitted as new facts for the purposes of review is bound to fail.

48. In relation to his request for review based on the Additional Statements, Niyitegeka also requests that the Appeals Chamber order that the identity of two victims that he was found to have killed be specified.<sup>100</sup> The Appeals Chamber recalls that the charges against Niyitegeka have already been determined and that his conviction has been confirmed on appeal. Outside the review mechanism provided for under Article 25 of the Statute, it is not within the Appeals Chamber's jurisdiction to re-open terminated proceedings to alter otherwise final findings.<sup>101</sup> Niyitegeka's attempt to further contest the original findings is therefore dismissed.

### 3. Conclusion

49. The Appeals Chamber reiterates that review is an exceptional remedy. In the instant case, Niyitegeka has failed to demonstrate that such a remedy is warranted.

<sup>98</sup> See Fourth Request for Review, paras. 36, 51, 52, 59.

<sup>99</sup> Trial Judgement, paras. 211-213; Appeal Judgement, paras. 146-157.

<sup>100</sup> Fourth Request for Review, paras. 55, 56, referring to Trial Judgement, para. 443. Niyitegeka bases this claim on the following finding from the *Ntagerura et al.* Appeal Judgement (*The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-22-AR, Judgement, 7 July 2006, para. 80): "[...] during the Prosecution alleges that an accused personally committed the crimes and he personally killed the identity of the victims."

<sup>101</sup> See *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9; *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motions and Requests Related to Reconsideration, 31 January 2008, p. 3.



2277/H

**B. Request for Assignment of Counsel**

50. Niyitegeka requests that the Appeals Chamber direct the Registrar to assign him counsel under the Tribunal's legal aid system to: (i) analyze the Trial Judgement, the Appeal Judgement, and the Appeals Chamber's prior review decisions; and (ii) analyze the newly discovered evidence and conduct new investigations with a view to adding relevant information and preparing arguments for the purpose of filing an additional brief to the Request.<sup>102</sup> The Prosecution responds that the requested assignment of counsel is not justified in the present case given that Niyitegeka's submissions are already extensive and detailed and since the Request is without merit.<sup>103</sup> In reply, Niyitegeka argues that the legal resources available to the Prosecution are clearly disproportionate to his own resources and that fairness considerations require that counsel be assigned to him.<sup>104</sup>

51. The Appeals Chamber recalls that review is an exceptional remedy and that an applicant is only entitled to assigned counsel at the Tribunal's expense if the Appeals Chamber authorizes the review or if it deems it necessary to ensure the fairness of the proceedings.<sup>105</sup>

52. As a matter of principle, it is not for the Tribunal to assist a convicted person whose case has reached finality with any new investigation he would like to conduct or any new motion he may wish to bring by assigning him legal assistance at the Tribunal's expense. It is only in exceptional circumstances that a convicted person will be granted legal assistance by the Tribunal after a final judgement has been rendered against him. At the preliminary examination stage of a request for review, such assistance will be granted only if the Appeals Chamber deems it "necessary to ensure the fairness of the proceedings". This necessity is, to a great extent, assessed in light of the grounds for review put forward by the applicant. In the present case, the Appeals Chamber considers that none of Niyitegeka's grounds for review has any chance of success.

53. Accordingly, the Appeals Chamber finds that the assignment of counsel under the auspices of the Tribunal's legal aid system is not warranted in the present case.

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<sup>102</sup> Fourth Request for Review, paras. 17, 27, 35, 62, 63, 65(iv).

<sup>103</sup> Prosecution Response, para. 6.

<sup>104</sup> Reply, paras. 32, 33.

<sup>105</sup> *Emmanuel Nindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Nindabahizi's Motion for Assignment of Counsel and the Prosecution's Request to Place the Motion Under Seal, 24 September 2008, p. 2; *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motion to Obtain Assistance From Counsel, 28 February 2008, p. 2; Third Review Decision, para. 12; *Rutaganda* Review Decision, para. 41.

2276/H

**IV. DISPOSITION**

54. For the foregoing reasons, the Appeals Chamber

**DENIES** Niyitegeka's Fourth Request for Review in its entirety;

**INSTRUCTS** the Registrar to place Niyitegeka's Fourth Request for Review and Reply under seal;  
and

**REMINDS** the Registrar of his continuing obligation to ensure a channel of communication between the Tribunal and a convicted person, even after he has been transferred to a State in which his sentence is to be served and of his obligation to serve promptly the relevant filings to the parties.

Done in English and French, the English text being authoritative.

Done this twelfth day of March 2009,  
at The Hague, The Netherlands.



*Liu Daqun*  
Judge Liu Daqun  
Presiding

[Seal of the Tribunal]

082

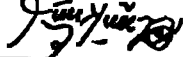
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