UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-12-16-R
Date: 27 May 2016
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Christoph Flügge
Judge Burton Hall
Judge Ben Emmerson

Registrar: **Mr. John Hocking**

Decision of: **27 May 2016**

ELIÉZER NIYITEGEKA

v.

THE PROSECUTOR

PUBLIC

DECISION ON NIYITEGEKA'S MOTION FOR AN EXTENSION OF THE ASSIGNMENT OF HIS COUNSEL

The Office of the Prosecutor
Serge Brammertz
Richard Karegyesa

Counsel for Eliézer Niyitegeka:
Philippe Larochelle

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of the "Motion for Reconsideration of *Decision on Niyitegeka's Request for Review and Assignment of Counsel* of 13 July 2015" filed confidentially by Eliézer Niyitegeka on 26 January 2016 ("Motion").[1]

I. BACKGROUND

2. Niyitegeka was the Minister of Information in the Rwandan Interim Government in 1994.[2] On 16 May 2003, Trial Chamber I of the International Criminal Tribunal for Rwanda ("ICTR" and "Trial Chamber", respectively) convicted Niyitegeka of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder, extermination, and other inhumane acts as crimes against humanity.[3] The Trial Chamber sentenced him to imprisonment for the remainder of his life.[4] On 9 July 2004, the ICTR Appeals Chamber dismissed Niyitegeka's appeal against his convictions in its entirety and affirmed his sentence.[5] Niyitegeka is currently serving his sentence in the Koulikoro Detention Unit in Mali.[6]

3. Following Niyitegeka's appeal, the ICTR Appeals Chamber dismissed Niyitegeka's five requests for review of his convictions on 30 June 2006,[7] 6 March 2007,[8] 23 January 2008,[9] 12 March 2009,[10] and 27 January 2010.[11] On 6 November 2014, the Appeals Chamber dismissed

[1] The Motion was originally filed confidentially and *ex parte* on 26 January 2016. However, on 23 February 2016, the Appeals Chamber ordered the Registrar to lift the *ex parte* status of the Motion. *See* Motion for Reconsideration of *Decision on Niyitegeka's Request for Review and Assignment of Counsel* of 13 July 2015, 26 January 2016 (confidential and *ex parte*); Order Lifting *Ex Parte* Status of Niyitegeka's Motion Requesting an Extension of the Assignment of His Counsel, 23 February 2016 ("Order of 23 February 2016"). The Appeals Chamber recalls that all decisions filed before the Mechanism shall be public unless there are exceptional reasons for keeping them confidential. The Appeals Chamber considers that there are no exceptional reasons for issuing this decision confidentially and therefore files it publicly.

[2] *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("Trial Judgement"), para. 5; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("Appeal Judgement"), para. 3.

[3] Trial Judgement, para. 480.

[4] Trial Judgement, para. 502.

[5] Appeal Judgement, para. 270.

[6] *See The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Decision on the Enforcement of Sentence, 5 December 2008, p. 3.

[7] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006 ("Review Decision of 30 June 2006"), para. 76. *See also Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, pp. 2, 3.

[8] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007 ("Review Decision of 6 March 2007"), para. 31. *See also Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Clarification, 17 April 2007, para. 5.

[9] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008 ("Review Decision of 23 January 2008"), para. 33.

[10] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, public redacted version, 12 March 2009 ("Review Decision of 12 March 2009"), para. 54. *See also Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Motion for Clarification, 1 July 2009, para. 7.

Niyitegeka's request for the assignment of counsel for the purpose of assisting him with the preparation of a new request for review.[12] On 1 April 2015, Niyitegeka filed another request for review of his convictions in which he also renewed his request for the assignment of counsel.[13] The Appeals Chamber considered that Niyitegeka's challenge to the credibility of Prosecution Witness GGV was a central feature of his potential grounds of review.[14] Not being able to exclude the chance of success of this potential ground of review and taking into account the complexity of the matter, the Appeals Chamber found it necessary, in order to ensure the fairness of the proceedings, that counsel be appointed under the auspices of the Mechanism's legal aid program for a limited period of there months.[15] Accordingly, on 13 July 2015, the Appeals Chamber granted Niyitegeka's renewed request for assignment of counsel, dismissed the remainder of the request for review as premature, and directed the Registrar of the Mechanism to assign Niyitegeka counsel to assist him in relation to his request for review.[16]

4. On 25 November 2015, the Registrar confirmed the assignment of Mr. Philippe Larochelle as counsel to represent Niyitegeka before the Mechanism for a period not exceeding three months, effective as of 29 October 2015.[17] On 26 January 2016, Niyitegeka filed the Motion *ex parte*[18] and on 23 February 2016, the Appeals Chamber instructed the Registrar to lift the *ex parte status* of the Motion and provide a copy thereof to the Prosecution.[19] The Appeals Chamber considered that Niyitegeka's request for the extension of his counsel's assignment necessarily relates to the potential merits of the request for review and as corollary the Prosecution should have the opportunity to respond.[20] The Prosecution did not file a response to the Motion.

5. The Appeals Chamber further clarified that, "in authorizing three months of legal assistance at the expense of the Mechanism, the Appeals Chamber did not intend to limit the duration of counsel's mandate or the time frame for filing the request for review, but rather set only the total amount of funds available at this stage for remunerating counsel at the equivalent of three months

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[11] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010 (public redacted version), para. 11; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Motion for Reconsideration of Fifth Review Decision, 25 March 2010, para. 7.
[12] Decision on Niyitegeka's Request for Assignment of Counsel, 6 November 2014 ("*Niyitegeka* Decision of 6 November 2014"), paras. 3, 11, 14.
[13] *Requête en révision du jugement d'Eliézer Niyitegeka.- (Articles 19 et 24 du Statut du MTPI; article 146 du Réglement du MTPI)*, 1 April 2015 ("Request of 1 April 2015"). An English translation was filed on 19 May 2015.
[14] Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015 ("Decision of 13 July 2015"), para. 9.
[15] Decision of 13 July 2015, paras. 12, 14.
[16] Decision of 13 July 2015, paras. 13,14.
[17] Decision by the Registrar, 25 November 2015, p. 2. *See also* Decision by the Registrar, 29 October 2015, p. 2.
[18] Motion for Reconsideration of *Decision on Niyitegeka's Request for Review and Assignment of Counsel* of 13 July 2015, 26 January 2016 (confidential and *ex parte*).
[19] Order of 23 February 2016, p. 3.
[20] Order of 23 February 2016, p. 2.

of work".[21] In addition, the Appeals Chamber requested the Registry to provide information on the funding arrangement currently in place for counsel and the extent to which the funds have been utilized.[22] The Registry filed submissions on 25 February 2016, outlining the funding arrangement in place, including the amount of hours still available to counsel, and expressing readiness to extend the duration of counsel's assignment in light of the Appeals Chamber's clarification in the Order of 23 February 2016.[23]

II. SUBMISSIONS

6. Niyitegeka seeks reconsideration of the Decision of 13 July 2015 and an extension of assignment of his counsel for a period of six months in view of new facts and circumstances connected to potential grounds of review.[24] In particular, Niyitegeka refers to: (i) efforts to obtain, through requests for cooperation addressed to States, statements by Prosecution witnesses given in domestic proceedings, potential delays related to the translation of material obtained from such sources, as well as the pursuit of new leads with respect to other potentially relevant witnesses in Rwanda;[25] (ii) pending requests to interview Prosecution witnesses who testified in his case and to access their evidence given in other ICTR cases;[26] (iii) difficulties related to counsel's familiarization with Niyitegeka's previous requests for review;[27] and (iv) the need to review recently disclosed and potentially exculpatory material related to the evidence seven witnesses gave in other ICTR trials and the difficulties in obtaining such material.[28] In Niyitegeka's view, these new circumstances amplify the complexity of the matter and the chances of success of his potential review request and, therefore, the extension of counsel's assignment is necessary in order to ensure the fairness of the proceedings.[29]

III. APPLICABLE LAW

7. The Appeals Chamber recalls that, as a matter of principle, it is not for the Mechanism 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

[21] Order of 23 February 2016, p. 2.
[22] Order of 23 February 2016, p. 3.
[23] Registrar's Submission Pursuant to Order of 23 February 2016, 25 February 2016 (confidential and *ex parte*).
[24] Motion, paras. 6, 8, 9-28, p. 7.
[25] Motion, paras. 17-21, 23-27.
[26] Motion, paras. 11-13, 22.
[27] Motion, para. 9.
[28] Motion, paras. 14-16.
[29] Motion, paras. 30, 31.

Mechanism's expense.[30] A review under Article 24 of the Statute of the Mechanism is an exceptional remedy and an applicant is only entitled to assigned counsel at the expense of the Mechanism if the Appeals Chamber authorizes the review, or, before such an authorization, if it deems it necessary to ensure the fairness of the proceedings.[31] This necessity is, to a great extent, assessed in light of the potential grounds for review put forward by the applicant.[32] The Appeals Chamber has previously confirmed such necessity where it found itself unable to exclude that the potential grounds for review invoked by the applicant may have a chance of success and where the particular complexity of the matter justified the granting of legal assistance in order to ensure the fairness of the proceedings.[33] It is only in exceptional circumstances that a convicted person will be granted legal assistance at the expense of the Mechanism after a final judgement has been rendered against him.[34]

IV. DISCUSSION

8. As explained in the Order of 23 February 2016, a general allotment of funds under the Mechanism's legal aid system does not itself set an outer limit on the time frame that an assigned counsel has to prepare a request for review.[35] Accordingly, the main question before the Appeals Chamber is whether to authorize an additional allotment of funds beyond the three months provided for in the Decision of 13 July 2015. The Appeals Chamber recalls that, in granting Niyitegeka's request for assignment of counsel, it considered that the particular complexity and potential significance of Niyitegeka's challenge to the credibility of Prosecution Witness GGV warranted the assignment of counsel at the expense of the Mechanism.[36] Although Niyitegeka frames the Motion as a request for reconsideration of the Decision of 13 July 2015, his arguments for additional funds almost exclusively relate to the possibility of new potential grounds of review, which are separate from those advanced in his Request of 1 April 2015.[37] Therefore, in deciding upon Niyitegeka's

[30] *See* Decision of 13 July 2015, para. 8; *Aloys Ntabakuze v. The Prosecutor*, Case No. MICT-14-77-R, Decision on Ntabakuze's *Pro Se* Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review, 19 January 2015 ("*Ntabakuze* Decision of 19 January 2015"), para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *François Karera v. Prosecutor*, Case No. MICT-12-24-R, Decision on Request for Assignment of Counsel, 4 December 2012 ("*Karera* Decision of 4 December 2012"), para. 10.
[31] Decision of 13 July 2015, para. 8; *Ntabakuze* Decision of 19 January 2015, para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *Karera* Decision of 4 December 2012, para. 10.
[32] Decision of 13 July 2015, para. 8; *Ntabakuze* Decision of 19 January 2015, para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *Karera* Decision of 4 December 2012, para. 10.
[33] Decision of 13 July 2015, paras. 8, 12; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Assignment of Counsel, 12 November 2009 (confidential), para. 13; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Decision on Motion for Legal Assistance, 21 July 2009, paras. 18-20. *See also Ntabakuze* Decision of 19 January 2015, para. 9.
[34] Decision of 13 July 2015, para. 8; *Ntabakuze* Decision of 19 January 2015, para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *Karera* Decision of 4 December 2012, para. 10.
[35] *See supra* para. 5.
[36] *See supra* para. 3.
[37] *See, e.g.*, Motion, paras. 17-20, 22-27.

present request, the Appeals Chamber will consider whether these additional potential new grounds of review warrant an expansion of the funding available to counsel under the Mechanism's legal aid system.

9. At the outset, the Appeals Chamber recalls that the assignment of counsel was meant to enable Niyitegeka to provide a "more focused submission supporting his request for review".[38] In contrast, his present request contains much broader and less focused submissions. In particular, the Appeals Chamber is not persuaded that the various aspects of Niyitegeka's sweeping investigations warrant the authorization of additional funding under the Mechanism's legal aid scheme. Niyitegeka's submissions fail to appreciate that his case has reached finality and the exceptional nature of legal assistance at the Mechanism's expense at this particular stage.[39] The credibility of the Prosecution witnesses was extensively litigated at trial and on appeal and has been subsequently challenged in several requests for review.[40] It follows from the jurisprudence 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.[41] Niyitegeka's submissions regarding his efforts to pursue additional evidence in relation to the involvement of the Prosecution witnesses in other ICTR trials and domestic proceedings merely evince his intention to impugn their credibility anew. His submissions do not, however, reveal newly discovered concrete information that potentially constitutes a "new fact" for the purposes of review proceedings, nor do they illustrate in a clear manner how this material could undermine any specific aspect of his convictions and, as such, the verdict.[42] Likewise, being a common feature in the context of the preparation of a review request, these efforts do not add to the complexity of the matter.[43]

10. Regarding Niyitegeka's submissions concerning access to evidence, the Appeals Chamber notes that, on 29 January 2016, the Single Judge denied Niyitegeka's request to interview the Prosecution witnesses in his case and to access material given by these witnesses in subsequent ICTR trials.[44] In so doing, the Single Judge observed that "[i]n the absence of more particularized submissions, the mere fact that witnesses may have testified in more than one case does not

[38] Decision of 13 July 2015, para. 12.
[39] *See supra* para. 7.
[40] *See, e.g.*, Trial Judgement, paras. 56-66, 72-78, 98-108, 121-128, 151-176, 185-188, 211-213, 219-221, 245-249, 253-255, 293, 306-310; Appeal Judgement, paras. 103-190 (challenging the individual credibility and reliability of the evidence of each Prosecution witness relied upon by the Trial Chamber); Review Decision of 30 June 2006, paras. 12, 13; Review Decision of 6 March 2007, paras. 10-16; Review Decision of 23 January 2008, paras. 15-21; Review Decision of 12 March 2009, paras. 24, 28-34, 35, 38-42. The Appeals Chamber observes that none of Niyitegeka's convictions rest on the evidence of Witnesses GGD and GHA. *See* Trial Judgement, paras. 91, 234, 264.
[41] *See* Review Decision of 23 January 2008, para. 13 and references cited therein.
[42] *See* Decision of 13 July 2015, para 12; *Ntabakuze* Decision of 19 January 2015, paras 11, 12.
[43] *See Ntabakuze* Decision of 19 January 2015, para. 13.
[44] Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016 ("Decision of 29 January 2016"), paras. 9-12.

necessarily reflect that their evidence is relevant to establishing a 'new fact' in the context of review proceedings, or demonstrate that any related material may be of material assistance to the preparation of a review application."[45] Niyitegeka did not seek to appeal the Single Judge's decision, and, as his present submissions are similarly nonspecific,[46] the analysis of the Single Judge is therefore apposite.

11. The Appeals Chamber is likewise not persuaded that the need for counsel to familiarize himself with Niyitegeka's previous requests for review increases the complexity of the matter and warrants an additional allotment of funding. The Appeals Chamber considers that counsel, once appointed, is, at a minimum, expected to familiarize himself with the case. The Appeals Chamber, in authorizing the equivalent of three months of legal assistance, was mindful of the fact that the review of the record would be required. Nothing in Niyitegeka's submissions suggests that his case requires significantly more time for familiarization than that already envisioned by the Appeals Chamber. The Appeals Chamber is also of the view that neither the need to analyze recently disclosed potentially exculpatory material, nor alleged difficulties with obtaining further disclosure suggest, as such, that the time and the corresponding amount of funds available at this stage for remunerating Niyitegeka's counsel are insufficient. Moreover, Niyitegeka fails to demonstrate that additional funding under the Mechanism's legal aid scheme is warranted on the basis of his original challenge to the credibility of Prosecution Witness GGV, which formed the basis for counsel's assignment. The record before the Appeals Chamber reveals that the available funds, allocated in accordance with the terms of the Order of 23 February 2016,[47] have not yet been exhausted.

12. Accordingly, Niyitegeka fails to demonstrate that an additional allotment of funds beyond the three months period granted by the Decision of 13 July 2015 is necessary to ensure the fairness of the proceedings. The Appeals Chamber emphasizes that the above findings pertain strictly to Niyitegeka's request for reconsideration of the Decision of 13 July 2015 in relation to the funding of counsel at the expense of the Mechanism and not to the merits of Niyitegeka's potential request for review. If and when such a request is filed, the Appeals Chamber will make its determination on the merits.

[45] Decision of 29 January 2016, para. 9.
[46] *See, e.g.*, Motion, paras. 18 (that statements given by several witnesses in domestic proceedings "contain information that will be useful to Niyitegeka in supporting his upcoming review request" and are "likely to have yielded material from the witnesses who testified against Niyitegeka"), 20 (that Niyitegeka is seeking to obtain "material which may directly contradict the evidence provided by [...] Prosecution witnesses"), 23 (that certain witnesses "have relevant information to support Niyitegeka's effort to obtain a review"), 24 (that there are other "witnesses who could support a review request"), 27 (that certain material "could eventually constitute material supporting Niyitegeka's review").
[47] *See supra* para. 5.

V. DISPOSITION

13. For the foregoing reasons, the Motion is **DISMISSED**.

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

Done this 27th day of May 2016,
At The Hague,
The Netherlands.

Judge Theodor Meron, Presiding

[Seal of the Mechanism]

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/ *FICHE DE TRANSMISSION POUR LE DÉPÔT DE DOCUMENTS DEVANT LE MÉCANISME POUR LES TRIBUNAUX PÉNAUX INTERNATIONAUX*

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