



ICTR-96-14-A  
1 APRIL 2004  
(1082/H - 1076/H)  
Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

10821

**IN THE APPEALS CHAMBER**

**Before:**

Judge Theodor Meron, Presiding Judge  
Judge Mohamed Shahabuddeen  
Judge Florence Mumba  
Judge Wolfgang Schomburg  
Judge Inés Mónica Weinberg de Roca

**Registrar:**

Mr. Adama Dieng

**Decision of:**

1 April 2004

**Eliézer NIYITEGEKA**

**V.**

**THE PROSECUTOR**

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

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**DECISION ON APPELLANT'S MOTION FOR ADJOURNMENT**

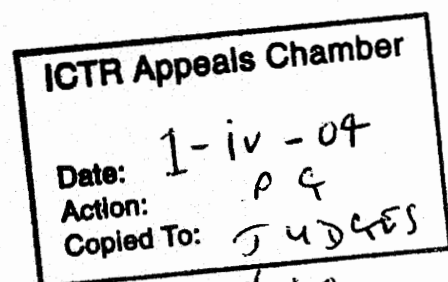
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**Counsel for the Appellant**

Ms. Sylvia Geraghty

**Counsel for the Prosecutor**

Mr. Hassan Bubacar Jallow  
Ms. Melanie Werrett  
Mr. James Stewart



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 "International Tribunal," respectively) is seised of the "Extremely Urgent Appellant's Motion for Adjournment," filed by counsel for Appellant Eliézer Niyitegeka on 19 March 2004 ("Motion"). The Appeals Chamber hereby decides the Motion on the basis of the written submissions of the parties.

### Procedural History

2. On 16 May 2003, Trial Chamber I issued a Judgement and Sentence ("Judgement") against Eliézer Niyitegeka ("Appellant"), finding him guilty of genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity (murder), crimes against humanity (extermination), and crimes against humanity (other inhumane acts).<sup>1</sup> The Judgement sentenced the Appellant to imprisonment for the remainder of his life.<sup>2</sup> The Appellant has appealed from the Judgement, and briefing of the appeal is now complete. The appeal hearing is scheduled for 21 and 22 April 2004.

3. The Motion seeks an adjournment of the appeal hearing. The Motion advances three arguments for an adjournment: (i) the Appellant recently received new information concerning the reliability of a Prosecution witness that requires further investigation; (ii) the Prosecution and Registry purportedly refused to provide the Appellant with information he sought with regard to certain grounds of appeal; and (iii) the Appellant planned to initiate proceedings before the courts of the State of New York to obtain certain documentation. The Motion contained minimal information in support of these grounds.

4. By order of 22 March 2004, the Pre-Appeal Judge ordered the Appellant to file additional information in support of the Motion, set a deadline for this additional submission and authorized the Prosecution to file a response shortly thereafter.<sup>3</sup> The Appellant filed his additional submission on time ("Additional Submission")<sup>4</sup> and the Prosecution filed a timely response.<sup>5</sup> The Registry also made a submission under Rule 33(B) of the Rules of Procedure and Evidence of the International

<sup>1</sup> *Prosecutor v. Niyitegeka*, No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 480.

<sup>2</sup> *Ibid.*, para. 502.

<sup>3</sup> Order for Additional Information, 22 March 2004.

<sup>4</sup> Extremely Urgent Appellant's Response to Order of 22 March 2004 for Additional Information, 25 March 2004.

<sup>5</sup> Prosecution Response to Appellant's Extremely Urgent Motion for Adjournment, 29 March 2004.

Tribunal ("Rules").<sup>6</sup> The Appellant filed a reply to the Prosecution's response on 31 March 2004.<sup>7</sup> The Reply clarified that the Appellant estimated that he would require "approximately three months, in which to continue his investigations" and to "collect and prepare the available evidence for presentation."<sup>8</sup>

### Applicable Law

5. Paragraph 1 of Article 36 of the Directive for the Registry of the International Tribunal provides that "[e]ither party requesting an adjournment must do so by filing a written motion accompanied by a draft order to postpone the scheduled hearing." Although that provision does not set out the standard to be applied in deciding a motion for postponement, the Appeals Chamber recently explained that a motion under this provision requires a showing of good cause similar to the showing required under Rule 116(A) of the Rules.<sup>9</sup>

### Discussion

#### (i) New Evidence

6. The Appellant's first basis for requesting an adjournment is the submission that his counsel "only recently became aware of the fact that further investigations needed to be carried out in relation to a Prosecution witness."<sup>10</sup> The Additional Submission states that, "[w]ithin the last number of weeks," a confidential informant, whose identity counsel "is not at liberty to disclose" but who is characterized as a "reliable source," has given information that "suggests" that a "highly respected expert in Rwandan affairs" has "expressed the professional opinion" that an unidentified Prosecution witness "is totally unreliable and his evidence entirely without credibility."<sup>11</sup> Counsel refused to identify the steps she has taken in relation to this new evidence, citing the need to "protect her confidential source," but stated that "investigations have very recently been renewed" and are likely to take "a further number of weeks to complete."<sup>12</sup> The Appellant contends that "it may transpire" that the evidence "which may come to light" will discredit a Prosecution witness. The Appellant seeks an adjournment in order to complete this investigation and prepare a motion to submit any resulting evidence to the Appeals Chamber.

<sup>6</sup> Registry's Submission Under Rule 33(B) of the Rules to the Extremely Urgent Appellant's Motion for Adjournment, 23 March 2004.

<sup>7</sup> Extremely Urgent Appellant's Reply to Prosecutor's Response to Motion for Adjournment and Additional Information, 31 March 2004 ("Reply").

<sup>8</sup> Reply, para. 8.

<sup>9</sup> *Prosecutor v. Ntakirutimana*, Decision on Extremely Urgent Prosecution Application for an Adjournment of the Oral Hearing, 20 November 2003, para. 9.

<sup>10</sup> Additional Submission, para. A.1.

7. The Additional Submission is vague as to the nature of the evidence that the Appellant seeks to uncover. In the first place, it is not even clear that any such evidence will surface at all; the Additional Submission merely states that "it may transpire" that evidence "may come to light." The Additional Submission indicates that the Appellant currently possesses only hearsay regarding the expression of an opinion about credibility: an informant "suggests" that a second person expressed an "opinion" about the reliability of a Prosecution witness. Furthermore, although the Pre-Appeal Judge ordered the Appellant to state "when he became aware of the evidence,"<sup>13</sup> the Appellant has not done so. While counsel's fear of exposing a confidential informant may be legitimate, it is difficult to see how providing precise details about when the information became known could have revealed an informant's identity. Nor is it clear how much time counsel envisions spending on the new investigations, other than general references to a "number of weeks."<sup>14</sup>

8. The imprecision of the Appellant's submissions and the uncertainty that any relevant evidence will in fact result from the investigations foreclose any finding of good cause for an adjournment. It should be noted, however, that in the event that counsel's new investigations prove fruitful, the Appellant remains free to bring a motion to admit additional evidence under Rule 115 of the Rules after the hearing in this case has been held but before a decision is given, provided good cause can be shown for the delay under Rule 115(A) of the Rules.<sup>15</sup>

(ii) Information Sought from Prosecution and Registrar

9. The Appellant's second ground for seeking an adjournment alleges that the Prosecution and Registrar have failed to provide information and materials relevant to his appeal, specifically his assertion that his trial was unfair because one of the lawyers on the Prosecution team, Melinda Y. Pollard, was suspended from the practice of law in the State of New York during the trial.

10. The Additional Submission summarizes lengthy correspondence between counsel for the Appellant and the Prosecution and between counsel and the Registry. With regard to the Prosecution, it appears that some of the information sought by the Appellant has been provided. For example, the Prosecution's letter of 15 March 2004 states that the Prosecution "would not require formal proof" of a particular document, assuming it were otherwise admissible.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Order for Additional Information, 22 March 2004, p. 3.

<sup>14</sup> Additional Submission, para. A.1; Reply, para. 2.

<sup>15</sup> See, e. g., *Prosecutor v. Rutaganda*, No. ICTR-96-3-A, Decision on the Consolidated Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, 19 February 2003.

Importantly, the Prosecution has also conceded that “one of the counsel on the Prosecution team that handled [the Appellant’s] trial was suspended from practice at her bar at the relevant time.”<sup>16</sup>

11. The Additional Submission raises an apparent inconsistency between an affidavit of Ms. Pollard, dated 19 February 2002 and filed in a New York court, which stated that she had notified her “employer” of the decision suspending her from practice. The Prosecution, on the other hand, stated that it became aware of the suspension for the first time in May 2003.<sup>17</sup> The time at which the Prosecution became aware of the suspension is potentially relevant to the grounds of appeal, since the Appellant appears to argue that the Prosecution should have disclosed the suspension to him and to the Trial Chamber upon becoming aware of it. The Appeals Chamber therefore orders the Prosecution to give any details of its statement that it became aware of the suspension of Ms. Pollard for the first time in May 2003.

12. Aside from this matter, the Appeals Chamber cannot determine how any of the further information the Appellant seeks would enhance the Appellant’s presentation of his grounds of appeal. Several of the letters from the Appellant’s counsel appear to seek information regarding the recruitment process, the specific recruitment of Ms. Pollard, and the conduct of internal enquiries, if any, within the Office of the Prosecutor. In light of the Prosecution’s concession that Ms. Pollard was indeed suspended from the practice of law in New York at the time of the trial, however, it is not clear how the Appellant’s case could benefit from disclosure of such material.

13. A similar conclusion applies to the Registry. Some of the Appellant’s enquiries, such as the question whether the Registry made any representation to a particular committee in New York with regard to Ms. Pollard’s character, have been answered. Letters from the Appellant’s counsel to the Registrar request further information regarding the recruitment of attorneys in general and any investigation or disciplinary action that the Registry may have conducted with regard to Ms. Pollard. For the reasons indicated above, the Appeals Chamber orders the Registry to advise the Appellant of the date on which it first learned of the suspension; whether the Registry ever conveyed this information to the Prosecution; and if so, when. Again, however, it is not clear how any of the other information sought could benefit the Appellant’s case, given that it is conceded that Ms. Pollard was suspended from the practice of law in New York during the trial.

14. The Appellant has not shown that further information from the Prosecution or the Registry, other than that ordered disclosed by this decision, is necessary to the argument of his grounds of

<sup>16</sup> Letter from Melanie Werrett to Sylvia Geraghty dated 15 March 2004. See also Prosecution Response to Appellant’s Extremely Urgent Motion for Adjournment, 29 March 2004, para. 10.

<sup>17</sup> Additional Submission, paras. A.3.(v), (vi).

appeal at the hearing as currently scheduled. Good cause for an adjournment of the hearing has not been shown.

(iii) Proceedings Before New York Courts

15. The Appellant also indicates that he plans to initiate proceedings before the Supreme Court of the State of New York, Appellate Division. Although the Pre-Appeal Judge ordered the Appellant to identify "the procedures he has to date instituted in this regard,"<sup>18</sup> the Additional Submission does not state that any proceedings have been initiated, but rather speaks of "proceedings to be taken,"<sup>19</sup> which suggests that nothing has yet been done. The Appellant's Reply indicates that pleadings have been drafted but not filed.<sup>20</sup>

16. The Additional Submission does not clarify how proceedings before the New York courts, whatever such proceedings may be, could yield evidence that does not duplicate the evidence already in the Appellant's possession and that is not rendered superfluous by the Prosecution's concession that Ms. Pollard was suspended from the practice of law in New York during the trial in this case. The Additional Submission refers only to the apparent contradiction (discussed above) between Mr. Pollard's affidavit filed in a New York court on 19 February 2002 and the Prosecution's statement that it first became aware of the suspension in May 2003.<sup>21</sup> If the only purpose of the New York proceedings is to resolve this tension, it is expected that the Appeals Chamber's orders to the Prosecution and Registry will render such proceedings unnecessary. The Appellant does not specify any other evidence that he expects will emerge from the planned New York proceedings.

17. The Appellant's indication of intent to commence proceedings in New York does not constitute good cause to postpone the appeal hearing in this matter. However, if the Appellant's investigations yield evidence that the Appellant believes warrant inclusion in the record on appeal, he may bring such evidence to the Appeals Chamber's notice after the appeal hearing through a properly-supported motion under Rule 115 of the Rules.

(iv) Professional Situation of Counsel

18. The Appellant points out in the Additional Submission that his counsel and co-counsel are sole practitioners who do not have secretarial staff available to them. The submission indicates that counsel are having difficulty preparing various submissions within the applicable deadlines. The

<sup>18</sup> Order for Additional Information, 22 March 2004, p. 3.

<sup>19</sup> Additional Submission, para. A.3.(i).

<sup>20</sup> Reply, para. 4.

Appeals Chamber notes that briefing of this appeal is complete and that counsel have been aware of the scheduled date for the appeal hearing for months. The Additional Submission does not indicate that any unexpected development has significantly altered counsel's ability to participate in the appeal hearing. The fact that counsel carry a heavy workload is an insufficient reason for the adjournment of an appeal hearing in these circumstances.

Disposition

19. For the foregoing reasons, the Appeals Chamber:

(a) **DISMISSES** the Motion in its entirety;

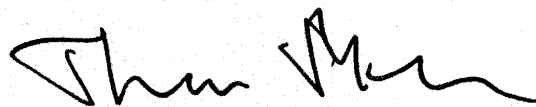
(b) **ORDERS** the Prosecutor to provide the Appellant no later than 8 April 2004 with details of its statement that it became aware of the suspension of Ms. Pollard for the first time in May 2003;

(c) **ORDERS** the Registrar to inform the Appellant no later than 8 April 2004 of the date on which an employee of the Registry first learned that Melinda Y. Pollard was suspended from the practice of law in the State of New York; and whether and when the Registry subsequently conveyed this information to an employee of the Office of the Prosecutor;

(d) **CONFIRMS** that the hearing of this appeal will take place on 21 and 22 April 2004; and

(e) **INFORMS** the parties that a detailed scheduling order will be issued shortly.

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



Theodor Meron  
Presiding Judge

Done this 1<sup>st</sup> day of April 2004,  
At The Hague,  
The Netherlands.

