

UNITED NATIONS
NATIONS UNIESInternational Criminal Tribunal for Rwanda
Tribunal Pénal International pour le RwandaIN THE APPEALS CHAMBER

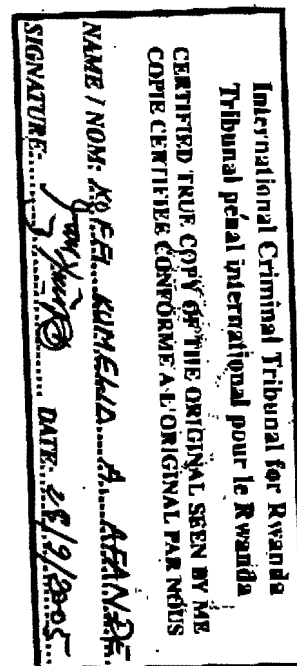
447/H
 28 September 2005
 (447/H - 438/H)

Original: English

Before: Judge Theodor Meron, Presiding
 Judge Mohamed Shahabuddeen
 Judge Florence Mumba
 Judge Fausto Pocar
 Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 28 September 2005



ELIÉZER NIYTEGEKA
 (Applicant)

v.

THE PROSECUTOR
 (Respondent)

Case No. ICTR-96-14-R

2005 SEP 29 AM 10:45

DECISION**ON****THE PROSECUTOR'S MOTION TO**

MOVE FOR DECISION ON NIYTEGEKA'S REQUESTS FOR REVIEW PURSUANT TO RULES 120 AND 121

AND**THE DEFENCE EXTREMELY URGENT MOTION PURSUANT TO**

- (i) RULE 116 FOR EXTENSION OF TIME LIMIT
- (ii) RULE 68 (A), (B) AND (E) FOR DISCLOSURE OF EXCULPATORY EVIDENCE BOTH OF THE RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND
- (iii) RESPONSE TO PROSECUTOR'S MOTION OF 15 AUGUST 2005 SEEKING A DECISION, IN THE ABSENCE OF ANY LEGAL SUBMISSIONS FROM THE APPLICANT

ICTR Appeals Chamber

Date: 28 September 2005
 Action: R. J.
 Copied To: Sec. Prov. of Service
 SLO's, LO's, ALO's

Counsel for the Applicant:

Ms. Sylvia Geraghty

Office of the Prosecutor:

Mr. James Stewart
 Mr. George Mugwanya
 Ms. Inneke Onsea

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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 serious violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 (the "Tribunal"),

RECALLING Eliézer Niyitegeka's ("Applicant") *pro se* Requests for Review filed on 27 October 2004¹ and on 7 February 2005 ("Requests for Review").²

RECALLING the *Decision on Niyitegeka's Urgent Request for Legal Assistance*, filed on 20 June 2005 ("Decision of 20 June 2005") in which the Appeals Chamber directed the Registrar to assign Ms. Geraghty as Counsel ("Defence") for a limited period of time for the purpose of assisting the Applicant at the preliminary examination stage and instructed the Applicant, should he deem it necessary, to file additional submissions no later than twenty (20) days after the date of assignment of Ms. Geraghty;

BEING SEIZED of the *Prosecutor's Motion to Move for Decision on Niyitegeka's Request for Review Pursuant to Rules 120 and 121*, filed on 15 August 2005 ("Prosecutor's Motion"), in which the Prosecution:

- a. submits that Counsel having been assigned on 20 July 2005, the final date for filing the additional submissions should have been 9 August 2005, as of which date, not only had Counsel not filed the said submissions, but had also not moved for extension of time by showing good cause pursuant to Rule 116 of the Rules of Procedure and Evidence ("Rules");³ and
- b. requests the Appeals Chamber to issue a decision pursuant to Rule 121 of the Rules upon the record before it,⁴ and not to consider the merits of a late filing, unless good cause is shown pursuant to Rule 116 of the Rules, in which case the Appeals Chamber should allow it to file submissions with regard to the issue of good cause;⁵

¹ Requête en révision du jugement/réparation du préjudice cause par la violation, par le procureur, du Règlement et des règlements internes.

² Mémoire supplémentaire à la requête en révision du Jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes.

³ Prosecutor's Motion, 15 August 2005, paras. 4 to 6.

⁴ Prosecutor's Motion, para. 7.

⁵ Prosecutor's Motion, para. 8.

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NOTING the *Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau* (Art. 54, 89, 107 et 120 du Règlement) filed *pro se* by the Applicant on 17 August 2005 ("Applicant's Request of 17 August 2005"), in which the Applicant requests the admission of new evidence in order to allege a new fact;

BEING FURTHER SEIZED of the *Extremely Urgent Defence Motion Pursuant to Rule 116 for an Extension of Time Limit and Rule 68 (a), (b) and (e) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant*, filed on 18 August 2005 ("Defence Motion") in which the Defence:

- a. asserts that the terms of the contract with the Tribunal, dated 20 July 2005, varied or interpreted the twenty days granted to the Applicant in the Appeals Chamber's Decision of 20 June 2005 as meaning working days,⁶ that the opportune date for filing the additional submissions was not 9 August 2005 but 19 August 2005,⁷ and that there was no failure on its part to comply with the date of 9 August 2005;⁸
- b. alleges that the Prosecution failed to disclose exculpatory evidence pursuant to Rule 68 of the Rules, and requests the Appeals Chamber to order the Prosecution to make full and complete disclosure to the Applicant so as to enable him to prepare and present all "new facts" which may be gleaned from perusal of all the exculpatory material in possession of the Prosecution;⁹ and
- c. submits that the preparation of the additional submissions, including the Applicant's recent motion of 17 August 2005, is a complex task that cannot be completed in twenty days, and requests an extension of time, *inter alia*, to obtain an affidavit and an English translation of all pleadings since 26 October 2004, and to file the additional submissions only after disclosure by the Prosecution of

⁶ Defence Motion, 18 August 2005, para. 12.

⁷ Defence Motion, para. 16.

⁸ Defence Motion, para. 17.

⁹ Defence Motion, paras. 25 to 33, especially paras. 32 to 33.

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all exculpatory evidence or, in the alternative, to extend the deadline until 5 September 2005;¹⁰

NOTING the Prosecutor's *Reply to Defence Response to Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121*, filed on 22 August 2005 ("Prosecutor's Reply to Defence Motion") in which the Prosecution:

- a. submits that given Counsel's experience and familiarity with the Rules, Counsel ought to know that an assignment letter from the Registry cannot vary a decision of the Appeals Chamber, and that the Appeals Chamber's Decision of 20 June 2005 is clear and not subject to any misunderstanding;¹¹
- b. submits that, even if it were admitted that the twenty days were working days, the opportune date for filing any additional submissions would have been 17 August 2005, not 19 August 2005;¹² and
- c. requests the Appeals Chamber to grant the relief sought in the Prosecutor's Motion;¹³

NOTING the Registrar's *Submissions under Rule 33 (B) of the Rules of Procedure and Evidence to the Extremely Urgent Defence Motion Pursuant to Rule 116 for an Extension of Time Limit and Rule 68 (a), (b) and (e) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda; and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant*, filed on 26 August 2005 ("Registrar's Submissions") in which the Registrar submits that:

- a. the Rules do not create a different mode of computation of time and that the Appeals Chamber did not order otherwise, and that Counsel, having represented the Applicant from the Pre-Trial through the Trial and Appellate stages, should have abided by the orders in accordance with Rule 7 *ter* of the Rules;¹⁴

¹⁰ Defence Motion, paras. 34 to 43.

¹¹ Prosecutor's Reply to Defence Motion, 22 August 2005, paras. 7 to 10 and 12.

¹² Prosecutor's Reply to Defence Motion, para. 11.

¹³ Prosecutor's Reply to Defence Motion, para. 15; *see also* Prosecutor's Motion, paras. 7, 8.

¹⁴ Registrar's Submissions, 26 August 2005, paras. 3, 6 and 10.

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- b. the contract between the Registry and Counsel cannot vary the Appeals Chamber's order which is very clear and makes no reference to working days;¹⁵
- c. the twenty working days in the contract only relate to remuneration and not to the Appeals Chamber's Decision of 20 June 2005 and that the "twenty working days" were allocated to enable Counsel to make use of weekends and enable her to have any further discussions with the Applicant relating to any other issues that may have arisen after filing the additional submissions, for example, replying to a possible Prosecutor's response within seven calendar days;¹⁶

NOTING the *Defence Reply to the Registrar's Submissions under Rule 33 (B) filed on 26 August 2005 on Extremely Urgent Defence Motion Pursuant to inter alia, (i) Rule 116 for an Extension of Time of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda; and in Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision*, filed on 26 August 2005 ("Defence Reply to the Registrar's Submissions"), in which Counsel reiterates that the contract between her and the Registry modifies the twenty days granted by the Appeals Chamber into twenty working days;¹⁷

NOTING the *Prosecutor's Response to Defence Request for an Extension of Time to File Additional Submissions Pursuant to Rule 116*, filed on 29 August 2005,¹⁸ ("Prosecutor's Response to the Defence Request for an Extension of Time") relating to paragraphs 34 to 43 of the Defence Motion in which the Prosecution requests the Appeals Chamber to dismiss the Defence Motion for failure to show "good cause"¹⁹ arguing:

- a. that Counsel assisted the Applicant throughout the entire proceedings, at the pre-trial, trial and appellate stages, and is therefore familiar with and well versed in the complexity of the case;²⁰ that Counsel had ample time since December 2004 to prepare for the additional submissions²¹ and also to obtain the affidavit,

¹⁵ Registrar's Submissions, paras. 5, 7.

¹⁶ Registrar's Submissions, paras. 4, 8 to 9.

¹⁷ Defence Reply to the Registrar's Submissions under Rule 33 (B) filed on 26 August 2005 on Extremely Urgent Defence Motion Pursuant to *inter alia*, (i) Rule 116 for an Extension of Time of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda; and in Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, 26 August 2005. paras. 4 to 12.

¹⁸ This Response was filed outside the 10-day deadline which should have been 28 August 2005. The Appeals Chamber will nevertheless consider it as validly filed.

¹⁹ Prosecutor's Response to the Defence Request for an Extension of Time, 29 August 2005. para. 23.

²⁰ Prosecutor's Response to the Defence Request for an Extension of Time, paras. 7 and 8.

²¹ Prosecutor's Response to the Defence Request for an Extension of Time, paras. 9 and 10.

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especially since Counsel stated as far back as April 2005 that she intended to contact Ms. Hernandez to obtain the affidavit;²²

- b. that a refusal to grant the extension of time sought would not at all undermine the principle of equality of arms because, contrary to Counsel's assertion, the Prosecution did not take more time than afforded under Rule 120 (B) of the Rules to respond to Niyitegeka's "*Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes*", filed on 27 October 2004;²³
- c. that there is no need for English translation as Counsel assisted the Applicant throughout the proceedings and spoke French with him in addition to the fact that some written and oral communications between Counsel and the Applicant concerning the Request for Review are in French, which is a clear indication that Counsel understands French;²⁴
- d. that the Decision of 20 June 2005 limited Counsel's role to filing additional submissions relating to the Applicant's two requests, and that the submissions should not extend to the third Request for Review, with the risk that the review process would become an open-ended procedure allowing Counsel to request an extension whenever she claims that there are further "new facts";²⁵
- e. that the Defence has only made a vague allegation that the Prosecution breached Rule 68 of the Rules, without specifying which exculpatory material has not been disclosed to it,²⁶ and that the review procedure is not designed to assist a convicted person to go on a fishing expedition in search of "new facts";²⁷ and
- f. that Counsel may not raise the issue of prejudice where she has failed to comply with the Appeals Chamber's decisions or with the Rules established to ensure the fairness of proceedings;²⁸

²² Prosecutor's Response to the Defence Request for an Extension of Time, para. 11.

²³ Prosecutor's Response to the Defence Request for an Extension of Time, paras. 12 and 13.

²⁴ Prosecutor's Response to the Defence Request for an Extension of Time, paras. 14 and 16.

²⁵ Prosecutor's Response to the Defence Request for an Extension of Time, paras. 17 and 18.

²⁶ Prosecutor's Response to the Defence Request for an Extension of Time, para. 19.

²⁷ Prosecutor's Response to the Defence Request for an Extension of Time, paras. 20 and 21.

²⁸ Prosecutor's Response to the Defence Request for an Extension of Time, para. 22.

NOTING that under Rule 7 *ter* (B) of the Rules, where a time limit is expressed in days, this means ordinary calendar days including weekdays, Saturdays, Sundays and public holidays;

CONSIDERING that given her experience with the Rules, Counsel should have been aware that the contract with the Registry,²⁹ which is an administrative document, cannot supersede the provisions of the Rules, in particular Rule 7 *ter* (B) relating to the computation of time, nor can it supersede the Appeals Chamber's Decision of 20 June 2005;³⁰

CONSIDERING that in accordance with the Rules and the Decision of 20 June 2005, the final date for filing the additional submissions was 10 August 2005 and that even if the time limit were computed as applying to "working days", it would have been 17 August 2005, not 19 August 2005;³¹

CONSIDERING that contrary to the Decision of 20 June 2005, Counsel failed to file the additional submissions relating to the new facts alleged by the Applicant within the prescribed time-frame;

CONSIDERING further that it was only on 18 August 2005, that is, even after the time limit more favourably construed to the Applicant (17 August 2005) had expired, that Counsel filed the Defence Motion instead responding to the Prosecutor's Motion of 15 August 2005, requesting the Appeals Chamber to issue an injunction to the Prosecution in respect of its obligation under Rule 68 of the Rules and requesting an extension of time pursuant to Rule 116 of the Rules;³²

CONSIDERING that pursuant to paragraph 12 of the *Practice Direction on Formal Requirements for Appeals from Judgement*,³³ the Appeals Chamber may recognize the Defence Motion as validly done even though it was filed after the expiration of the time limit;

NOTING that pursuant to Rule 68 (A) of the Rules, the Prosecution shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecution may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

²⁹ Correspondence Ref: ICTR/JUD-11-5-2-1925 dated 1 July 2005, Para. 4.

³⁰ Prosecutor's Reply to Defence Motion, 22 August 2005, para. 7; Registrar's Submissions, 26 August 2005, paras. 3 to 10.

³¹ Defence Motion, paras. 12, 16 and 17.

³² Defence Motion, paras. 12, 16 and 17, 25 to 43.

³³ Issued on 4 July 2005.

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CONSIDERING that pursuant to Rule 68 (E) of the Rules, the Prosecutor's obligation to disclose exculpatory material continues notwithstanding the completion of the trial and any subsequent appeal;³⁴

CONSIDERING, however, that the Prosecution may be relieved of the obligations under Rule 68 of the Rules, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by any non-disclosure³⁵ and consequently, that since the documents referred to by the Applicant in his various requests are already in his possession, the Defence will not suffer any prejudice if the Prosecution does not disclose them to it;

CONSIDERING that by alleging a breach of Rule 68 of the Rules, the Defence must establish that the evidence was in the possession of the Prosecution and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought,³⁶ but that in the instant case the Defence has not established that specific evidence which is of probable exculpatory nature, other than what was in his possession and which the Applicant referred to in his requests for review, was in the possession of the Prosecution but not disclosed to the Defence;³⁷

CONSIDERING that Counsel's ability to work in French is attested to not only by communications between Counsel and the Applicant throughout the entire proceedings, but also by the official records of the Tribunal;³⁸

CONSIDERING that the arguments raised by the Defence in its belated request for extension of time³⁹ in the Defence Motion for filing additional submissions do not constitute good cause pursuant to Rule 116 of the Rules;

CONSIDERING, however, that Counsel's failure to file the additional submissions within the time limit, ought not to be imputed to the Applicant, and that under the present circumstances it is in the interests of justice, that additional time be granted to file any additional submissions;

³⁴ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No IT-95-14/2-A, "Decision on Appellant's Notice and Supplemental Notice on Prosecution's Non-Compliance with its Disclosure Obligation under Rule 68 of the Rules", 11 February 2004, para. 17.

³⁵ *Ibid.*, para. 20.

³⁶ *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Appeals Judgement, 23 May 2005, para. 262.

³⁷ Defence Motion, paras. 25 to 33, especially paras. 32 to 33; Prosecutor's Response to the Defence Request for an Extension of Time, paras. 19 to 21.

³⁸ The monthly official Contact Sheets issued by the Court Management Section, disclosing among other things the languages abilities of Defence Counsel based on information provided by DCDMS.

³⁹ Defence Motion, paras. 34 to 43.

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CONSIDERING that leave was granted to the Defence in the Decision of 20 June 2005 solely for filing additional submissions as to the alleged "new facts" discovered and already referred to the Appeals Chamber by the Applicant in his original Requests for Review;

CONSIDERING however that Applicant's *pro se* filing on 17 August 2005 identifying a "new fact" should in the interest of justice be treated as timely filed, since the Applicant is not at fault for his Counsel's failure to assist him properly in his filing or Counsel's misunderstanding of the proper deadlines and because the Applicant has stated that he was unable to establish the existence of this new fact when filing his original Requests for Review;⁴⁰

CONSIDERING therefore that the Applicant should also be permitted a reasonable time to submit additional filings with Counsel's assistance concerning this alleged "new fact";

RECALLING that the Prosecution may respond to the Applicant's additional submissions no later than fifteen days after these have been filed, and that the Applicant may reply to any response no later than seven days after such response has been filed;⁴¹

FOR THESE REASONS,

PARTIALLY GRANTS the Defence Motion and **INSTRUCTS THE APPLICANT** to file, through his Counsel, the additional submissions, should he deem it necessary, no later than ten days upon receipt of this decision. Should that time limit elapse without the filing of any additional submissions, the Appeals Chamber will proceed as requested in the Prosecutor's Motion, and render a decision solely on the basis of the record before it;

DISMISSES the Motion in all other respects;

DEFERS a decision on the Prosecutor's Motion regarding the request to the Appeals Chamber to issue a Decision pursuant to Rule 121 of the Rules based on the record before it;

REMINDS DEFENCE COUNSEL of her duty to comply with the Rules and other instruments of the Tribunal and with the decisions of this Chamber;

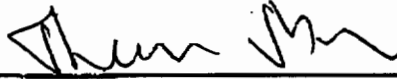
REMINDS THE PROSECUTION of its continuing obligation to disclose exculpatory material to the Defence pursuant to Rule 68 (A) of the Rules.

⁴⁰ Applicant's Request of 17 August 2005, para. 4.

⁴¹ Decision of 20 June 2005, p. 4.

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



Theodor Meron,
Presiding Judge

Done at The Hague, The Netherlands, on 28 September 2005.

[Seal of the Tribunal]

