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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1141/H

ICTR-96-14-R
27 September 2006
(1141/H – 1134/H)

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Decision of: **27 September 2006**

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ELIÉZER NIYITEGEKA
(Applicant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-14-R

DECISION ON REQUEST FOR RECONSIDERATION OF THE DECISION ON REQUEST FOR REVIEW

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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Counsel for the Prosecution
Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. George Mugwanya
Ms. Inneke Onsea

Counsel for Eliézer Nivitegeka
Mrs. Sylvia Geraghty

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 1994 and 31 December 1994 ("International Tribunal"),

RECALLING that the Appeals Chamber rendered its Judgement in this case on 9 July 2004 ("Appeal Judgement"), in which it sentenced Eliézer Niyitegeka ("Niyitegeka") to life-imprisonment;[1]

RECALLING the "Decision on Request for Review" rendered on 30 June 2006 ("Impugned Decision"), in which the Appeals Chamber dismissed all requests submitted by Niyitegeka on 27 October 2004, 7 February 2005, 17 August 2005, and 10 October 2005 for review of the Appeals Judgement pursuant to Article 25 of the Statute and Rules 120 and 121 of the Rules of Procedure and Evidence of the International Tribunal;[2]

BEING SEIZED OF the "Requête en reconsidération de la 'Decision on Request for Review' du 30 juin 2006" filed by Niyitegeka on 1 August 2006 ("Request for Reconsideration"), in which he: (1) seeks reconsideration of the Impugned Decision on grounds that he is a victim of a miscarriage of justice due to the existence of clear errors in the Appeals Chamber's reasoning in the Impugned Decision that have caused him grave material prejudice;[3] and (2) requests that, prior to the Appeals Chamber's full consideration of his Request for Reconsideration, it extend his Counsel's mandate to assist him in obtaining an Affidavit from Mr. Kambanda and in filing additional submissions that would provide further evidence of the persuasiveness of his alibi;[4]

NOTING the "Prosecutor's Response to Niyitegeka's 'Requête en reconsidération de la Decision on Request for Review du 30 juin 2006'" filed on 10 August 2006;

NOTING the "Réplique de l'Appelant à la Réponse du Procureur à la 'Requête en reconsidération de la Decision on Request for Review du 30 juin 2006'" filed by Niyitegeka on 17 August 2006;

CONSIDERING that the Appeals Chamber recently held that: although it has inherent discretionary power to reconsider its own decisions in exceptional circumstances, "there is no power to reconsider a final judgement" because it is inconsistent with the Statute of the International Tribunal, "which provides for a right of appeal and the right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement"; existing proceedings for appeal and review established under the Statute provide sufficient safeguards for due process

[1] *Niyitegeka v. The Prosecutor*, Case. No. ICTR-96-14-A, Judgement, 9 July 2004, paras 1, 270.
[2] Decision on Request for Review, 30 June 2006, para. 76.
[3] Request for Reconsideration, paras. 49, 55, 66, 69.

and the right to a fair trial; and it is in the interests of justice for both victims and convicted persons who are entitled to "certainty and finality of legal judgements";[5]

CONSIDERING further that a final judgement is a decision which terminates the proceedings in a case;[6]

FINDING, by majority, that because the Impugned Decision rejected Niyitegeka's requests for review of the Appeal Judgement, it is a final decision closing the proceedings in this case;

HEREBY DISMISSES the Appellant's Request for Reconsideration; and

DECLARES the request therein for extension of Counsel's mandate as moot.

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

Judge Fausto Pocar
Presiding Judge

Done this 27th day of September 2006,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[5] *Id.*, paras 74-75.
[5] *Prosecutor v. Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9.
[6] *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 49.

DECLARATION OF JUDGE SHAHABUDDEEN

1. On the merits, I agree with the dismissal of the request for reconsideration of the decision denying the appellant's request for review. However, I am not persuaded by the holding of the Appeals Chamber that it has no power to reconsider a decision on a request for review.

2. In *Žigić*, the Appeals Chamber, disagreeing with the rule established by it in *Čelebići*, held that "there is no power to reconsider a final judgement."[1] I disagree with the conclusion of the majority in this case that the Appeals Chamber's "Decision on Request for Review" of 30 June 2006 ("impugned decision") likewise is not subject to the Appeals Chamber's inherent discretionary power to reconsider its own decisions.

3. The impugned decision of the Appeals Chamber did not address, on the merits, the original findings in this case. The Appeals Chamber found that the test for review in Rules 120 and 121 had not been met by the applicant in that he had not presented a new fact that, if proven, could have been a decisive factor in reaching the appeal judgement. No other Chamber previously considered the question whether there was a new fact. This question was raised for the first time in the applicant's Request for Review and decided for the first time in the impugned decision.

4. In *Žigić*, the Appeals Chamber emphasized that the Statute of the Tribunal "provides for a right of appeal and a right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement."[2] The rationale for the rule barring reconsideration of a final judgement is that an appellant, having had the opportunity to contest the original findings against him through appeal and review proceedings, is not entitled to a further bite at the cherry by way of a request for reconsideration. In this case, by contrast, the Appeals Chamber's decision marked the first time that any Chamber considered the applicant's arguments concerning the existence of new facts and their possible impact on the judgement. In my view, the Appeals Chamber has jurisdiction to reconsider such a decision, which is not subject to any further appeal or review proceedings, in order to correct a clear miscarriage of justice. This power should be exercised only in exceptional circumstances. However, consistent with the reasoning in *Žigić* and in the interests of justice, the exercise of this power should not be precluded altogether.

[1] *Prosecutor v. Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005," 26 June 2006, para. 9.
[2] *Id.*

5. Nonetheless, the applicant has not demonstrated either a clear error of reasoning in the impugned decision or an injustice that warrants the exercise of the Appeals Chamber's inherent jurisdiction to reconsider the impugned decision. For this reason, I support the outcome of the case.

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

27 September 2006
The Hague
The Netherlands.

Mohamed Shahabuddeen

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE MERON

1. I agree with my learned colleagues that the Appeals Chamber must dismiss the Request for Reconsideration. I write separately, however, because I base my position solely on the fact that Niyitegeka has neither demonstrated a clear error of reasoning in the Impugned Decision nor shown that reconsideration is necessary in order to prevent injustice.[1]

2. In the *Čelebići* Judgement on Sentence Appeal,[2] the Appeals Chamber concluded that it "has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice."[3] Yet in a separate opinion, one colleague and I explained that to decide the matter then before the Appeals Chamber, there was no need to determine whether it has inherent power to reconsider its judgements.[4] We therefore reserved our position on whether the Appeals Chamber has such an inherent power.[5] Recently, the Appeals Chamber overturned the rule it established in the *Čelebići* Judgement on Sentence Appeal, holding instead that "there is no power to reconsider a final judgement."[6] I was not on the bench of the Appeals Chamber that departed from the holding of the *Čelebići* Judgement on Sentence Appeal. In the case where the Appeals Chamber so departed – *Prosecutor v. Žigić* – as in *Čelebići*, I therefore had no occasion to consider whether the Appeals Chamber has the power to reconsider a final judgement that it renders.

3. I continue to reserve my position on this question, as Niyitegeka's Request for Reconsideration must be dismissed regardless of whether the Appeals Chamber may reconsider one of its final judgements. A motion for reconsideration cannot succeed without "demonstrat[ing] the existence of a clear error of reasoning in the [impugned decision], or of circumstances justifying its reconsideration in order to avoid injustice".[7] The Request for Reconsideration raises one frivolous challenge to the manner in which, in one part of the Impugned Decision, the Appeals Chamber applied the requirement that a review request be based on a new fact.[8] Aside from this, the Request

[1] *See Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Supplemental Motion for Extension of Time to File Appeal Brief, 31 August 2005 ("*Blagojević and Jokić* Decision"), para. 7 (noting that "in order to succeed in a motion for reconsideration, [a party] would have to demonstrate the existence of a clear error of reasoning in the [impugned decision], or of circumstances justifying its reconsideration in order to avoid injustice"); *Prosecutor v. Naletelić and Martinović*, Case No. IT-98-34-A, Decision on Naletelić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 20 (making the same point).

[2] *Prosecutor v. Mucić, Delić and Landžo*, Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal, 8 April 2003 ("*Čelebići* Judgement on Sentence Appeal").

[3] *Ibid.*, para. 49.

[4] *Čelebići* Judgement on Sentence Appeal, Separate Opinion of Judges Meron and Pocar, para. 1.

[5] *Ibid.*

[6] *Prosecutor v. Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9.

[7] *Blagojević and Jokić* Decision, para. 7.

[8] Request for Reconsideration, paras 24-25. Niyitegeka points to a paragraph of the Trial Judgement stating that his counsel tried to prove he "was at a government council meeting in Kigali the entire day on 10 April" 1994. Request for

for Reconsideration never attempts to show error in the Appeals Chamber's conclusion that arguments raised in the Request for Review did not pertain to new facts,[9] and that these arguments therefore could not satisfy the four requirements – laid out in paragraph 6 of the Impugned Decision – for obtaining review of a judgement. Though Niyitegeka challenges the Impugned Decision's conclusions that different pieces of alleged "new evidence" could not – if they had been presented in time – have been a decisive factor in the original decision on an issue, the Request for Reconsideration fails to show that the Appeals Chamber clearly erred in reaching these conclusions,[10] or that failure to revisit them would lead to a miscarriage of justice. The Request for Reconsideration likewise fails to show any clear error in the rejection of Niyitegeka's Rule 68 arguments, or that failure to revisit them would lead to a miscarriage of justice.[11] Further, while making clear that Niyitegeka remains concerned about a Prosecution attorney in this case who was subjected to professional discipline in her home jurisdiction,[12] the Request for Reconsideration fails to suggest that in the Impugned Decision, the Appeals Chamber erred: a) in considering only whether newly discovered communications would have led it to handle the issue differently in the Appeals Judgement, and b) in determining that the newly discovered communications would not

Reconsideration, para. 24 (quoting *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 ("Trial Judgement"), para. 67). He then quotes the Trial Judgement's assertion that he adduced no evidence of this meeting, Request for Reconsideration, para. 24 (quoting Trial Judgement, para. 67), and contends that as "he is being compelled to prove the veracity of his alibi … the factual evidence of the meeting of 10 April 1994" that he sought to introduce in the review proceeding "does constitute a 'new fact'." Request for Reconsideration, para. 25. As the Impugned Decision explained, however, a new fact is "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings". Impugned Decision, para. 6 (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, para. 25). The new evidence that Niyitegeka offers to show that the 10 April 1994 meeting occurred therefore does not constitute a new fact.

[9] The Request for Reconsideration encourages the Appeals Chamber to "endorse" the views on the "new fact" requirement expressed by Judge Shahabuddeen in a separate opinion in *Prosecutor v. Barayagwiza*. Request for Reconsideration, paras 14-15 (referring to *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 47). The Request for Reconsideration, however, never explains how doing so might prompt the Appeals Chamber, when considering whether arguments raised in the Request for Review pertain to new facts, to reach results different from those reached in the Impugned Decision. In fact, in the cited paragraph, Judge Shahabuddeen explains the "new fact" requirement in a manner consistent with the way it was applied in the "Impugned Decision".

[10] Niyitegeka errs when he suggests that the Impugned Decision assumed an accused who raises the defence of alibi has the burden of proving the alibi. *See* Motion for Reconsideration, para. 15 (arguing that the Impugned Decision makes this assumption). Paragraphs of the Impugned Decision cited by Niyitegeka in making this argument do not suggest that an accused has the burden of proof when asserting an alibi defence. *See* Impugned Decision, paras 14, 19, 22, 23, 28, 32, 40.

[11] The Request for Reconsideration asserts that, contrary to what the Impugned Decision held, Niyitegeka was prejudiced by the Prosecution's improper failure to disclose transcripts of cassettes AV906, AV 907, and AV 908. Niyitegeka, however, does not explain how the Appeals Chamber might have erred in concluding, at paragraph 57 of the Impugned Decision, that the finding Niyitegeka sought to contest with these transcripts is not "critical to his conviction for any crime". *See* Motion for Reconsideration, paras 21-23. The Request for Reconsideration also challenges the conclusion that Niyitegeka was not prejudiced by the fact that the Prosecution improperly disclosed only 11 of the 29 pages of the transcript of cassette AV/917. Though Niyitegeka asserts that the remaining 18 pages would have helped him to better establish his whereabouts on 16 April 1994, he offers no coherent explanation for why it was clearly erroneous to conclude, on the basis of his submissions during the review proceeding, that these 18 pages would have provided no such assistance. Moreover, he does not explain why failure to reconsider the extent of his prejudice would lead to a miscarriage of justice. *See* Motion for Reconsideration, paras 30-31.

[12] *See* Motion for Reconsideration, paras 67-69.

have had such an effect, as they relate to an issue the Appeals Chamber did not consider crucial when it addressed the import of the professional discipline to which the attorney was subjected.[13]

4. In sum, the arguments Niyitegeka now raises do not meet the requirements for obtaining reconsideration. I therefore concur in the outcome without joining in the majority's explanation for it.

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

Done on the 27th day of September 2006
at The Hague, The Netherlands.

Theodor Meron
Judge

[Seal of the International Tribunal]

[13] *See* Impugned Decision, paras 72-75.