



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-96-14-R
06th October 2010
{2501/H – 2497/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 6 October 2010

ICTR Appeals Chamber
Date: 06th October 2010
Action: A. Dieng
Copied To: Concerned Judges,
SLO, LO, ALO, CMS,
Pastors, LSS.
Jugyung

Eliézer NIYITEGEKA

v.

THE PROSECUTOR

Case No. ICTR-96-14-R

**DECISION ON MOTION TO ORDER THE PROSECUTION TO COMPLY
WITH A TRIAL CHAMBER DECISION**

The Applicant

Mr. Eliézer Niyitegeka, *pro se*

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. George Mugwanya
Ms. Inneke Onsea

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR MOI
NAME/NOM: KOEEL KUMELIO A. AFANDE
SIGNATURE: DATE: 06 Oct. 2010

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 “*Requête aux fins d’une ordonnance enjoignant le Procureur de s’acquitter de son obligation de se conformer à la Décision du Tribunal*”, filed on 25 August 2010 (“Motion”) by Eliézer Niyitegeka (“Niyitegeka”). The Prosecution responded on 3 September 2010¹ and Niyitegeka replied on 20 September 2010.²

2. On 16 May 2003, Trial Chamber I of the Tribunal (“Trial Chamber”) 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, and sentenced him to life imprisonment.³ In its Judgement of 9 July 2004, the Appeals Chamber dismissed Niyitegeka’s appeal against his convictions and affirmed his sentence.⁴

3. To date, Niyitegeka has filed five requests for review pursuant to Rules 120 and 121 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), which have all been dismissed by the Appeals Chamber.⁵ Niyitegeka’s attempts to have some of these decisions reconsidered were also rejected.⁶

4. In his Motion, Niyitegeka requests the Appeals Chamber to order the Prosecution to disclose the identities of the girl killed in Bisesero on 20 May 1994, the old man and young boy killed at Kiziba on 18 June 1994, and the man and woman killed on 28 June 1994 near the *École Normale Technique* in Kibuye.⁷ He asserts that the jurisprudence of the Tribunal and of the International Criminal Tribunal for the former Yugoslavia establishes that the Prosecution must provide an

¹ Prosecutor’s Response to Niyitegeka’s “*Requête aux fins d’une ordonnance enjoignant le Procureur de s’acquitter de son obligation de se conformer [à] la D[é]cision du Tribunal*”, 3 September 2010 (“Response”).

² *Mémoire en réplique à la « Prosecutor’s Response to Niyitegeka’s “Requête aux fins d’une ordonnance enjoignant le Procureur de s’acquitter de son obligation de se conformer à la Décision du Tribunal” », 20 September 2010 (“Reply”).* Niyitegeka explains in his Reply that he was provided with the Prosecution’s Response on 13 September 2010. See Reply, para. 3.

³ *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 (“Trial Judgement”), paras. 420, 429, 437, 447, 454, 467, 480, 502.

⁴ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“Appeal Judgement”), para. 270.

⁵ Decision on Fifth Request for Review, public redacted version, 27 January 2010; Decision on Fourth Request for Review, signed on 12 March 2009, public redacted version filed on 21 April 2009; Decision on Third Request for Review, 23 January 2008; Decision on Request for Review, 6 March 2007; Decision on Request for Review, 30 June 2006.

⁶ Decision on Motion for Reconsideration of Fifth Review Decision, 25 March 2010; Decision on Request for Clarification, 17 April 2007; Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006.

⁷ Motion, paras. 20, 23.

accused with the identity of the alleged victims.⁸ He argues that the Trial Chamber ordered the disclosure of the identities of the girl killed on 20 May 1994 and the man and woman killed on 28 June 1994 in its Decision of 20 November 2000 but that the Prosecution never complied.⁹ He further submits that the Decision of 20 November 2000 also implicitly required the disclosure of the identities of the old man and young boy killed at Kiziba on 18 June 1994.¹⁰ He asserts that he is unable to undertake investigations which could lead to a request for review without knowing the identities of these victims, and is thereby deprived of his right of review provided for under Article 25 of the Statute of the Tribunal ("Statute") and Rule 120 of the Rules.¹¹ Niyitegeka further requests the Appeals Chamber to find that the Prosecution manifestly disregarded the Trial Chamber's Decision of 20 November 2000, to declare the Trial Judgement void, and to order sanctions against the Prosecution for its "offensive behaviour".¹²

5. The Prosecution responds that Niyitegeka impermissibly attempts to re-litigate issues which he has previously unsuccessfully advanced.¹³ The Prosecution also recalls that, on appeal, the Appeals Chamber noted that the Decision of 20 November 2000 only ordered it to disclose the identity of the victims "if known".¹⁴

6. The Appeals Chamber notes that Niyitegeka frames his Motion as a request for disclosure pursuant to Rule 68 of the Rules¹⁵ but in substance relies entirely on arguments relating to the requirement of pleading material facts in the indictment.¹⁶

7. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 of the Rules¹⁷ to, "as soon as practicable, disclose to the Defence any material, which

⁸ Motion, paras. 4-7, referring to *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 74; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 23; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 89; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 213; *The Prosecutor v. François Karera*, Case No. 01-74-T, Judgement and Sentence, 7 December 2007, para. 14; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 24. See also Reply, paras. 5, 6, 12.

⁹ Motion, paras. 9, 10, 12-15, referring to *The Prosecutor v. Elzézer Niyitegeka*, Case No. ICTR-96-14-T, Decision on Defence Motion on Matters Arising From Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction, 20 November 2000 ("Decision of 20 November 2000"), paras. 41(b), 46(d). See also Reply, para. 10.

¹⁰ Motion, para. 11.

¹¹ Motion, para. 16. See also Reply, para. 8.

¹² Motion, paras. 21, 23.

¹³ Response, paras. 3, 4.

¹⁴ Response, para. 3.

¹⁵ See reference on cover page of the Motion to Rule 68 of the Rules. The Appeals Chamber notes that Niyitegeka also invokes Articles 19(1), 20(2) and 20(4)(d) of the Statute in support of his Motion. See Motion, paras. 1, 2. The Appeals Chamber recalls that while Article 19(1) of the Statute relates to the "Commencement and Conduct of Trial Proceedings", Articles 20(2) and 20(4)(d) of the Statute provide rights for "the accused" in "the determination of charges against him". The Appeals Chamber stresses again that the charges against Niyitegeka have already been determined and that his conviction has been confirmed on appeal; he is not an accused before the Tribunal but a convicted person whose case has reached finality. See Decision on Motion for Clarification, 1 July 2009, para. 5.

in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.” To establish that the Prosecution is in breach of its disclosure obligation, the applicant must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.¹⁸ However, in the instant case, the Appeals Chamber notes that Niyitegeka does not refer to any specific materials he seeks to have disclosed and does not demonstrate that the information sought is in the custody or under the control of the Prosecution.

8. The Appeals Chamber also notes that the alleged failure to plead the identities of the girl killed on 20 May 1994 and of the old man and the young boy killed on 18 June 1994 was raised on appeal and rejected by the Appeals Chamber.¹⁹ Moreover, Niyitegeka’s argument concerning the identity of the man and woman killed on 28 June 1994 was raised at trial when the Trial Chamber ordered the victims’ identities to be pleaded, if known,²⁰ and Niyitegeka did not raise the issue again on appeal.²¹ Accordingly, the Appeals Chamber considers that Niyitegeka is attempting to re-litigate issues which have already been adjudicated or which he failed to raise at the appropriate time.

¹⁶ See Motion, paras. 4-7.

¹⁷ See, e.g., Decision on Request for Disclosure, 7 September 2009, para. 5; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze’s and the Prosecution’s Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, public redacted version, 27 November 2006, para. 11.

¹⁸ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010, para. 16.

¹⁹ Appeal Judgement, paras. 236, 237, 239-242.

²⁰ Decision of 20 November 2000, paras. 41(b), 46(d).

²¹ The Appeals Chamber notes that Niyitegeka was not convicted for the killing of the man and woman killed on 28 June 1994, but was convicted for ordering the perpetration of sexual violence on the body of a dead woman. See Trial Judgement, paras. 287, 316, 416, 420, 463, 467, 480.

9. Niyitegeka's Motion is accordingly **DISMISSED** in its entirety.

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

Done this sixth day of October 2010,
At The Hague,
The Netherlands



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]