MICT-12-16-R
06-11-2014
(862 - 855)

UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-12-16-R

Date: 6 November 2014

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Jean-Claude Antonetti
Judge Carmel Agius
Judge Christoph Flügge
Judge Burton Hall

Registrar: **Mr. John Hocking**

Decision of: **6 November 2014**

ELIÉZER NIYITEGEKA

v.

THE PROSECUTOR

PUBLIC

DECISION ON NIYITEGEKA'S REQUEST FOR ASSIGNMENT OF COUNSEL

The Applicant:

Eliézer Niyitegeka, *pro se*

Office of the Prosecutor:

Hassan B. Jallow
Richard Karegyesa
Inneke Onsea

Received by the Registry
Mechanism for International Criminal Tribunals
06/11/2014 14:38

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of a request for the assignment of counsel filed by Eliézer Niyitegeka on 29 April 2014.[1] The Prosecution responded to the Motion on 7 May 2014.[2] Niyitegeka filed a reply on 16 May 2014.[3]

I. BACKGROUND

2. Niyitegeka was the Minister of Information in the Rwandan Interim Government in 1994.[4] On 16 May 2003, Trial Chamber I of the International Criminal Tribunal for Rwanda ("Trial Chamber" and "ICTR", 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.[5] The Trial Chamber sentenced him to imprisonment for the remainder of his life.[6] On 9 July 2004, the ICTR Appeals Chamber dismissed Niyitegeka's appeal against his convictions in its entirety and affirmed his sentence.[7] The ICTR Appeals Chamber has dismissed Niyitegeka's five previous requests for review on 30 June 2006,[8] 6 March 2007,[9] 23 January 2008,[10] 12 March 2009,[11] and 27 January 2010.[12] Niyitegeka is currently serving his sentence in the Koulikoro Detention Unit in Mali.[13]

---

[1] *Requête aux fins d'une ordonnance en désignation d'un Conseil pour représenter les intérêts d'Eliézer Niyitegeka.- [Article 19 du Statut du MTPI; articles 46 et 146 du Règlement du MTPI]*, 29 April 2014 ("Motion"). An English translation was filed on 2 June 2014.

[2] Prosecution Response to Eliézer Niyitegeka's Request for Assignment of Counsel, 7 May 2014 ("Response").

[3] *Mémoire en réplique à la Réponse du Procureur à la «Requête aux fins d'une ordonnance en désignation d'un Conseil pour représenter les intérêts d'Eliézer Niyitegeka.»*, 16 May 2014 ("Reply"). An English translation was filed on 2 June 2014.

[4] *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.

[5] Trial Judgement, para. 480.

[6] Trial Judgement, para. 502.

[7] Appeal Judgement, para. 270.

[8] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006 ("First Review Decision"), 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, p. 2.

[9] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007 ("Second Review Decision"), 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.

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

[11] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, public redacted version, 12 March 2009 ("Fourth Review Decision"), 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.

[12] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010 ("Fifth Review Decision"), paras. 10-11. *See also 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.

[13] *See The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Decision on the Enforcement of Sentence, 4 December 2008, p. 3.

II. SUBMISSIONS

3. Niyitegeka requests the assistance of counsel for the preparation of a potential request for review.[14] He contends that, in light of his indigent status, the assignment of counsel paid by the Mechanism is necessary in order to ensure the fairness of the proceedings against him[15] and that, due to the remote location of the Koulikoro Detention Unit, it is impossible for him to find counsel who would be willing to assist him *pro bono*.[16] Consequently, Niyitegeka requests the assignment of counsel at the expense of the Mechanism or, in the alternative, to be transferred to a state where free legal assistance is guaranteed for indigent persons whose conviction is final.[17]

4. Niyitegeka contends that he needs legal assistance in light of developments in the jurisprudence of the ICTR following his conviction, which in his view could amount to "new facts" pursuant to Rule 146 of the Rules of Procedure and Evidence of the Mechanism ("Rules").[18] To support his claim, Niyitegeka submits that he was convicted for the crime of conspiracy to commit genocide while Clément Kayishema and Obed Ruzindana, who were found to have participated with Niyitegeka at a meeting to plan the killing of the Tutsis in Bisesero, were not prosecuted for this crime.[19] Niyitegeka argues that, as a result, his conviction for conspiracy to commit genocide involves an abuse of authority by the Prosecution and violates the principle of equality of all persons before the ICTR.[20] He also claims that his conviction was based solely on the testimony of Witness GGV, although ICTR jurisprudence prohibits reliance on uncorroborated witness testimony.[21]

5. In relation to his conviction for extermination, Niyitegeka submits that the Prosecution abused its authority in failing to disclose exculpatory material relevant to his alibi for 10 April 1994 in a timely manner.[22] Furthermore, Niyitegeka contends that the Trial Chamber's rejection of his alibi is indicative of unequal treatment given that a separate trial chamber ultimately accepted the same alibi in the case of André Rwamakuba.[23] As to his conviction for murder in relation to the death of three Tutsi civilians, Niyitegeka argues that he lacked sufficient notice of the identity of the victims as required by current ICTR jurisprudence.[24] Niyitegeka claims that the

---

[14] Motion, paras. 36-38.
[15] Motion, paras. 30, 33-35.
[16] Motion, para. 31.
[17] Motion, paras. 32, 34, 37-38; Reply, para. 10.
[18] Motion, paras. 28, 36.
[19] Motion, paras. 11-12.
[20] Motion, para. 12; Reply, paras. 5-6.
[21] Motion, para. 13. *See also* Motion, paras. 14-15.
[22] Motion, paras. 21-24; Reply, para. 8.
[23] Motion, paras. 22, 25-27.
[24] Motion, paras. 14-20, *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, *Prosecutor v. André Ntagerura et*

Prosecution's failure to disclose the identity of the victims violated his right to a fair trial and warrants the Trial Judgement being declared null as a remedy for the prejudice suffered.[25]

6. The Prosecution responds that Niyitegeka's request should be dismissed as he fails to show that the provision of legal assistance is necessary to ensure the fairness of the proceedings against him.[26] In particular, the Prosecution argues that Niyitegeka repeats submissions that have already been dismissed at trial, by the ICTR Appeals Chamber as part of Niyitegeka's appeal against the Trial Judgement, or in the context of his subsequent requests for review.[27]

III. DISCUSSION

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. 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.[28] At the preliminary examination stage of a request for review, legal assistance will be granted only if the Appeals Chamber deems it "necessary to ensure the fairness of the proceedings".[29] This necessity is, to a great extent, assessed in light of the potential grounds for review put forward by the applicant.[30]

8. Turning to the first argument raised by Niyitegeka as a potential ground for review, namely that, unlike him, Kayishema and Ruzindana were not prosecuted for the crime of conspiracy to commit genocide, the Appeals Chamber recalls that the Prosecution has a broad discretion in relation to the initiation of prosecutions and the preparation of indictments.[31] Moreover, a trial chamber's conclusion on the individual criminal responsibility of an accused is the result of a complex evaluation of all the evidence presented in relation to that accused.[32] Bearing in mind these principles, the Appeals Chamber is not satisfied that this potential ground of review has any chance of success, and therefore it does not justify the assignment of counsel at the expense of the Mechanism.

---

al., Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 23, *The Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Judgement and Sentence, 7 December 2007, para. 14; Reply, para. 7.

[25] Motion, para. 20.

[26] Response, paras. 1, 8.

[27] Response, paras. 1-7.

[28] *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, *citing François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Review and Assignment of Counsel, 28 February 2011 ("*Karera* Decision of 28 February 2011"), para. 39.

[29] *Karera* Decision of 4 December 2012, para. 10, *citing Karera* Decision of 28 February 2011, para. 39.

[30] *Karera* Decision of 4 December 2012, para. 10, *citing Karera* Decision of 28 February 2011, para. 39.

[31] *See The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 94, *citing Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 602.

9. In relation to Niyitegeka's remaining arguments, the Appeals Chamber observes that they largely repeat submissions which have been considered by the ICTR Appeals Chamber in the context of Niyitegeka's prior requests for review. In particular, the Prosecution's failure to timely disclose exculpatory material in relation to Niyitegeka's alibi for 10 April 1994 was addressed in the First Review Decision,[33] where the ICTR Appeals Chamber held that the material could not have been a decisive factor in reaching the original decision.[34] Likewise, in its Second Review Decision, the ICTR Appeals Chamber explicitly rejected Niyitegeka's argument that the acceptance of the accused's alibi in the *Rwamakuba* case constituted a new fact for the purposes of review.[35]

10. As to the Trial Chamber's reliance on the testimony of Witness GGV, in its Fourth and Fifth Review Decisions, the ICTR Appeals Chamber considered that the witness' credibility had been litigated at trial and on appeal, and rejected Niyitegeka's requests to revisit the matter.[36] The Appeals Chamber finds unpersuasive Niyitegeka's attempt to re-litigate this issue by erroneously claiming that the jurisprudence disallows reliance on uncorroborated witness testimony.[37] Contrary to his submission, it is well established that trial chambers have discretion to decide whether corroboration is necessary, and to rely on uncorroborated, but otherwise credible, witness testimony.[38] As regards the alleged lack of notice of the identity of the victims in relation to Niyitegeka's conviction for murder, the Appeals Chamber observes that similar arguments by Niyitegeka were addressed both in the Appeal Judgement and in the Third Review Decision.[39]

11. In view of the foregoing, it is apparent that a large part of Niyitegeka's submissions effectively seek reconsideration of the ICTR Appeals Chamber's decisions dismissing his prior requests for review. The Appeals Chamber recalls that decisions rejecting requests for review are final decisions closing the proceedings and, as such, are not subject to reconsideration.[40] In any event, having considered Niyitegeka's potential grounds for review, the Appeals Chamber finds that Niyitegeka has failed to show that the fairness of the proceedings requires that he be afforded legal assistance under the auspices of the Mechanism's legal aid system.

---

[32] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 1055. *See also Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014, para. 143.

[33] First Review Decision, paras. 55-59.

[34] First Review Decision, para. 14.

[35] Second Review Decision, paras. 6-7.

[36] Fourth Review Decision, para. 47, *referring to* Trial Judgement, paras. 211-213, Appeal Judgement, paras. 146-157; Fifth Review Decision, para. 8, *referring to* Fourth Review Decision, paras. 46-47.

[37] Motion, para. 13.

[38] *See, e.g., Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 138, *referring to Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012, para. 150, *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Judgement, para. 21, *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 45, *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgement, 8 May 2012, para. 150, *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para. 556.

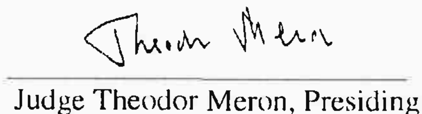
12. The Appeals Chamber emphasizes that its findings in this decision pertain strictly to Niyitegeka's request for the assignment of counsel and not to the merits of Niyitegeka's potential request for review. If and when such a request is filed, the Appeals Chamber will make its determination on the merits.

13. Finally, the Appeals Chamber dismisses Niyitegeka's alternative request to be transferred to another state where legal aid is guaranteed for indigent persons whose conviction is final. Pursuant to Rule 127 of the Rules and Article 5 of the relevant Practice Direction,[41] it is the President of the Mechanism, and not the Appeals Chamber, that can and shall designate the state in which imprisonment shall be served and decide on any subsequent requests for transfer to another enforcement state.[42]

IV. DISPOSITION

14. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Motion.

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



Done this 6th of November 2014,
At The Hague,
The Netherlands

Judge Theodor Meron, Presiding

Judge Jean-Claude Antonetti appends a separate opinion.

[Seal of the Mechanism]

---

[39] Appeal Judgement, paras. 239-242; Third Review Decision, para. 7.
[40] *Karera* Decision of 4 December 2012, para. 11.
[41] *See* Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve His or Her Sentence of Imprisonment (MICT/2 Rev. 1), 24 April 2014, Article 5.
[42] *See Prosecutor v. Radislav Krstić*, Case No. MICT-13-46-ES.1/IT-98-33-ES, Order Designating the State in Which Radislav Krstić is to Serve the Remainder of his Sentence, 19 July 2013. The corresponding documents of the ICTR and the International Criminal Tribunal for the former Yugoslavia ("ICTY") also endow the President with the power to designate the state in which imprisonment shall be served. For the ICTR, *see* Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve his/her Sentence of Imprisonment [As revised and amended on 23 September 2008], Article 4; *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-A26, Decision on the Enforcement of Sentence *Article 26 of the Statute & Rule 103(A) of the Rules of Procedure and Evidence*, 13 February 2008, para. 7. For the ICTY, *see* Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013, Rule 103(A); Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted Person is to Serve his/her Sentence of Imprisonment (IT/137/Rev.1), 1 September 2009, Article 5.

OPINION INVIDUELLE CONCORDANTE

Je souscris pleinement à la décision rendue par la **Chambre d'appel** tendant au **rejet** de la requête du condamné **Eliézer Niyitegeka**. Toutefois, compte tenu de l'importance de la requête, j'estime nécessaire de faire part de mon opinion sur un plan général d'une demande en révision présentée par un **condamné** devant une **juridiction internationale** qui sollicite l'assistance d'un avocat aux frais du Mécanisme résiduel pour les tribunaux pénaux internationaux.

La Chambre d'appel a eu l'occasion d'évoquer cette question et avait considéré qu'il y avait une possibilité d'affecter à un condamné un conseil pendant une durée limitée.

En effet, elle rappelle que « c'est à titre exceptionnel qu'une personne contre laquelle un jugement définitif a été rendu peut se voir accorder l'assistance d'un conseil aux frais du Mécanisme après qu'un jugement définitif ait été rendu contre lui. Au stade de l'examen préliminaire de la demande en révision, l'assistance d'un conseil ne sera accordée que si la Chambre d'appel juge cette assistance nécessaire pour assurer l'équité de la procédure. Cette nécessité est dans une large mesure appréciée à la lumière des moyens que le requérant entend invoquer à l'appui de sa demande »[1].

Je ne partage pas ce point de vue car il est susceptible d'appeler des **demandes de révision « en cascade »**. En effet, un **condamné** purgeant sa peine pourra toujours penser qu'il a été mal assisté ou mal représenté par ses conseils antérieurs et que dans ces conditions, il doit refaire l'enquête avec un nouvel avocat qui recherchera des témoins pour établir l'existence de faits nouveaux.

Ceci me paraît **très dangereux** pour la **sécurité juridique** des jugements rendus par une juridiction internationale après un très long processus qui dure des années où les preuves ayant abouti à la déclaration de culpabilité de l'Accusé ont été présentées par l'Accusation et contestées par la Défense. Il convient également d'ajouter à ce tableau les preuves présentées par la Défense au moment de la présentation de ses moyens.

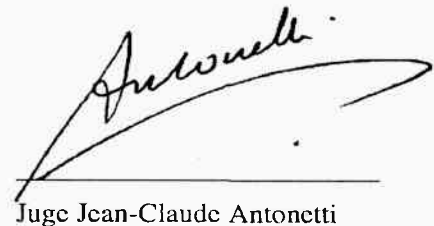
Il convient de rappeler que ce procès s'est déroulé sous le contrôle des juges qui pouvaient en cas de doute ou de moyens de preuve discutables demander aux parties de compléter leurs arguments ou d'elle-même, ordonner la comparution de témoins ou l'admission de nouveaux éléments de

preuve en application de l'article 98 du Règlement de procédure et de preuve du TPIR[2]. Compte tenu du professionnalisme des juges de la Chambre de première instance, il serait étonnant qu'ils ne se soient pas posés la question et qu'ils aient conclu qu'il n'y avait aucune raison de compléter les éléments à charge et les éléments à décharge.

A mon avis, il serait extrêmement grave d'entrer dans cette voie car pourquoi accorder une telle demande à un condamné et le refuser à un autre ? De même, pourquoi introduire cette notion de circonstance exceptionnelle ? j'estime qu'en matière de révision de procès basée sur des faits nouveaux, le condamné, ou le cas échéant son avocat ou tout autre bénévole ou toute autre entité juridique agissant *pro bono* doit pouvoir être en mesure de présenter un dossier suffisant de lui-même afin de permettre aux juges de statuer.

En revanche, j'aurais une opinion favorable à son transfert dans un autre pays. En effet, il purge actuellement sa peine au Mali, pays actuellement en proie à des difficultés intérieures. Dans ces conditions, il est fort probable qu'il ne puisse disposer d'une assistance juridique et d'un accès à des visiteurs susceptibles de l'aider dans le futur dans le cadre d'une demande de révision étayée par de solides arguments ce qui n'est pas le cas actuellement ; étant observé qu'il a déjà formé 5 requêtes en révision avant celle-ci qui ont été rejetées par la Chambre d'appel du TPIR. Comme l'indique le paragraphe 13 de la présente décision, c'est le **Président du Mécanisme résiduel** qui a cette compétence et non la Chambre d'appel. C'est à lui qu'il incombera le cas échéant la décision de transférer l'intéressé dans un autre pays comme cela a été fait pour le Général **Krstić**[3].

Fait en français et en anglais, la version française faisant foi.



Juge Jean-Claude Antonetti

Le 6 novembre 2014
La Haye (Pays-Bas)

[Sceau du Mécanisme]

[1] *François Karera c. Procureur*, MICT-12-24-R, « Décision relative à la requête aux fins de commission d'office d'un conseil », 4 décembre 2012, §10.

[2] Selon l'article 98 du Règlement de procédure et de preuve du TPIR, « La Chambre de première instance peut, de sa propre initiative, ordonner la production de moyens de preuve supplémentaires par l'une ou l'autre des parties. Elle peut de sa propre initiative citer des témoins à comparaître ».

[3] *The Prosecutor v. Radislav Krstić*, MICT-13-46-ES.1, "Order designating the state in which Radislav Krstić is to serve the remainder of his sentence", Public, 19 July 2013.