UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-12-16-R

Date: 13 July 2015

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: **13 July 2015**

ELIÉZER NIYITEGEKA

v.

THE PROSECUTOR

PUBLIC

DECISION ON NIYITEGEKA'S REQUEST FOR REVIEW AND ASSIGNMENT OF COUNSEL

The Applicant:

Eliézer Niyitegeka, *pro se*

Office of the Prosecutor:

Hassan B. Jallow
Richard Karegyesa
Cheickh Bangoura
Sunkarie Ballah-Conteh

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of a request for review filed by Eliézer Niyitegeka on 1 April 2015.[1] The Prosecution responded to the Request on 11 May 2015 and filed a corrigendum on 12 May 2015.[2] Niyitegeka filed a reply on 11 June 2015.[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] Niyitegeka is currently serving his sentence in the Koulikoro Detention Unit in Mali.[8]

3. The ICTR Appeals Chamber has dismissed Niyitegeka's five previous requests for review on 30 June 2006,[9] 6 March 2007,[10] 23 January 2008,[11] 12 March 2009,[12] and 27 January 2010.[13] On 6 November 2014, the Appeals Chamber dismissed Niyitegeka's request for assignment of

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[1] *Requête en révision du jugement d'Eliézer Niyitegeka.- (Articles 19 et 24 du Statut du MTPI; article 146 du Réglement du MTPI)*, 1 April 2015 ("Request"). An English translation was filed on 19 May 2015.
[2] Prosecution Response to *Requête en révision d'Éliezer [sic] Niyitegeka (Articles 19 et 24 du Statut du MTPI; article 146 du Réglement du MTPI)*, 11 May 2015 (confidential). A confidential corrigendum was filed on 12 May 2015 ("Response").
[3] *Mémoire en réplique à la* "Prosecution Response to *Requête en révision d'Eliézer Niyitegeka.*", 11 June 2015 ("Reply").
[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] *See The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Decision on the Enforcement of Sentence, 4 December 2008, p. 3.
[9] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, 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, pp. 2-3.
[10] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007, 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.
[11] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008, para. 33.
[12] *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.
[13] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010 (public redacted version) ("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.

Counsel.[14] The Appeals Chamber noted that "a large part of Niyitegeka's submissions effectively seek reconsideration of the ICTR Appeals Chamber's decisions dismissing his prior requests for review".[15] After considering Niyitegeka's potential grounds for review, the Appeals Chamber found that he "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".[16] The Appeals Chamber emphasized, however, that its findings pertained strictly to Niyitegeka's request for the assignment of counsel and not to the merits of any potential request for review.[17]

4. Niyitegeka filed the present Request publicly on 1 April 2015. On 20 May 2015, the Registrar requested the Appeals Chamber to make the Request confidential because it identified a protected witness.[18] On 26 May 2015, the Presiding Judge, acting pursuant to Rule 86(K) of the Rules of Procedure and Evidence of the Mechanism ("Rules"),[19] ordered the Registry to reclassify the Request as confidential and warned against its unauthorized disclosure.[20] In view of the fact that the protected witness agreed to testify publicly in a domestic proceeding, the Appeals Chamber considers that Niyitegeka's reference to the protected witness in a public filing was unintentional and inadvertent.[21] That being said, the Appeals Chamber recalls that the protective measures applicable in this case, including the use of a pseudonym in communications with the public, can only be varied following a decision by a Chamber and in accordance with Rule 86 of the Rules.[22]

5. In his Request, Niyitegeka advances a number of arguments which, in his view, constitute potential grounds for review.[23] In addition, Niyitegeka renews his request for the assignment of counsel.[24] The Prosecution responds that Niyitegeka's Request is an impermissible attempt to seek reconsideration of prior decisions dismissing the applicant's earlier requests for review and that, in any case, the material and arguments in support of the Request could not have been a decisive factor in reaching the original decision.[25] In view of this, the Prosecution further submits that his

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[14] Decision on Niyitegeka's Request for Assignment of Counsel, 6 November 2014 ("*Niyitegeka* Decision of 6 November 2014"), para. 14.
[15] *Niyitegeka* Decision of 6 November 2014, para. 11.
[16] *Niyitegeka* Decision of 6 November 2014, para. 11.
[17] *Niyitegeka* Decision of 6 November 2014, para. 12.
[18] Registrar's Submission Requesting Reclassification of Filing, 20 May 2015, para. 9.
[19] In accordance with Rule 86(K) of the Rules, an application to a chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the chamber or by a judge of that chamber.
[20] Order on Registrar's Submission Requesting Reclassification of Filing, 26 May 2015, pp. 2-3.
[21] *See* Request, Annex transcript of the domestic hearing, dated 8 June 2012, pp. 12-13.
[22] *See The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000, p. 6 ("MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.").
[23] Request, paras. 5-44. *See also* Reply, paras. 9-13.
[24] Request, para. 45. *See also* Reply, para. 7.
[25] Response, paras. 3, 16-38.

request for legal assistance does not meet the threshold for legal assistance at the expense of the Mechanism.[26]

II. APPLICABLE LAW

6. Review proceedings are governed by Article 24 of the Statute and Rules 146, 147, and 148 of the Rules. A request for the review of a final judgment will be granted if the moving party shows that the following cumulative conditions are met: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the trial or appeal proceedings before the International Criminal Tribunal for the former Yugoslavia, the ICTR, or the Mechanism; (iii) the new fact could not have been discovered through the exercise of due diligence; and (iv) the new fact could have been a decisive factor in reaching the original decision.[27] In wholly exceptional circumstances, the Appeals Chamber may grant review, even where the second or third criteria are not satisfied, if ignoring the new fact *would* result in a miscarriage of justice.[28]

7. A new fact refers to new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.[29] The requirement that the new fact was not in issue during the proceedings means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict.[30] In other words, what is relevant is whether the deciding body knew about the fact or not in arriving at the decision.[31]

8. As a matter of principle, it is not for the Mechanism to assist a convicted person whose case has reached finality with any new investigation he would like to conduct or any new motion he may wish to bring by assigning him legal assistance at the Mechanism's expense.[32] The Appeals Chamber recalls that review is an exceptional remedy and that an applicant is only entitled to assigned counsel at the expense of the Mechanism if the Appeals Chamber authorizes the review,

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[26] Response, paras. 38-39.
[27] *See* Article 24 of the Statute; Rule 146(A) of the Rules. *See also Prosecutor v. Veselin Šljivančanin*, Case No IT-95-13/1-R.1, Decision with Respect to Veselin Šljivančanin's Application for Review, 14 July 2010, p. 2; *Mladen Naletilić v. Prosecutor*, Case No IT-98-34-R, Decision on Mladen Naletilić's Request for Review, 19 March 2009, para. 10; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Review, 29 May 2013 ("*Kajelijeli* Decision of 29 May 2013"), para. 7.
[28] *Kajelijeli* Decision of 29 May 2013, para. 7. *See also George Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("*Rutaganda* Decision of 8 December 2006"), para. 8.
[29] *Kajelijeli* Decision of 29 May 2013, para. 8; *Rutaganda* Decision of 8 December 2006, para. 9.
[30] *Kajelijeli* Decision of 29 May 2013, para. 8; *Rutaganda* Decision of 8 December 2006, para. 9.
[31] *Kajelijeli* Decision of 29 May 2013, para. 8; *Rutaganda* Decision of 8 December 2006, para. 9.
[32] *Aloys Ntabakuze v. The Prosecutor*, Case No. MICT-14-77-R, Decision on Ntabakuze's *Pro Se* Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review, 19 January 2015 ("*Ntabakuze* Decision of 19 January 2015"), para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *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.

or, before such an authorization, if it deems it necessary to ensure the fairness of the proceedings.[33] This necessity is, to a great extent, assessed in light of the potential grounds for review put forward by the applicant.[34] In previous cases, the ICTR Appeals Chamber has confirmed such necessity where it found itself to be unable to exclude that the potential grounds for review invoked by the applicant may have a chance of success and where the particular complexity of the matter justified the granting of legal assistance in order to ensure the fairness of the proceedings.[35] 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.[36]

III. DISCUSSION

9. In the context of this decision, the Appeals Chamber considers that Niyitegeka's request for assignment of counsel is a threshold issue and, as such, will address it before turning to the merits of his request for review. A central feature of Niyitegeka's potential grounds for review is his challenge to the credibility of Prosecution Witness GGV,[37] whose uncorroborated testimony underpins certain key aspects of Niyitigeka's convictions. In particular, the Trial Chamber relied on Witness GGV to find that Niyitegeka participated in meetings at the Kibuye Prefecture office on 10 and around 17 or 18 June 1994 and in an attack at Kibiza on 18 June 1994.[38] The Trial Chamber relied on these findings, among other things, to support Niyitegeka's convictions for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder, extermination, and other inhumane acts as crimes against humanity.[39] The Appeals Chamber recalls that Witness GGV's credibility was litigated at trial and on appeal and has been subsequently challenged in several previous requests for review.[40] Niyitegeka, however, claims that he has identified new elements relating to Witness GGV's credibility that would warrant review.

10. Specifically, Niyitegeka highlights that several aspects of Witness GGV's testimony in a separate domestic proceeding in 2012, as well as other statements admitted into evidence during

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[33] *Ntabakuze* Decision of 19 January 2015, para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *Karera* Decision of 4 December 2012, para. 10.
[34] *Ntabakuze* Decision of 19 January 2015, para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *Karera* Decision of 4 December 2012, para. 10.
[35] *See, e.g., Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Assignment of Counsel, 12 November 2009 (confidential) ("*Kajelijeli* Decision of 12 November 2009"), para. 13; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Decision on Motion for Legal Assistance, 21 July 2009 ("*Kamuhanda* Decision of 21 July 2009"), paras. 18-20. *See also Ntabakuze* Decision of 19 January 2015, para. 9.
[36] *Ntabakuze* Decision of 19 January 2015, para. 9; *Niyitegeka* Decision of 6 November 2014, para. 7; *Karera* Decision of 4 December 2012, para. 10.
[37] Request, paras. 16-30. *See also* Reply, paras. 10-12.
[38] Trial Judgement, paras. 208-213, 216-221, 226-227, 265-266, 269-270.
[39] Trial Judgement, paras. 415, 418, 420, 424, 429, 434, 437, 443, 447, 453-454, 466-467.
[40] Trial Judgement, paras. 211-213; Appeal Judgement, paras. 146-157. *See also* Fourth Review Decision, para. 47; Fifth Review Decision, para. 8.

that case, indicate that the witness may have testified falsely against him.[41] Among other things, Niyitegeka points to material inconsistencies between statements Witness GGV gave to domestic authorities concerning the killing of two individuals in Kibiza and the witness's testimony in the *Niyitegeka* case.[42] The Trial Chamber convicted Niyitegeka of committing these killings based on Witness GGV's testimony.[43] However, according to Niyitegeka, it follows from the domestic proceedings that Witness GGV attributed one or both of these murders to another perpetrator.[44] Niyitegeka submits excerpts of the transcripts of the domestic proceeding to support his claim.[45]

11. The Prosecution contends that Niyitegeka has taken several excerpts of Witness GGV's testimony out of context and claims that a review of the full testimony of the witness in the domestic proceedings reveals that the witness maintained the description of Niyitegeka's role in the killings which he provided before the ICTR.[46] The Prosecution submits the full record of Witness GGV's testimony before the domestic proceeding to support its position.[47]

12. The Appeals Chamber cannot exclude that this potential ground for review may have a chance of success. The provision of materially inconsistent testimony in a domestic proceeding, which was unavailable at the time of trial or appeal, could impact the credibility of an uncorroborated witness and thus the verdict. The scope of Witness GGV's testimony during the domestic proceedings and any justifications for providing different accounts underscore the complexity of this matter. Given this complexity, Niyitegeka, who is serving his sentence in Mali, would benefit from the assistance of counsel to better evaluate the viability of his potential grounds for review and to provide a new and more focused submission supporting his request for review. Accordingly, the Appeals Chamber finds that Niyitegeka has shown that it is necessary in order to ensure the fairness of the proceedings that counsel be appointed under the auspices of the Mechanism's legal aid program.

13. In view of this finding, the Appeals Chamber considers that it would be premature to decide on the merits of this or other potential grounds of review. Accordingly, the Appeals Chamber dismisses the request for review without prejudice.

[41] Request, paras. 8, 16-30. *See also* Reply, paras. 10-12.
[42] Request, paras. 28-30.
[43] Trial Judgement, paras. 443-447.
[44] Request, paras. 29-30.
[45] Request, Annex.
[46] Response, paras. 27-32.
[47] Response, Annex.

IV. DISPOSITION

14. For the foregoing reasons, the Appeals Chamber hereby **GRANTS** the Request, in part, **DIRECTS** the Registrar to assign Niyitegeka counsel for a limited period of three months for the purpose of assisting him in relation to his request for review, and **DISMISSES** without prejudice, Judge Antonetti dissenting, the Request in all other respects. Judge Antonetti's dissenting opinion will be issued separately.

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

Done this 13th day of July 2015,
At The Hague,
The Netherlands.

Judge Theodor Meron, Presiding

[Seal of the Mechanism]