

ICTR-96-14-A  
29 - March - 2004  
(1071/A - 1065/A)

1071/A

UNITED NATION - NATIONS UNIES  
THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA  
TRIBUNAL PENAL INTERNATIONAL POUR LA RWANDA

APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding  
Judge Mohamed Shahabuddeen  
Judge Florence Mumba  
Judge Wolfgang Schomburg  
Judge Inés Weinberg de Roca

Registrar: Mr Adama Dieng

Date filed: 29 March 2004

Eliézer NIYITEGEKA  
(Appellant)

v.

THE PROSECUTOR  
(Respondent)

*Case No. ICTR-96-14-A*

PROSECUTION RESPONSE TO APPELLANTS EXTREMELY URGENT  
MOTION FOR ADJOURNMENT

Counsel for the Prosecution

Melanie Werrett  
James Stewart

Counsel for Appellant

Sylvia Gerharty, Lead Counsel  
Feargal Kavanagh, S.C. Co-Counsel  
Cindy Hernanadez, Legal Assistant

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## OVERVIEW

1. The Prosecution files this response opposing the motion dated 19 March 2004, (the "Motion"), and the Appellant's Response to the Order of March 22 2004 for Additional Information dated 25 March 2004<sup>1</sup> filed by the Appellant, Eliézer Niyitegeka, requesting an adjournment of the hearing of the appeal. The Prosecution Response is filed in accordance with the Order of the Pre-Appeal Judge, the Honourable Judge Shahabuddeen, dated 22 March 2004 (the "Order for Additional Information"). The Prosecution is content that the Motion be decided without an oral hearing.
2. The Prosecution submits that the Motion and the Appellant's Response completely lack merit. The Appellant has failed to show good cause justifying an adjournment and, therefore, the Appeals Chamber ought to dismiss the Motion.

## ARGUMENT

3. The Appellant has brought his motion pursuant to Article 20(4)(b) of the Statute of the International Criminal Tribunal for Rwanda. This provision, however, does not provide any authority for permitting the adjournment of the hearing. Rule 116 of the Rules of Procedure and Evidence and Article 36 of the Directive for the Registry of the International Criminal Tribunal for Rwanda, when read together, allow for the adjournment of a hearing where "good cause" can be shown. The Appellant has failed to demonstrate good cause for the adjournment sought.
4. The Appellant seeks an adjournment on the basis of three unrelated matters. First, the Appellant alleges new information relating to an unidentified Prosecution Witness. Second, the Appellant raises issues concerning the suspension of counsel and, finally, the Appellant alleges difficulties on the part of his counsel which, he seems to be

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<sup>1</sup> This Response was apparently filed in the Hague on 25 March 2004 but it was not served on the Prosecution until the late afternoon of Friday 26 March 2004, after the close of business.

saying, prevent them from being ready for the hearing in April 2004. The Prosecution submits that none of these grounds show good cause justifying an adjournment.

*(a) Prosecution Witness*

5. The Appellant has failed to provide the information requested by the Appeals Chamber in the Order for Additional Information. The Appellant has only offered obscure and vague references to both the timing of the discovery of the evidence and the actions the Appellant has taken in relation thereto.

6. In addition, the Appellant has failed to provide any information relating to the relevance of the information. In his response to the Order for Additional Information, the Appellant simply alleges that the information could affect the credibility of a Prosecution Witness. The Appellant, however, has failed even to indicate which prosecution witness is being referred to, making it impossible to determine the relevance of any such information, especially given there were 13 Prosecution Witnesses called during trial. By not specifying which Prosecution Witness is being referred to, it is impossible to determine whether, or to what extent, the Trial Chamber relied upon, or even considered, the testimony of this witness. Therefore, based on the paltry information provided by the Appellant, it is not possible to determine the importance or relevance of the Prosecution testimony or what verdict or findings, if any, in the Judgement the "new information" relates to.

7. The Prosecution submits that it is inappropriate for the Appellant to seek an adjournment of the hearing on such speculative and inadequate information. The Appellant, in essence, is seeking an adjournment in order to embark on a fishing expedition to search for evidence that the Appellant will then seek to have introduced pursuant to Rule 115.

(b) *Suspension of Counsel*

8. In the Motion for an adjournment, the Appellant made reference to the issue of the suspension of counsel. However, it was left unclear how that issue related to the "new information" relating to the undisclosed Prosecution Witness. It now appears, from the Appellant's Response to the Order for Additional Information, that the Appellant is seeking an adjournment also to pursue issues relating to the suspension of counsel. The Prosecution submits that this ground must fail as the Appellant is out of time to bring a motion pursuant to Rule 115 relating to the material sought and the material cannot constitute "new evidence" for the purposes of Rule 115.

9. Rule 115 additional evidence is admitted exceptionally. Appeals are normally decided on the record of the proceedings. The proposed Rule 115 motion, as contemplated by the Appellant, fails to meet the exceptional standards required under Rule 115.

10. First, the Prosecution has at no time disputed that counsel was suspended during the Appellant's trial. The only issue on appeal, as addressed in the appeal briefs submitted to the Appeals Chamber, is what effect, if any, does the suspension have on the fairness of the Appellant's trial. The appeal is not an inquiry into this counsel's affairs, her standing at her national Bar or into the conduct of the Office of the Prosecutor.

11. The Appellant has made it clear in his Response to the Order for Additional Information that the proceedings he wishes to commence in the New York Supreme Court relate only to the issue of the suspension of counsel. The proposal outlined by the Appellant, respecting initiating proceedings in New York, will not advance the issue on the appeal. In these circumstances, it is difficult to conceive what evidence could be elicited that could be relevant to the proceedings, let alone affect any verdict of the Trial Chamber. In any event, the Appellant has failed to indicate the requested information of what steps, if any, the Appellant has already taken with respect to the proceedings before the New York Court. It can only be assumed that, to date, the Appellant, has not

commenced any such proceedings. The Appellant has failed to explain his delay in commencing these proceedings.

12. Second, the Appellant is grossly out of time in bringing a Rule 115 Motion. The Appellant cannot be excused from complying with the clear timelines provided for in Rule 115. As indicated at paragraph 6 of the Motion, the Appellant raised the issue of the suspension of counsel at the outset of the appeal proceedings, in its Notice of Appeal dated 20 June 2003. Also, as the Appellant sets out at page 4 of the Appellant's Response to the Order for Additional Information, the Appellant has been seeking this same information since 9 August 2003, when the Appellant wrote to the Prosecutor raising 17 points to which substantive replies were sought, all relating to the issue of suspension of counsel, and primarily seeking information concerning the circumstances relating to the knowledge and handling of the suspension by the Office of the Prosecutor.

13. Further, the Appellant brought a motion, dated 3 September 2003, seeking an order compelling the Prosecution to provide answers to the questions set out in the Appellant's letter of 9 August 2003, arguing that the information sought was necessary in order to "exercise his right to fully and comprehensively prosecute his Appeal", which is the same argument currently being made in seeking the adjournment. Through several addendae to that motion, the Appellant slightly revised the relief sought, adding to the that the Appeals Chamber order an inquiry by an independent entity into the answers to the questions raised in the letter of 9 August 2003 be procured.

14. On 16 October, 2003, the Appeals Chamber denied the Appellant's motion, stating that:

"CONSIDERING that the central ruling sought by the Appellant in his Defence Reply is a request for the appointment of an independent and impartial person who would conduct a comprehensive investigation into 'all matters touching and concerning the involvement of Ms Pollard and the conduct, before, during and after the trial of Eliézer Niyitegeka, to include the circumstances surrounding the failure of the Prosecution to notify the Appellant of the status of Ms. Pollard' and that this request

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would amount to an incorrect encroachment by the Appeals Chamber on the independence of the Prosecutor.”<sup>2</sup>

15. In that decision, the Appeals Chamber did not view the information sought as exculpatory material or necessary for the determination of the issues raised on appeal concerning the fairness of the Appellant’s trial. Rather, the Appeals Chamber declined involving itself in matters within the discretion and purview of the Office of the Prosecutor. The Prosecution submits that the Appeals Chamber decision of 16 October 2003 correctly recognizes that the information sought are matters relevant only to the internal procedures of the Office of the Prosecutor and not evidence for the purposes of the appeal.

16. The Prosecution has repeatedly stated that it does not believe the information sought by the Appellant to be exculpatory material subject to Rule 68 disclosure. The Appellant has known of the Prosecution’s position on this issue since September 2003 and any steps the Appellant felt that he needed to take to obtain relief from the Appeals Chamber should have been undertaken long ago. It is inappropriate now for the Appellant to seek an adjournment, on only the prospect of bringing a Rule 115 motion, when the oral hearing is set to commence in just 4 weeks. The Appellant has failed to show any “exceptional circumstances” to warrant an exception to the time restrictions in Rule 115.

17. The Appellant offers no explanation, whatsoever, for his delay in both bringing a Rule 115 motion and for seeking an adjournment.

**(c) Other Relevant Information for Adjournment**

18. In the Order for Additional Information, the Appeals Chamber requested that the Appellant identify any other relevant information to the motion for adjournment. The Appellant responded by pointing out that his counsel have neither the resources nor the

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<sup>2</sup> *The Prosecutor v. Niyitegeka*, “Decision on Eliézer Niyitegeka’s Urgent Motion Filed on 4 September 2003”, dated 16 October 2003, page 4.

requisite amount of time to be ready for the Appeal hearing as scheduled in April 2004. These apparent shortcomings could not have come to the attention of the Appellant's counsel so late in the day and, indeed, the Appellant has not indicated any change of circumstance in his counsels' offices between December 2003, when the hearing was first scheduled, and the present. In any event, the information provided by the Appellant does not constitute exceptional circumstances. In the absence of exceptional circumstances, this ground ought not to constitute good cause for an adjournment.

19. The Motion for an adjournment is all the more problematic as the Appellant has failed to indicate how long an adjournment he is seeking. Based on the Appellant's representations in paragraph 10 of the Motion, the appeals hearing could be adjourned indefinitely. Given the nature of the evidence sought and the delay in bringing a motion under Rule 115 and in seeking an adjournment, it is inappropriate for the Appellant to seek an indefinite delay of the oral hearing.

#### **RELIEF SOUGHT**

20. The Prosecution prays that the relief requested in this Response be granted and that the Appeals Chamber dismiss the Appellant's Motion in its entirety and confirm that the oral hearing will proceed as scheduled.

Dated: 29 March 2004

M. Werrett

Melanie Werrett

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