

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
Case No. 96-14-A

IN THE APPEALS CHAMBER

Between/

ELIÉZER NYITTEGEKA Appellant

And

THE PROSECUTOR Respondent

DEFENCE REPLY to Prosecutors Second Response dated 26 September 2003 to
Defence Extremely Urgent Motion dated 3 September 2003 and Reply thereto,
dated 19 September 2003.

Background:

1. 3 September 2003, the Appellant filed an Extremely Urgent Motion, wherein he prayed the pre-Appeal Judge, for the reasons therein set out to, inter alia, Order Mme del Ponte or someone acting on her behalf and at her direction, to comprehensively reply to each of the 17 issues raised in a letter addressed to her dated 9 August 2003 and if no enquiry had already been undertaken, by the Prosecutor or on her behalf and at her Direction, to order an enquiry into the matters raised concerning Ms. Pollard and the conduct of the Trial and to furnish a true copy of the Report thereon to the Appellant and his Counsel.
2. 15th September 2003 the Prosecutor filed a Response to the Appellants said Extremely Urgent Motion. Attached thereto¹, was a letter from the Senior Appeals Counsel, purporting to be a reply to the 17 questions raised.
3. 19 September 2003 the Appellant transmitted his Reply to the Prosecutors Response which, consequent upon information disclosed in the Prosecutors Response and letter therewith, sought to vary the relief sought in the original Motion of 3 September 2003.
4. 26 September 2003, the Prosecutor filed a Second Response, seeking leave to file same. The said second Response was entitled Prosecutors Response to "Extremely Urgent Defence Motion Reply" filed on 22 September 2003.
5. Monday 29 September 2003, in Arusha, Tanzania, Lead Defence Counsel was handed a copy of the said document. It had been filed at ICTR on of 29 September 2003 at 8.54am. Not having previously seen the document, it is difficult for Lead Defence Counsel to Reply within 36 hours but she will make her best efforts .

¹ As Annexure 1

Submissions on the Prosecutions aforesaid Second Response: (paragraphs 1-9)

6. The Defence object to the filing or admission of the Second Response of the Prosecutor, no provision therefor having been made in the Practice Direction.²
7. Notwithstanding this, should the pre-Appeal Judge grant leave for the filing and decide to admit the said Second Response, the Appellant hereby seeks leave to file and have admitted this Reply thereto.
8. The Senior Appeals Counsel submits³ that the Appellant in his Reply of 19 September 2003, raises fresh arguments and /or new requests, "*outside of the matters raised in the opposing parties response*". He cites paragraphs 9, 10, 11, 15, 17, 18, 25, 26, 27, 28, 29, 31, 34, 35, 39, 40, 41, 43, and 45 thereof. This, he submits, entitles him to leave to have his (second) Response filed and admitted for consideration.
9. A perusal of the said paragraphs clearly demonstrates that, in his Reply, the Appellant remained within both the scope and nature of a Reply in that, each and every one⁴ of the said paragraphs is raised because, it flows directly from the matters set forth in the Prosecutors Response and/or the letter attached thereto⁵.
10. It is therefore submitted that, the said allegation is disingenuous and made for the purpose of facilitating the circumvention of the Practice Direction and is a blatant attempt to ground an entitlement to leave to file the said (second) Response.
11. Pursuant to paragraph 9 hereof, it is submitted that the Prosecutors submission made at paragraph 9, page 3 of the Second Response⁶, is based on a false and misleading premise, in consequence whereof, it should not be entertained.

Submissions on -(B) Prosecutions Response: (paragraphs 10-17)

On Paragraph 10

12. At paragraph 10 of his Second Response, the Senior Appeals Counsel has misunderstood /or misrepresented the Appellants submissions as regards his own *locus standi*. The Appellant has not at any time submitted that the said Counsel has no *locus standi* in the Appeals process, nor raised any objection to his position as the Senior Appeals Counsel therein. [It should also be noted that no point is being made on a personal level against Mr. Farrell but rather

² Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal dated 16 September 2002.

³ Pages 2+3: paragraphs 2 and 3

⁴ At paragraph 8 hereof and paragraph 2/footnote 3 -page 1, of the Senior Appeals Counsel's Second Response dated 26 September 2003.

⁵ Letter dated 12 September 2003: -The Senior Appeals Counsel to Sylvia Geraghty, served on 15 September with the Prosecutors Response, of same date.

⁶ -that the Appellants arguments should be dismissed in their entirety

with the holder of the position of Senior Appeals Counsel, whomever that may be, at a given time.]

13. What the Appellant has submitted, plainly stated, is that the Senior Appeals Counsel has no right to be a judge in his own cause, as it were, particularly so, given the most unusual circumstances of this case.

On Paragraph 11

14. In response to the Prosecution assertion that, the Appellant should have advanced, "*concerns with the role of the Senior Appeals Counsel in his Original Defence Motion*," the Appellant submits that he quite reasonably presumed that (i) Ms Melanie Werrett was an experienced Lawyer, at the top of her branch of the profession and that the Counsel to whom she referred was likewise experienced and procedurally knowledgeable, given that they had risen to Chief of Prosecutions and Senior Appeals Counsel respectively and that (ii) as such, they did not require any pre-emptive direction from him, as to how to conduct the matter in hand. Thus, he did not provide it.

15. The further submission in Paragraph 11 that "*he comprehensively responded to the 17 questions posed in the Appellants letter dated 9 August 2003*", has already been fully responded to by the Appellant in his Reply⁷. The said submissions are hereby adopted and resubmitted in their entirety.

On Paragraph 12

16. At paragraph 12, in an attempt to reassure the pre-Appeal Judge that it can be trusted and relied upon to make Disclosure to the Appellant, thus obviating the need for an Order for an independent enquiry, the Prosecution seek to call in aid, it's bona fides and the "*good faith*" with which Prosecution Counsel "*discharge their duty*". The Appellant agrees that, in dispensing its responsibilities under Rule 68, the Prosecution normally has a presumption of bona fides. However, it is submitted that in this case, any fair-minded person would accept that the Prosecution and their Counsel have abused the aforesaid presumption of good faith and in so doing, have placed this matter outside the ambit of Rule 68.

17. On having made their discovery on an undisclosed date in May 2003, a Prosecution with bona fides or their Counsel discharging their duty in good faith, would have immediately "*owned up*" to the grave irregularity in the Trial of Mr. Niyitegeka and alerted, at least the Trial Chamber, which was preparing to hand down Judgment, unaware of the true circumstances.

18. Instead, this Prosecution and their Counsel, chose to remain silent for a further four and a half to five months or thereabouts, before making Disclosure, whilst in the meantime, seeing Mr. Niyitegeka convicted and sentenced to life imprisonment.

⁷ Please see Defence Reply dated 19 September 2003 to Prosecutors Response, at pages 3 + 4: paragraphs 7 to 14 inclusive.

19. Such Disclosure as was made, was not until after the Prosecution had been "found out" (so to speak) by the Defence. Even at that late stage, the Disclosure was not made voluntarily.

20. To further compound their untrustworthiness and professional unreliability, the Prosecution and their Counsel have failed, refused and neglected to Disclose to the Appellant the exact date in May on which they found out about the various suspensions from practice of Ms. Pollard, nor who was informed, nor who knew.

21. Instead, many months later and despite the Rule 46 Warning already on the Prosecutors record in this case, the Appellant has been met alternately with silence", obfuscation, obstruction, misrepresentation, refusal to reply and delay".

22. Further and as clearly demonstrated in his letter and Response, the Appellant re-iterates that the Senior Appeals Counsel in this case, is not a proper person to undertake the task of obtaining the information sought and communicating it in its original "as-managed" state to the Appellant. There is a manifest conflict of interest.

23. In acknowledgement of the fact that such Prosecutorial conflicts of interest do occur (*mutatis mutandis*), the Judges of the ICTR and ICTY in their combined wisdom in May of this year, felt sufficiently moved to put in place a new mechanism for dealing with same.
(new) Rule 91 (B) (ii) states
*"where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to relevant conduct, (it may) direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instituting proceedings for false testimony"*

On Paragraph 13

24. Pursuant to Article 19.1 and Article 20. 2 and 4 (c) of the Statute and Rule 107 of the Rules of Procedure and Evidence, the Appellant is entitled as of right given the circumstances of this case, to all of the information sought, well in advance of the preparation of his Appeal Brief. Further, he is entitled to have this information communicated to him in a transparent and expeditious manner. Ideally, he should have all of the information communicated to him before he re-files his Notice of Appeal.

25. The Prosecutor is referred to the Decision of Judge Shahabuddeen dated 13 June 2003, page 4, first paragraph¹⁰ wherein it was envisaged that on application, permission to amend the Notice of Appeal in certain circumstances and on showing good cause, would be granted. Discovery of

² See Prosecutors admission at page 2, final paragraph of Senior Appeals Councils letter in reply to Sylvia Geraghty, dated 12 September 2003, attached to the Response of 15 September 2003.

³ See letter referred to at footnote 9; at page 1: paras 4, 5; At page 2: paras 1, 2, 5, 6, 7; and at page 3: paras 2 and 3; And also see Appellants Reply dated 19 September 2003, pages 3+ 4; paragraphs 7-14, together with accompanying footnotes.

¹⁰ Of the French version.

new information, given all the aggravated and unusual circumstances of this case, would, it is most respectfully submitted, be such good cause.

26. The Prosecution could greatly assist this entire process by henceforth adopting a pro-active, open, fair and reasonable approach hereto.
27. Further, it is not judicially economic, that the Appellant is repeatedly obliged to file Motions to the pre-Appeals Judge, to obtain information which he is entitled to have in good time for the preparation of his Appeal Brief.
28. The Appellant is at a loss to understand the Prosecutors submission that the Appellant is "*exercising dilatory tactics*." No evidence in substantiation having been produced, the Appellant will assume it is inserted to deflect this charge from the Prosecution itself.

On paragraphs 14

29. The Prosecutor seeks to reserve unto himself the right to carry out an investigation and then only "*if it deems fit*". This is wholly unacceptable, as it is the conduct of the Prosecution, which is being impugned.
30. For the reasons set out in the Appellants Reply of 19 September 2003 and for the reasons herein set out, in particular at paragraphs 17 to 25 inclusive, the Appellant submits that no reliance can be placed on the Prosecution or any person involved with the Prosecution to be as said earlier, a judge in their own cause. The Appellant therefore submits that the pre- Appeal Judge should now intervene, so as to ascertain, in so far as possible at this juncture, *inter alia*, the manner in which the Prosecutor and her/his Counsel have exercised their discretion under Rule 68 in this case.
31. The Prosecution persist in referring to "*unfounded allegations*". The allegations made by the Appellant are well founded. They are even admitted to by the Prosecution. We would refer the pre-Appeals Judge to our Reply dated 19 September 2003, in particular page 6, paragraph 33 thereof and repeat and reaffirm the contents of same.

Relief sought

34. For all of the reasons set out in the Appellants Extremely Urgent Motion dated 3 September 2003, in the Defence Reply to the Prosecutors Response, dated 19 September 2003 and in this Reply, the Appellant prays the pre-Appeals Judge, if he should grant leave to the Prosecution to file their (second) Response, that he will also
 - (i) Grant leave to the Defence to file and have this Reply admitted for consideration in the interests of fairness and justice, notwithstanding that it might be out of time, two of the four days allowed for a Reply (albeit over a weekend) having already elapsed before it was served on Lead Defence Counsel in Arusha, as set out at paragraph 5 herein
 - (ii) Permit the Appellant to vary the terms of his original Motion of 3 September 2003 to

(iii) Order that an independent, impartial and comprehensive investigation be immediately carried out, into all matters touching and concerning the involvement of Ms. Pollard and the conduct of the Prosecution, before, during and after the Trial of Eliézer Niyitegeka, to include the circumstance surrounding the failure of the Prosecution to make comprehensive disclosure to the Appellant of the status of Ms. Pollard immediately it discovered same or at all

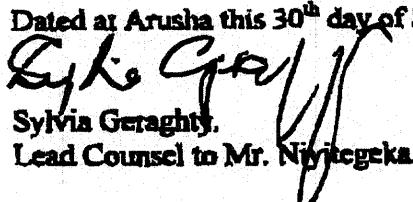
(iv) Appoint an independent, impartial and trustworthy person to carry out the said investigation

(v) Direct that a true copy of the Final Report on such an investigation (to include but not limited to (i) comprehensive replies to the questions raised in the Appellants letter of 9 August 2003, (ii) an answer to the matter set out at paragraph 23 of the Reply of 19 September 2003, (iii) the documentation referred to at paragraph 32 of the said Reply of 19 September, and (iv) a certified copy of the Certificate of Fitness to Practice of all of the Lawyers involved in the Trial of Eliézer Niyitegeka) be made available to the Appellant and his Counsel, immediately on conclusion of the said investigation

(vi) Order that, if required, access be granted to the Defence, to those persons who may be in a position to assist the Defence

(vii) Direct that, in the event of no other Application for an extension of time to file the Appeal Brief being made, that the 45 days presently allowed for filing the Appeal Brief will begin to run, from the date of service of the said Final Report /answers/documentation on Lead Counsel for the Appellant and not from the date on which the Judgment is served on the Appellant, in a language he understands.

Dated at Arusha this 30th day of September 2003


Sylvia Geraghty.
Lead Counsel to Mr. Niyitegeka.

30/09/03 19:14 FAX 255+27+2504373

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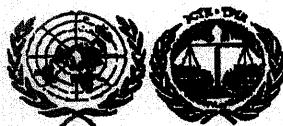
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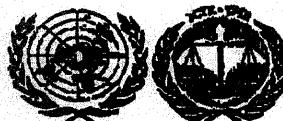
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