



Mechanism for International Criminal Tribunals

Case No: MICT-12-16-R

Date: 08 May 2017

Original: English

**BEFORE A SINGLE JUDGE**

**Before:** Judge Lee G. Muthoga

**Registrar:** Mr. Olufemi Elias

The Prosecutor

v.

Eliézer Niyitegeka

**PROSECUTION RESPONSE TO REQUEST FOR CERTIFICATION  
OF THE DECISION ON NIYITEGEKA'S URGENT REQUEST FOR  
ORDERS RELATING TO PROSECUTION WITNESSES**

**Office of the Prosecutor**  
Richard Karegyesa  
Sunkarie Ballah-Conteh

**The Applicant**  
Eliézer Niyitegeka

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## PROSECUTOR'S SUBMISSIONS

1. Niyitegeka's request for certification to appeal the "Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses" is not admissible nor does it meet the standard for certification and should be denied.<sup>1</sup>

2. *First*, Niyitegeka currently has no criminal proceedings or trial before the Mechanism, for which appellate intervention is required. By its plain language, Rule 80 of the Rules applies to interlocutory decisions taken in the context of a trial proceeding and not to final decisions issued after the close of the trial and appeal proceedings in a given case.<sup>2</sup> On this ground alone, Niyitegeka's application must fail.

3. *Second*, even assuming the application was admissible, certification to appeal a decision will only be granted where it involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>3</sup> Even where these standards are met, certification to appeal must remain an exceptional measure.<sup>4</sup>

4. Additionally, contrary to Niyitegeka's assertion, the extent of the Prosecution's disclosure obligation towards convicted individuals regarding subsequent statements and testimonies of witnesses is well established in the Rules and in the Jurisprudence of the Tribunal.<sup>5</sup> Appellate intervention would therefore not advance the proceedings in any way.

<sup>1</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. MICT-12-16-R, "Request for Certification of the Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 8 February 2016, re-distributed on 28 April 2017 due to error in distribution.

<sup>2</sup> *The Prosecutor v. Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Decision on a Request for Certification to Appeal, 1 November 2016, para.8. In limited circumstances however, an applicant can appeal the decision of a Trial Chamber, made pursuant to Rule 86 after the close of proceedings, without certification where the issue concerns "the important question of balance between the right of the convicted person to access potentially exculpatory material and the need to guarantee the protection of victims and witnesses" See. *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, paras. 13, 14

<sup>3</sup> MICT Rule 80(B).

<sup>4</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para.10; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the "Decision on Defence Urgent Motion to Declare parts of the Evidence of Witness RV and QBZ Inadmissible, 18 March 2004, para.15.

<sup>5</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. MICT-12-16-R, "Request for Certification of the Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 8 February 2016, re-distributed on 28 April 2017 due to error in distribution, para. 4; *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence (Confidential), 23 March 2011, para. 13 (citing *Kristić Appeal Judgement*, para. 180); *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Second Motion to

5. The Prosecution's disclosure obligation, at this stage, extends only to material which may suggest Niyitegeka's innocence or mitigate his guilt, or which affects the credibility of the Prosecution evidence adduced during his trial.<sup>6</sup> It is undisputed by the Prosecution, that this obligation is a positive and continuing obligation which does not cease when an accused's case reaches finality.<sup>7</sup>

6. However, Niyitegeka's assertion that any subsequent statements, made in other cases, by the witnesses who testified in his own case will necessarily be considered as potentially exculpatory, is fundamentally flawed and contrary to the established rules and procedure pertaining to disclosure of exculpatory material both during trial and post appeal, which clearly establishes that the determination of what materials are subject to disclosure pursuant to Rule 73, is a fact-based inquiry undertaken by the Prosecution.<sup>8</sup>

7. Witnesses sometimes testified in more than one ICTR case and possibly testified in cases outside of the ICTR. A witness's subsequent testimony may be premised on different facts, which have no relevance to those in Niyitegeka's case. It is precisely for this reason that the initial determination of what material is exculpatory, rests with the Prosecutor.<sup>9</sup>

8. In this regard, the ICTR Prosecutor disclosed, to Niyitegeka, potentially exculpatory material between 2008 and 2014, in addition to the volumes of disclosures that were made to Niyitegeka pursuant to ICTR Rule 66 and 68 both prior to and during his trial. Furthermore, the MICT Prosecutor disclosed to Niyitegeka additional potentially exculpatory material, on 7 January 2016, in accordance with its continuing disclosure obligation pursuant to Rule 73.

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Admit Evidence (Confidential), 23 March 2011, para. 11; *Krstić* Appeal Judgement, paras. 204, 206.

<sup>6</sup> MICT Rule 73; *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence (Confidential), 23 March 2011, para. 13 (citing *Krstić* Appeal Judgement, para. 180); *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Second Motion to Admit Evidence (Confidential), 23 March 2011, para. 11; *Krstić* Appeal Judgement, paras. 204, 206.

<sup>7</sup> *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence (Confidential), 23 March 2011, para. 13 (citing *Krstić* Appeal Judgement, para. 180); *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Second Motion to Admit Evidence (Confidential), 23 March 2011, para. 11; *Krstić* Appeal Judgement, paras. 204, 206.

<sup>8</sup> *Kajelijeli* Appeal Judgement, para. 262; *Renzaho* Appeal Judgement, para. 143; *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence (Confidential), 23 March 2011, para. 12; *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14; *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Second Motion to Admit Evidence (Confidential), 23 March 2011, para. 11; *Blaškić* Appeal Judgement, para. 264; *Kordić and Čerkez* Appeal Judgement, para. 183; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012, para. 7; *Edouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-A, Decision on Karemera's and Ndirumpatse's Motions under Rules 68 and 115 of the Rules, 6 February 2014, para. 4; *Augustin Ndirabatware v. The Prosecutor*, Case No. MICT-12-29-A, Decision on Augustin Ndirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014, para. 12.

<sup>9</sup> *The Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Appeals Judgment, 23 May 2005, para. 262.

9. If Niyitegeka requires access to confidential material from another case, which does not fall within the ambit of Rule 73, such material must be identified or described by its general nature and a legitimate forensic purpose for the access must be demonstrated.<sup>10</sup>

10. The extent of the Prosecution's disclosure obligation towards convicted individuals is unambiguous and clearly established in the jurisprudence of the Mechanism. There is therefore no issue that requires an immediate resolution by the Appeals Chamber. Niyitegeka's application for certification should therefore be dismissed for being inadmissible or denied for failing to meet the requisite standard for certification.

Dated at Arusha this 8<sup>th</sup> day of May 2017



Richard Karegyesa  
Senior Legal Officer



Sunkarie Ballah-Conteh  
Legal Advisor

Word Count  
1287

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<sup>10</sup> *Prosecutor v. Nyiramasuhuko et. al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 17; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Ndindiyimana v. Prosecutor*, Case No. ICTR-00-56-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemura et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.



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