



Mechanism for International Criminal Tribunals

Case No. MICT-12-16

Date: 29 January 2016

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Lee G. Muthoga

Registrar: Mr. John Hocking

Decision of: 29 January 2016

ELIÉZER NIYITEGEKA

v.

THE PROSECUTOR

PUBLIC

**DECISION ON NIYITEGEKA'S URGENT REQUEST FOR
ORDERS RELATING TO PROSECUTION WITNESSES**

The Office of the Prosecutor:

Hassan B. Jallow
Richard Karegyesa
Sunkarie Ballah-Conteh

Counsel for Eliézer Niyitegeka:

Philippe Larochelle

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1. I, Lee G. Muthoga, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and a Single Judge in this case,¹ am seised of a motion filed by Eliézer Niyitegeka on 21 December 2015, requesting access to material related to witnesses who testified before the International Criminal Tribunal for Rwanda (“ICTR”) in the case of *The Prosecutor v. Eliézer Niyitegeka*.² The Prosecution filed its response opposing the Motion on 4 January 2016.³ Niyitegeka submitted a reply on 8 January 2016, which was filed on 23 January 2016.⁴

I. BACKGROUND

2. Niyitegeka was the Minister of Information in the Rwandan Interim Government in 1994.⁵ On 16 May 2003, Trial Chamber I of the ICTR (“Trial Chamber”) 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.⁶ The Trial Chamber sentenced him to imprisonment for the remainder of his life.⁷ On 9 July 2004, the ICTR Appeals Chamber dismissed Niyitegeka’s appeal against his convictions in its entirety and affirmed his sentence.⁸ Niyitegeka is currently serving his sentence in the Koulikoro Detention Unit in Mali.⁹

3. On 6 November 2014, the Appeals Chamber of the Mechanism (“Appeals Chamber”) dismissed Niyitegeka’s request for the assignment of counsel for the purpose of assisting him with the preparation of a potential request for review.¹⁰ On 1 April 2015, Niyitegeka filed a request for

¹ Order Assigning a Single Judge to Consider a Request, 12 January 2016, p. 1.

² Urgent Request for Orders Relating to Prosecution Witnesses, 21 December 2015 (public with public and confidential annexes) (“Motion”), para. 14, pp. 8, 9.

³ Prosecution Response to Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses (“Response”), 4 January 2016.

⁴ Reply to Prosecution Response to Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses (“Reply”), dated 8 January 2016, filed on 23 January 2016. Following informal consultations with the Registry, it appears that a technical problem related to the receipt of submissions prevented the timely filing of the Reply, which was submitted according to the transmission sheet on 8 January 2016, until 23 January 2016. In view of these circumstances and the importance of hearing Niyitegeka on this matter, I consider it in the interests of justice to accept the Reply as validly filed and to consider it.

⁵ *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.

⁶ Trial Judgement, para. 480.

⁷ Trial Judgement, para. 502.

⁸ Appeal Judgement, para. 270.

⁹ See *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14, Decision on the Enforcement of Sentence, 5 December 2008, p. 3.

¹⁰ *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka’s Request for Assignment of Counsel, 6 November 2014, paras. 3, 11, 14. The ICTR Appeals Chamber has also dismissed Niyitegeka’s five previous requests for review on 30 June 2006, 6 March 2007, 23 January 2008, 12 March 2009, and 27 January 2010, respectively. See *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006; *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; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Clarification, 17 April 2007; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008; *Eliézer Niyitegeka v. The Prosecutor*,

review in which he also renewed his request for the assignment of counsel.¹¹ On 13 July 2015, the Appeals Chamber granted Niyitegeka's renewed request for assignment of counsel in view of the particular complexity of one of his grounds of review, dismissed the remainder of the request for review as premature, and directed the Registrar to assign Niyitegeka counsel to assist him in relation to his request for review.¹²

II. SUBMISSIONS

4. Niyitegeka seeks information and access to material related to the 12 Prosecution witnesses – namely Prosecution Witnesses DAF, GGD, GGH, GGM, GGO, GGR, GGV, GGY, GHA, GK, HR, and KJ – who testified against him before the ICTR.¹³ In particular, Niyitegeka requests a list of all other cases in which these witnesses have testified as well as their corresponding pseudonyms in those cases and the disclosure of all statements, exhibits, and transcripts related to the witnesses appearances in other trials.¹⁴ Niyitegeka also alleges that his Counsel has not been provided with the complete case file, including any evidence given by the Prosecution witnesses prior to and after his trial.¹⁵ He further argues that any such evidence serves a legitimate forensic purpose as it “can provide leads to impeach [the] evidence” of the Prosecution witnesses and is therefore likely to materially assist him in his investigation into possible new facts which may warrant review of his conviction.¹⁶ Niyitegeka argues that such material constitutes potentially exculpatory evidence pursuant to Rule 73 of the Rules of Procedure and Evidence of the Mechanism (“Rules”).¹⁷ Niyitegeka adds that he has already requested disclosure of Rule 73 material from the Prosecution and that his request in this regard is still pending.¹⁸

5. In addition, Niyitegeka requests that his counsel be allowed to interview the Prosecution witnesses in his case in order to establish whether they have provided statements to other courts or

Case No. ICTR-96-14-R, Decision on Fourth Request for Review, public redacted version, 12 March 2009; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Motion for Clarification, 1 July 2009; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010 (public redacted version); *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Motion for Reconsideration of Fifth Review Decision, 25 March 2010.

¹¹ *Requête en révision du jugement d'Eliézer Niyitegeka*.- (Articles 19 et 24 du Statut du MTPI; article 146 du Règlement du MTPI), 1 April 2015. An English translation was filed on 19 May 2015.

¹² Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015, paras. 12-14.

¹³ Motion, paras. 23, 32, 37, pp. 8-9.

¹⁴ Motion, paras. 37, pp. 8-9.

¹⁵ Motion, paras. 7, 24; Reply, paras. 4-5, 13.

¹⁶ Motion, paras. 35, 36. See also Reply, paras. 6-8.

¹⁷ Motion, paras. 32, 34; Reply, para. 16. Niyitegeka adds that the exculpatory nature of this evidence was recognized by the ICTR Appeals Chamber and the Prosecution “was blamed” for not disclosing it. See Motion, para. 33; Reply, para. 14.

¹⁸ Motion, paras. 8-11. Niyitegeka further submits that since the Witnesses used different pseudonyms in other cases before the ICTR, the Prosecution is in a better position to furnish him with the relevant information. See Motion, paras. 25-31; Reply, para. 10.

entities and for appropriate orders in the event that they refuse to meet with his team and provide this information.¹⁹

6. The Prosecution responds that Niyitegeka fails to establish a legitimate forensic purpose for accessing this material.²⁰ The Prosecution argues that Niyitegeka has not demonstrated the required nexus between his case and other ICTR cases.²¹ The Prosecution further submits that Niyitegeka is not entitled to indiscriminate disclosure of all accounts given by the witnesses who appeared in his case subsequent to the conclusion of his trial, and that, as far as potentially exculpatory evidence is concerned, such evidence has already been disclosed to Niyitegeka.²² The Prosecution also submits that it has informed Niyitegeka of its current efforts to ascertain whether it has additional potentially exculpatory material in its possession, and that, therefore, Niyitegeka's request is premature.²³ Finally, the Prosecution opposes Niyitegeka's request to interview the Prosecution witnesses as unfounded and exceeding the scope of the terms on which Counsel was appointed.²⁴

7. In reply, Niyitegeka submits that, on several occasions, the Prosecution has failed to comply with its disclosure obligations which, in his view, raises concerns as to its ability to properly determine the potentially exculpatory nature of the requested material.²⁵ Niyitegeka further contends that the Prosecution's restrictive interpretation of the terms of the appointment of counsel to assist with the preparation of the review application is unwarranted.²⁶

III. APPLICABLE LAW

8. Pursuant to Rule 86(F) of the Rules, protective measures ordered in proceedings before the ICTR continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism unless and until they are rescinded, varied or augmented. In accordance with the settled jurisprudence of the ICTR and ICTY, a party is entitled to seek material from any source, including from another case before the ICTR, to assist in the preparation of its case.²⁷ Where a party requests

¹⁹ Motion, paras. 14, 40, 41, pp. 8, 9. Niyitegeka annexes a questionnaire to be provided to Witnesses who refuse to meet with members of his Defence team. See Motion, Annex V. See also Reply, paras. 21-23.

²⁰ Response, para. 3.

²¹ Response, paras. 5-6, 11.

²² Response, paras. 7-8.

²³ Response, para. 8.

²⁴ Response, paras. 9-10.

²⁵ Reply, paras. 15-20.

²⁶ Reply, paras. 25-29.

²⁷ *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Decision on Ildephonse Nizeyimana's Request for Access to Closed Session Transcripts, 31 March 2011 ("Muvunyi Decision of 31 March 2011"), para. 3, referring to *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Michel Bagaragaza's Motion for Access to Confidential Material, 14 May 2009, para. 7 ("Zigiranyirazo Decision of 14 May 2009"). See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-A & IT-04-75-T, Decision on Goran Hadžić's Urgent Motion for Access to Audio Recordings in the *Stanišić and Simatović* Case, 28 August 2014 ("Stanišić and Simatović Decision of 28 August 2014"), p. 2 and references cited therein.

access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose must be demonstrated.²⁸ Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.²⁹ Further, the requesting party must establish that this material is likely to assist its case materially, or that there is at least a good chance that it would.³⁰

IV. DISCUSSION

9. Niyitegeka has identified the material sought with sufficient precision by providing the pseudonyms assigned to the Prosecution witnesses in his case and asking for access to other material related to their testimony in other cases before the ICTR.³¹ That said, Niyitegeka has not demonstrated a legitimate forensic purpose for receiving access to the requested material in other trials conducted after the conclusion of his case. Given that the proceedings against Niyitegeka have been concluded, the only legitimate forensic purpose for obtaining access to this material is to establish a "new fact" capable of constituting the basis for a review of Niyitegeka's convictions.³² In this regard, Niyitegeka merely advances a broad and speculative assertion that any evidence provided by the witnesses in other proceedings before the ICTR necessarily serves a legitimate forensic purpose.³³ It follows from jurisprudence that the requesting party may not engage in a "fishing expedition".³⁴ In the absence of more particularized submissions, the mere fact that witnesses may have testified in more than one case does not necessarily reflect that their evidence is relevant to establishing a "new fact" in the context of review proceedings, or demonstrate that any related material may be of material assistance to the preparation of a review application. Accordingly, Niyitegeka has failed to demonstrate a legitimate forensic purpose for receiving access to the requested material in other trials conducted after the conclusion of his case or for interviewing the Prosecution witnesses in his case.

²⁸ *Muvunyi* Decision of 31 March 2011, para. 3; *Stanišić and Simatović* Decision of 28 August 2014, p. 2.

²⁹ *Muvunyi* Decision of 31 March 2011, para. 3; *Zigiranyirazo* Decision of 14 May 2009, para. 7. See also *Stanišić and Simatović* Decision of 28 August 2014, p. 2.

³⁰ *Muvunyi* Decision of 31 March 2011, para. 3; *Zigiranyirazo* Decision of 14 May 2009, para. 7.

³¹ See Motion, paras. 23, 37.

³² See *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A. N. Rutaganda's Appeal against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 16. See also *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33-R86.2, Second Decision on Motion for Access to Confidential Material from the *Nshogoza* Case, 9 November 2015, para. 5.

³³ Motion, paras. 35-36.

³⁴ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* Case, 19 May 2009, para. 11, referring to *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

10. With respect to Niyitegeka's request for material related to the witnesses' testimony given in other ICTR cases prior to his trial, it follows from Rule 66(A)(ii) of the ICTR Rules of Procedure and Evidence that copies of the statements of all Prosecution witnesses which were intended to be called at trial should have already been disclosed to Niyitegeka 60 days before the date set for trial. This material should have included transcripts of all previous testimony of the witnesses in other cases before the ICTR in the event that they had previously appeared in another case. To the extent that Niyitegeka has not yet received full access to the complete file in his case, it should be recalled that in order to carry out their duties in full, counsel recognized, assigned, or appointed by the Registrar as acting for an accused or convicted person must, in principle, automatically have access to the complete record of the proceedings to which their client is entitled.³⁵ Accordingly, the Registry is expected to provide Niyitegeka's newly assigned Counsel with access to such a complete record, without the need, except in exceptional circumstances, of any judicial order.

11. Furthermore, under Rule 72(D) of the Rules, the Prosecution has the duty to disclose to the defence any additional evidence or material which should have been disclosed earlier as soon as it is discovered and has a positive and continuous obligation to disclose potentially exculpatory material in accordance with Rule 73(E) of the Rules. The Prosecution has already indicated that any such material has been previously disclosed and that, in any case, it is conducting a review of the material in its possession to identify if any additional material should be disclosed. As it relates to Niyitegeka's current request for disclosure, there is no reason to doubt, in the circumstances of this case, that the Prosecution is complying with its continuous disclosure obligations in good faith in relation to this renewed search, notwithstanding any previous findings that it has breached on occasion its disclosure obligations. In this regard, the Prosecution is reminded that it is expected to act in good faith and comply with its positive and continuous disclosure obligations under the Rules, which is essential to the fair administration of justice.

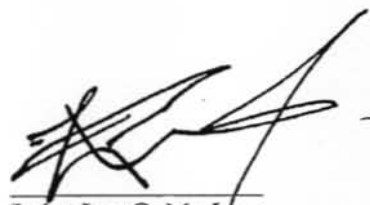
³⁵ See *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29, Decision on Request for Access, 16 September 2015, p. 2, referring to *Prosecutor v. Radoslav Brdanin*, Case No. MICT-13-48, Decision on Request for Access, 3 August 2015, p. 1; *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Request for Access, 25 June 2015, paras. 11, 14.

V. DISPOSITION

12. For the foregoing reasons, the Motion is **DISMISSED**.

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

Done this 29th of January 2016,
At Arusha,
Tanzania.



Judge Lee G. Muthoga
Single Judge

[Seal of the Mechanism]





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