



Mechanism for International Criminal Tribunals

Case No.: MICT-12-16-R

Date: 9 August 2017

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**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Prisca Matimba Nyambe  
Judge Seymour Panton

**Registrar:** Mr. Olufemi Elias

**Decision of:** 9 August 2017

**PROSECUTOR**

v.

**ELIÉZER NIYITEGEKA**

***PUBLIC***

**DECISION ON APPEALS OF DECISIONS RENDERED BY A  
SINGLE JUDGE**

**The Office of the Prosecutor:**

Mr. Serge Brammertz  
Mr. Richard Karegyesa  
Ms. Sunkarie Ballah-Conteh

**Counsel for Mr. Eliézer Nivitegeka:**

Mr. Philippe Larochelle

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*Uwaipopo*

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of “Niyitegeka’s Appeal of the ‘Decision On Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses’ and ‘Decision on a Request for Certification’” filed by Eliézer Niyitegeka on 17 May 2017 (“Appeal”).<sup>1</sup> The Prosecution responded on 29 May 2017 (“Response”)<sup>2</sup> and Niyitegeka did not file a reply.

## I. BACKGROUND

2. On 16 May 2003, Trial Chamber I of the International Criminal Tribunal for Rwanda (“Trial Chamber” and “ICTR”, respectively) convicted Niyitegeka, a former Minister of Information in the interim Government of Rwanda in 1994,<sup>3</sup> of genocide, conspiracy to commit genocide, and direct and public incitement to commit genocide as well as murder, extermination, and other inhumane acts as crimes against humanity.<sup>4</sup> The Trial Chamber sentenced Niyitegeka to imprisonment for the remainder of his life.<sup>5</sup> On 9 July 2004, the Appeals Chamber of the ICTR upheld Niyitegeka’s convictions and affirmed his sentence.<sup>6</sup> Niyitegeka is currently serving his sentence in the Koulikoro Detention Unit in Mali.<sup>7</sup>

3. Between June 2006 and March 2010, the Appeals Chamber of the ICTR dismissed five requests for review of Niyitegeka’s convictions.<sup>8</sup> On 6 November 2014, the 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.<sup>9</sup> In response to Niyitegeka’s request for review and assignment of counsel filed on 1 April 2015, the Appeals Chamber found that it could not exclude that one of the potential grounds for review would have a chance of success, and therefore directed

<sup>1</sup> See Order Assigning Judges to a Case Before the Appeals Chamber, 25 May 2017.

<sup>2</sup> Prosecution Response to Niyitegeka’s Appeal of the Decision on Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses and Decision on a Request for Certification, 29 May 2017.

<sup>3</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 (“Trial Judgement”), para. 5.

<sup>4</sup> Trial Judgement, para. 480.

<sup>5</sup> Trial Judgement, para. 502.

<sup>6</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 270.

<sup>7</sup> See *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14, Decision on the Enforcement of Sentence, 5 December 2008, p. 3.

<sup>8</sup> See *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 76; *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; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007, para. 31; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 24 January 2008, para. 33; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, 22 April 2009 (public redacted version), para. 54; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010 (public redacted version), para. 11; *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.

<sup>9</sup> Decision on Niyitegeka’s Request for Assignment of Counsel, 6 November 2014, paras. 3, 11, 14.

the Registrar to assign Niyitegeka counsel for a period of three months to assist with a potential request for review, while dismissing the remainder of the request for review as premature.<sup>10</sup>

4. On 21 December 2015, Niyitegeka filed a motion requesting information and access to material related to 12 Prosecution witnesses – namely Prosecution Witnesses DAF, GGD, GGH, GGM, GGO, GGR, GGV, GGY, GHA, GK, HR, and KJ – who testified in his case before the ICTR.<sup>11</sup> In particular, Niyitegeka requested: (i) a list of all other cases in which these witnesses had testified as well as their corresponding pseudonyms in those cases; (ii) the disclosure of all statements, exhibits, and transcripts related to the witnesses' appearances in other trials; and (iii) orders enabling members of his Defence team to interview such witnesses.<sup>12</sup> Niyitegeka argued, *inter alia*, that the requested material served a legitimate forensic purpose in his pre-review investigations into possible new facts that may warrant a review of his conviction and constituted potentially exculpatory evidence pursuant to Rule 73 of the Rules of Procedure and Evidence of the Mechanism ("Rules").<sup>13</sup>

5. In a decision rendered on 29 January 2016, the Single Judge dismissed the Request of 21 December 2015 in its entirety.<sup>14</sup> Recalling Rule 86 of the Rules, the Single Judge determined that Niyitegeka's "broad and speculative" assertion that access to any evidence provided by the witnesses in other proceedings before the ICTR necessarily serves a legitimate forensic purpose was not substantiated, and denied him access to material deriving from the 12 Prosecution witnesses in other ICTR trials conducted after the conclusion of his case.<sup>15</sup> As it concerned material given in other ICTR cases prior to the conclusion of Niyitegeka's trial, the Single Judge observed that, under Rule 66(A)(ii) of the Rules of Procedure and Evidence of the ICTR ("ICTR Rules"), the Prosecution should have already provided copies of statements and transcripts of all testimony provided by these witnesses in prior cases before the ICTR and that the Registrar had been previously instructed to provide complete access to Niyitegeka's case file to his assigned counsel.<sup>16</sup> The Single Judge further recalled that Rule 72(D) of the Rules provides that the Prosecution has the duty to disclose to the Defence any additional evidence or material which should have been

<sup>10</sup> Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015, paras. 12-14. On 27 May 2016, the Appeals Chamber denied Niyitegeka's request to extend the assignment of his counsel for a period of six months. *See* Decision on Niyitegeka's Motion for an Extension of the Assignment of His Counsel, 27 May 2016, para. 13.

<sup>11</sup> Urgent Request for Orders Relating to Prosecution Witnesses, 21 December 2015 (public with public and confidential annexes) ("Request of 21 December 2015"), para. 14, pp. 8, 9.

<sup>12</sup> Request of 21 December 2015, paras. 23, 24, 37, 41, 43, pp. 8, 9.

<sup>13</sup> Request of 21 December 2015, paras. 32, 34.

<sup>14</sup> Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016 ("Decision of 29 January 2016"), para. 12.

<sup>15</sup> Decision of 29 January 2016, paras. 8, 9.

<sup>16</sup> Decision of 29 January 2016, para. 10.

disclosed earlier.<sup>17</sup> The Single Judge also recalled that Rule 73(E) of the Rules creates a positive and continuous obligation to disclose potentially exculpatory material, and determined that there was no reason to doubt that the Prosecution was complying with its continuous disclosure obligations in good faith notwithstanding any previous findings that it breached its disclosure obligations.<sup>18</sup>

6. On 8 February 2016, Niyitegeka filed a request for certification to appeal the Decision of 29 January 2016.<sup>19</sup> Due to a transmission error by the Registry, the Request for Certification was only distributed on 28 April 2017.<sup>20</sup> On 10 May 2017, the Single Judge dismissed the Request for Certification, recalling that Rule 80(B) of the Rules on certification of appeals “is not applicable to decisions rendered after the close of trial and appeal proceedings of a case and that decisions regarding witness protective measures do not require certification”.<sup>21</sup>

7. In his Appeal, Niyitegeka argues that he is entitled to appeal the Decision of 29 January 2016 as of right and that there is good cause to consider his Appeal notwithstanding its late filing.<sup>22</sup> Alternatively, Niyitegeka seeks to appeal the Decision of 10 May 2017 denying his Request for Certification.<sup>23</sup> In both instances, Niyitegeka argues that the Single Judge applied the wrong legal standard and that the decisions were so unfair and unreasonable as to constitute an abuse of discretion.<sup>24</sup> The Appeals Chamber addresses these issues in turn.

## II. PRELIMINARY MATTER

8. Niyitegeka submits that he is entitled to file an appeal as of right against the Decision of 29 January 2016 in light of controlling ICTR and Mechanism jurisprudence.<sup>25</sup> He further contends that good cause exists for allowing the Appeal to be recognized as validly filed given the confusion as to whether he was required to seek certification to appeal the Decision of 29 January 2016, which

<sup>17</sup> Decision of 29 January 2016, para. 11.

<sup>18</sup> Decision of 29 January 2016, para. 11.

<sup>19</sup> Request for Certification of the “Decision on Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses”, 8 February 2016 (“Request for Certification”).

<sup>20</sup> See Registrar’s Submission pursuant to Rule 31(B) of the Rules, 28 April 2017 (confidential with confidential annex), paras. 4, 5. See also Appeal, para. 5; Prosecution Response to Request for Certification of the Decision on Niyitegeka’s Urgent Request for Orders Relating to Prosecution Witnesses, 8 May 2017, n. 1.

<sup>21</sup> Decision on a Request for Certification, 10 May 2017 (“Decision of 10 May 2017”), p. 1.

<sup>22</sup> Appeal, paras. 17-24. See also Appeal, paras. 9-11.

<sup>23</sup> Appeal, paras. 8, 22, 23. Niyitegeka also requests that the Appeals Chamber provide guidance as to the appropriate procedures for generally challenging decisions related to access to confidential material but not issued under Rule 86 of the Rules and rendered after the close of an applicant’s trial and appeal proceedings. See Appeal, para. 24.

<sup>24</sup> Appeal, paras. 23, 25, 28, 53.

<sup>25</sup> Appeal, paras. 14, 17, referring to *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008 (“*Niyitegeka* Decision of 20 June 2008”), para. 14, *Prosecutor v. Jean De Dieu*

he timely applied for on 8 February 2016.<sup>26</sup> Niyitegeka argues that his Appeal should be considered as having been filed on 8 February 2016 when he filed the Request for Certification.<sup>27</sup>

9. The Prosecution responds that leave to appeal the Decision of 29 January 2016 should be denied as Niyitegeka has not demonstrated good cause for the late filing.<sup>28</sup> The Prosecution emphasizes that ICTR jurisprudence from Niyitegeka's own case in 2008 provided him with clear notice that he should have filed an appeal within seven days of the Decision of 29 January 2016 without seeking certification to appeal.<sup>29</sup> The Prosecution further argues that Niyitegeka has not demonstrated that the Appeals Chamber should vary the time limits in the interests of justice since he has not shown that he would suffer undue prejudice if his Appeal were found to be inadmissible.<sup>30</sup> In this respect, the Prosecution submits that Niyitegeka could simply file a renewed request for access to the material which was not granted in the Decision of 29 January 2016 with more detailed submissions establishing a legitimate forensic purpose for access.<sup>31</sup>

10. The Appeals Chamber accepts Niyitegeka's argument that, at the time he filed the Request for Certification, it was not clear that he was entitled to appeal as of right the Decision of 29 January 2016, which was issued, in part, on the basis of Rules 73 and 86 of the Rules. The Appeals Chamber recalls that the Appeals Chamber of the ICTR had ruled in Niyitegeka's case that Rule 73 of the ICTR Rules concerning the requirement of certification prior to appeal applies only to interlocutory appeals during an applicant's proceedings before a trial chamber and had held that an applicant is entitled to appeal as of right a decision pursuant to Rule 75(G) of the ICTR Rules rendered by another trial chamber after the close of that applicant's trial and appeal proceedings.<sup>32</sup> Subsequently, Rule 75 of the ICTR Rules – the equivalent of Rule 86 of the Rules – was amended to provide for an express right of appeal of decisions taken under that rule when issued after the

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*Kamuhanda*, Case No. MICT-13-33, Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness, 14 November 2016 (“*Kamuhanda* Decision of 14 November 2016”), para. 6.

<sup>26</sup> Appeal, paras. 18-21. In this respect, Niyitegeka observes that a Single Judge, pursuant to Rule 80(B) of the Rules, granted certification to appeal a decision denying the rescission of protective measures after the conclusion of that applicant's trial and appeal proceedings. He further observes that a different Single Judge summarily dismissed a request for certification to appeal a decision denying the same applicant's motion to interview a witness finding that Rule 80 of the Rules only applied to interlocutory decisions taken in the context of trial. *See* Appeal, paras. 12, 13, referring to *Prosecutor v. Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Motion for Certification to Appeal, 8 August 2016, p. 3, *Prosecutor v. Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Decision on a Request for Certification to Appeal, 1 November 2016, p. 2.

<sup>27</sup> Appeal, paras. 19, 21.

<sup>28</sup> Response, paras. 1, 7.

<sup>29</sup> Response, para. 7.

<sup>30</sup> Response, para. 8.

<sup>31</sup> Response, para. 8.

<sup>32</sup> *Niyitegeka* Decision of 20 June 2008, paras. 13, 14.

conclusion of an applicant's trial proceedings.<sup>33</sup> However, Rule 86 of the Rules does not provide the same express right of appeal of decisions issued under it after the close of trial proceedings. In addition, only after Niyitegeka filed his Request for Certification did the Appeals Chamber clarify that the requirement of certification to appeal is not applicable to decisions under Rule 86 of the Rules rendered after the close of an applicant's trial and appeal proceedings and that there lies a right of appeal in such circumstances.<sup>34</sup>

11. In this context, the Appeals Chamber finds that it was reasonable for Niyitegeka to request certification to appeal the Decision of 29 January 2016, which was issued, in part, on the basis of Rule 86 of the Rules. Notably, Niyitegeka filed the Request for Certification within the seven-day timeframe provided under Rule 80(C) of the Rules.<sup>35</sup> Moreover, he lodged the present Appeal within seven days of the Decision of 10 May 2017 denying his Request for Certification. Consequently, and pursuant to Rule 154 of the Rules, the Appeals Chamber finds that there is good cause to recognize the Appeal of the Decision of 29 January 2016 as validly filed.

12. Furthermore, and mindful that Niyitegeka's appeal of the Decision of 29 January 2016 principally alleges that the Single Judge erred in his application of Rule 73 of the Rules,<sup>36</sup> the Appeals Chamber clarifies that an appeal lies as of right of any decision taken under Rule 73 of the Rules by a single judge or trial chamber after an applicant's trial and appeal proceedings have concluded. This is necessary to give full effect to the continuous obligation imposed upon the Prosecution by Rule 73(E) of the Rules to disclose exculpatory material after the completion of trial and any subsequent appeal.<sup>37</sup>

13. Consequently, the Appeals Chamber recognizes the Appeal of the Decision of 29 January 2016 as validly filed. In light of the above, the Appeals Chamber finds it unnecessary to

<sup>33</sup> Compare ICTR Rules of 14 March 2008 with ICTR Rules of 1 October 2009. Specifically, the ICTR Rules of 1 October 2009 were amended to include Rule 75(J), which states: "Decisions under paragraph (G) and, after the close of trial proceedings, paragraph (A), and under Rule 69, are subject to appeal directly to a full bench of the Appeals Chamber by either party. Appeals shall be filed within fifteen days of the filing of the impugned decision. A responding party shall, thereafter, file any response within ten days from the date of the filing of the appeal. The Appellant may file a reply within four days of the filing of the response. Failure to comply with these time limits shall constitute a waiver of the right to appeal."

<sup>34</sup> See *Kamuhanda* Decision of 14 November 2016, para. 6.

<sup>35</sup> Niyitegeka states that the Decision of 29 January 2016 was only circulated on 1 February 2016 and that he filed his application seeking certification to appeal on 8 February 2016. Appeal, paras. 3, 4. This is not disputed by the Prosecution.

<sup>36</sup> See *infra* para. 15.

<sup>37</sup> Cf. *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016 ("*Orić* Decision of 17 February 2016"), para. 6.

consider Niyitegeka's alternative request appealing the denial of his Request for Certification of the Decision of 10 May 2017.<sup>38</sup>

### III. STANDARD OF REVIEW

14. The Appeals Chamber recalls that decisions related to witness protection and disclosure of evidence are discretionary decisions.<sup>39</sup> In order to successfully challenge such a decision, Niyitegeka must demonstrate that the Single Judge committed a discernible error resulting in prejudice to him.<sup>40</sup> The Appeals Chamber will only reverse a discretionary decision issued in the first instance where it is found to be based on an incorrect interpretation of the governing law or on a patently incorrect conclusion of fact, or where the decision is so unfair or unreasonable as to constitute an abuse of discretion.<sup>41</sup>

### IV. APPEAL OF DECISION OF 29 JANUARY 2016

15. Niyitegeka submits that the Single Judge erred in disposing of his Request of 21 December 2015 by applying the standard for access to confidential information under Rule 86 of the Rules, which requires a demonstration of a legitimate forensic purpose, rather than determining it on the basis of Rule 73 of the Rules as a request for disclosure of potentially exculpatory material.<sup>42</sup> Consequently, Niyitegeka posits, the Single Judge erroneously denied him access to the subsequent statements and testimonies of Prosecution witnesses who were material to his conviction.<sup>43</sup> Niyitegeka argues that the Defence cannot independently monitor subsequent statements and testimonies of witnesses whose evidence was given confidentially in other cases before the ICTR and that the Prosecution "is simply not in a position to know whether a witness in

<sup>38</sup> The Appeals Chamber also dismisses Niyitegeka's further request that it provide guidance as to the appropriate procedures for generally challenging decisions related to access to confidential material not issued under Rule 86 of the Rules and rendered after the close of an applicant's trial and appeal proceedings in addition to what has already been stated in this decision. Article 23 of the Statute of the Mechanism ("Statute") provides that the Appeals Chamber may affirm, reverse or revise the decisions taken by a Single Judge or Trial Chamber. However, the Appeals Chamber does not have advisory power and Niyitegeka's submission fails to demonstrate that this is an issue of general importance whose adjudication would contribute substantially to the Mechanism's jurisprudence. *See, e.g., Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 3; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 23 November 2011, para. 23.

<sup>39</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015 ("Nyiramasuhuko et al. Appeal Judgement"), paras. 137, 431; *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Judgement, 29 September 2014, para. 85; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 29.

<sup>40</sup> *Nyiramasuhuko et al. Appeal Judgement*, para. 68; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015, para. 131.

<sup>41</sup> *Kamuhanda* Decision of 14 November 2016, para. 7; *Orić* Decision of 17 February 2016, para. 9.

<sup>42</sup> Appeal, paras. 22, 25, 28-30, 53. Niyitegeka emphasizes that, in view of Rule 86(F)(ii) of the Rules, the Prosecution is under an obligation to disclose this exculpatory material under Rule 73 of the Rules to a convicted person regardless of the relevant protective measures in place. Appeal, paras. 31, 37, 38.

<sup>43</sup> Appeal, para. 25.

his subsequent testimonies has given evidence which contradict[s] material not known to the Prosecution”.<sup>44</sup> At the same time, he contends, a further statement “always has the potential to affect the credibility of its author” and “any new information concerning the credibility of witnesses may amount to a new fact.”<sup>45</sup> Therefore, he submits, the Prosecution’s disclosure obligation under Rule 73(B) of the Rules necessarily includes subsequent statements and testimony of witnesses material to a conviction, because such statements and testimonies always have the potential to affect the witness’s credibility and, as such, may be used to establish a new fact in support of a request for review.<sup>46</sup>

16. The Prosecution responds that, contrary to Niyitegeka’s contention, the Single Judge did not rely exclusively on Rule 86 of the Rules but accepted the Prosecution’s submissions that it was complying with Rule 73 of the Rules.<sup>47</sup> It further rejects Niyitegeka’s assertion that all statements made by the 12 Prosecution witnesses subsequent to his trial are potentially exculpatory, arguing that establishing whether materials are subject to disclosure under Rule 73 of the Rules is a fact-based inquiry undertaken by the Prosecution.<sup>48</sup>

17. The Appeals Chamber observes that, in his determination of the Request of 21 December 2015, the Single Judge took into account both Rule 86 and Rule 73 of the Rules.<sup>49</sup> Consequently, the Appeals Chamber rejects Niyitegeka’s contention that the Single Judge impermissibly restricted his analysis to Rule 86 of the Rules.

18. The Appeals Chamber turns to Niyitegeka’s contention that the Single Judge erred in failing to consider that all the statements and testimony of the 12 Prosecution witnesses given subsequent to his own proceedings constitute potentially exculpatory material subject to disclosure under Rule 73 of the Rules. In this respect, the Appeals Chamber recalls that Rule 73(A) of the Rules imposes upon the Prosecution a positive and continuous obligation to, “as soon as practicable, disclose to the Defence any material that in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.<sup>50</sup> The determination as to which material is subject to disclosure under Rule 73 of the Rules is a fact-

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<sup>44</sup> Appeal, paras. 34-36, 41. Niyitegeka refers to the subsequent statements and testimony of Witnesses KJ and GGH as examples of the inability of the Prosecution to determine whether subsequent statements and testimony constitute potentially exculpatory material subject to disclosure. Appeal, paras. 43, 44.

<sup>45</sup> Appeal, paras. 49, 50.

<sup>46</sup> Appeal, paras. 42, 47-51.

<sup>47</sup> Response, para. 11.

<sup>48</sup> Response, para. 10.

<sup>49</sup> Decision of 29 January 2016, paras. 8, 9, 11.



based enquiry made by the Prosecution.<sup>51</sup> A chamber will not intervene in the exercise of the Prosecution's discretion unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will presume that the Prosecution is acting in good faith.<sup>52</sup> Niyitegeka demonstrates no error in the Single Judge's determination that, with respect to Niyitegeka's present request for disclosure, there was no reason to doubt that the Prosecution was complying with its continuous disclosure obligations in good faith.<sup>53</sup> The Appeals Chamber recalls that the Prosecution's obligation to disclose exculpatory material is essential to a fair trial, and notes that this obligation has always been interpreted broadly.<sup>54</sup>

19. Niyitegeka argues that all subsequent statements and testimony of witnesses material to a conviction necessarily are subject to disclosure under Rule 73 of the Rules, particularly because it is his view that the Prosecution may be unaware of how information contained in them may be potentially exculpatory. In this respect, the Appeals Chamber recalls that the Office of the Prosecutor has a duty to utilize procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Rule 73 of the Rules to determine whether any material has to be disclosed.<sup>55</sup> This obligation reflects the possibility that statements or testimony given by a witness in a subsequent proceeding may contain material subject to disclosure under Rule 73 of the Rules and underscores that, as noted above, determining what is subject to disclosure is a fact-based enquiry by the Prosecution.<sup>56</sup> Niyitegeka's unsupported submissions do not persuade the Appeals Chamber to strip the Prosecution of its well-established duty and discretion in this respect. Furthermore, Rule 73 of the Rules limits the Prosecution's obligation to the disclosure of material that "*in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence*".<sup>57</sup> To the extent Niyitegeka considers that the Prosecution may

<sup>50</sup> See also *Augustin Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Decision on Ngirabatware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014 ("*Ngirabatware Decision of 21 November 2014*"), para. 15.

<sup>51</sup> *Ngirabatware Decision of 21 November 2014*, para. 15; *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012 ("*Mugenzi Decision of 24 September 2012*"), para. 7; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez Appeal Judgement*"), para. 183.

<sup>52</sup> *Ngirabatware Decision of 21 November 2014*, para. 15. See also *Mugenzi Decision of 24 September 2012*, para. 7; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14.

<sup>53</sup> Decision of 29 January 2016, para. 11.

<sup>54</sup> *Ngirabatware Decision of 21 November 2014*, para. 15; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira Appeal Judgement*"), para. 18; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić Appeal Judgement*"), paras. 265, 266. See also *Kalimanzira Appeal Judgement*, para. 20.

<sup>55</sup> Cf. *Blaškić Appeal Judgement*, para. 302.

<sup>56</sup> See *supra* note 51.

<sup>57</sup> Emphasis added.

be unaware of information that may impact the assessment of whether material in its possession is subject to disclosure under Rule 73 of the Rules, he may share such information with the Prosecution. In light of the foregoing, the Appeals Chamber finds that Niyitegeka fails to establish that the Single Judge committed a discernible error by not determining that all the statements and transcripts of evidence given by the 12 Prosecution witnesses during proceedings subsequent to the conclusion of Niyitegeka's case constitute material subject to disclosure pursuant to Rule 73 of the Rules.<sup>58</sup>

20. Notwithstanding, the Appeals Chamber reminds the Prosecution that its obligation to disclose exculpatory material is continuous and that it is as important as the obligation to prosecute.<sup>59</sup> As the Prosecution has indicated that it is evaluating its databases to ascertain whether it has any additional potentially exculpatory material beyond what it already provided to Niyitegeka,<sup>60</sup> the Appeals Chamber finds, *proprio motu*, that it would be useful for the Prosecution to certify when such review is complete and any additional disclosures resulting therefrom, if applicable, have been made.<sup>61</sup> If at any time additional disclosure provides Niyitegeka with exculpatory material, he may submit an application for review of his conviction.<sup>62</sup> In addition, Niyitegeka may submit a new request for access to materials at any time, particularly if he can provide concrete indications that the Prosecution is not in compliance with its disclosure obligations.<sup>63</sup>

<sup>58</sup> The Appeals Chamber considers that Niyitegeka's specific contentions related to Witnesses KJ and GGH cannot demonstrate discernible error in the Decision of 29 January 2016. In the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first instance. *See Orić* Decision of 17 February 2016, para. 14. Niyitegeka provides no submissions as to why these arguments could not have been raised in the first instance and he fails to demonstrate any circumstances that would justify consideration of this argument for the first time on appeal.

<sup>59</sup> *See, e.g., The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9 ("The Prosecution's obligation to disclose exculpatory material is essential to a fair trial. [...] The positive nature of this obligation and its significance stem from the Prosecution's duty to investigate, which the Appeals Chamber [of the ICTR] has explained runs continuously with its duty to prosecute. In particular, the Appeals Chamber [of the ICTR] recalls that one of the purposes of the Prosecution's investigative function is 'to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused.'"); *Kordić and Čerkez* Appeal Judgement, paras. 183 ("The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 [of the ICTY Rules] has been stressed by the Appeals Chamber [of the ICTY], and the obligation to disclose under Rule 68 [of the ICTY Rules] has been considered as important as the obligation to prosecute."), 242 ("The Appeals Chamber [of the ICTY] has emphasised that the right of an accused to a fair trial is a fundamental right protected by the Statute [of the ICTY] and by the [ICTY] Rules. Rule 68 [of the ICTY Rules], imposing disclosure obligations on the Prosecution, is an important shield in the accused's possession. [...] The Appeals Chamber [of the ICTY] reiterates that the onus on the Prosecution to enforce the rules rigorously to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute.").

<sup>60</sup> Prosecution Response to Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 4 January 2016, para. 8.

<sup>61</sup> *Cf.* Rule 139(B) of the Rules.

<sup>62</sup> *See* Article 24 of the Statute; Rule 146 of the Rules.

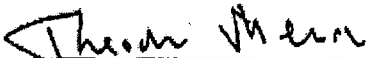
<sup>63</sup> *See supra* para. 18.

## V. DISPOSITION

21. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal and, *proprio motu*, **ORDERS** the Prosecution to file a certification on the record once its review of its databases is complete and all resulting disclosures, if any, have been made.

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

Done this 9<sup>th</sup> day of August 2017,  
At The Hague,  
The Netherlands

  
\_\_\_\_\_  
Judge Theodor Meron  
Presiding Judge

[Seal of the Mechanism]





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