

**UNITED  
NATIONS**

**1083/H  
ICTR-16-44-R  
30 June 2006**



International Criminal Tribunal for the  
Prosecution of Persons Responsible for  
Genocide and Other Serious Violations of  
International Humanitarian Law Committed  
in the Territory of Rwanda and Rwandan  
Citizens Responsible for Genocide and  
Other Such Violations Committed in the  
Territory of Neighbouring States between  
1 January 1994 and 31 December 1994

Case No. ICTR-96-14-R

Date: 30 June 2006

Original: English

**(1083/H - 1045/H)**

**IN THE APPEALS CHAMBER**

**Before:**

Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Wolfgang Schomburg

**Registrar:**

Adama Dieng

<b>ICTR Appeals Chamber</b>
Date: 30 June 2006
Action: ...
Copied To: ...

2006 JUN 30 13:13  
 1083/H-1045/H  
 v.  
 THE PROSECUTOR

**ELIÉZER NIYITEGEKA**  
(Applicant)

**THE PROSECUTOR**  
(Respondent)

**DECISION ON REQUEST FOR REVIEW**

**The Office of the Prosecutor:**

James Stewart  
George Mugwanya  
Inneke Onsea

**Counsel for the Accused:**

Sylvia Geraghty

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda
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NAME / NOM: CHARLES ZANA
SIGNATURE: [Signature] DATE: 30/06/2006

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## INTRODUCTION

1. **THE APPEALS CHAMBER** of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (the "Tribunal") is seized of requests for review by Eliézer Niyitegeka (the "Applicant") filed on 27 October 2004, 7 February 2005, 17 August 2005 and 10 October 2005.

2. The Applicant, the former Minister of Information in the Rwandan Interim Government in 1994, was tried and sentenced to life imprisonment by Trial Chamber I of the Tribunal on 16 May 2003 for genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; and murder, extermination, and other inhumane acts as crimes against humanity.<sup>1</sup>

3. The Applicant appealed his conviction on the ground that the Trial Judgement was manifestly unfair and in breach of his statutory right to a fair trial, as well as on various other legal and factual grounds. On 9 July 2004, the Appeals Chamber dismissed his appeal in its entirety and affirmed the sentence of imprisonment for the remainder of his life.<sup>2</sup>

### I. THE REQUEST FOR REVIEW

4. The Applicant submits that transcripts of the radio broadcasts of the *compte rendus* of various Cabinet meetings in which he allegedly participated and an affidavit of one of his alibi witnesses as well as certain testimonies of witnesses in other cases amount to "new facts" within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules, warranting review of the trial and appeal judgements in his case.

#### A. Applicable Law

5. The provisions of Article 25 of the Statute and Rules 120 and 121 of the Rules govern review proceedings before the Tribunal.

#### Article 25 of the Statute: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

<sup>1</sup> Trial Judgement, paras. 481 *et seq.*

<sup>2</sup> Appeal Judgement, para. 270.

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## Rule 120 of the Rules: Request for Review

- (A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber and could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.
- (B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.
- (C) Any brief in reply shall be filed within fifteen days after the filing of the response.

## Rule 121 of the Rules: Preliminary Examination

If the Chamber constituted pursuant to Rule 120 agrees that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

6. Accordingly, in order for the Chamber to proceed to the review of its decision, the moving party must demonstrate that:

a – *there is a new fact*, which is defined as “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.<sup>3</sup> By the phrase “not in issue”, the Appeals Chamber has held that “it must not have been among the factors that the deciding body could have taken into account in reaching its verdict”;<sup>4</sup>

b – *the new fact must not have been known to the moving party at the time of the proceedings before the Trial Chamber or the Appeals Chamber*. However, “[I]t is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What is relevant is whether the deciding body and the moving party knew about the fact or not”;<sup>5</sup>

c – *the lack of discovery of the new fact must not have been through the lack of diligence on the part of the moving party*. By analogy to the jurisprudence relating to the admission of additional evidence in appeals proceedings, diligence shall mean that the party in question must show that it sought to make “appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal [...] before the Chamber.”<sup>6</sup>

<sup>3</sup> *Tadić*, Decision on Motion for Review, para. 25.

<sup>4</sup> *Tadić*, Decision on Motion for Review, para. 25.

<sup>5</sup> *Tadić*, Decision on Motion for Review, para. 25; *Delić*, Decision on Motion for Review, para. 11.

<sup>6</sup> *Ntagerura et al.*, Decision on Prosecution Motion for Admission of Additional Evidence, para. 9; *Kamuhanda*, Decision on Motion for Admission of Additional Evidence, para. 9; *Krstić*, Decision on Applications for Admission of Additional Evidence, pp. 3-4; *Semanza*, Decision on Motion of Additional Evidence, para. 6; *Nahimana et al.*, Decision on Appellant's Motion for Leave to Present Additional Evidence, p. 3; *Ntakirutimana E. and G.*, Reasons for the Decision on Request for Admission of Additional Evidence, paras. 11-13.

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d – the new fact, if proved, could have been a decisive factor in reaching the original decision.<sup>7</sup>

7. These criteria are cumulative.<sup>8</sup> However, the Appeals Chamber recalls that in “wholly exceptional circumstances”, where the impact of a “new fact” on the decision would be such that to ignore it would lead to a miscarriage of justice, review might be possible even though the “new fact” was known to the moving party, or was discoverable by it through the exercise of due diligence.<sup>9</sup>

### **B. Analysis**

8. The Applicant requests the Appeals Chamber to review the factual findings and legal conclusions in the Judgements of both the Trial and Appeals Chambers.<sup>10</sup> The Appeals Chamber recalls that review proceedings under Article 25 of the Statute and Rule 120 of the Rules are available only with respect to the final judgement.<sup>11</sup> As a result, the Appeals Chamber shall only consider whether its Judgement of 9 July 2004 should be reviewed.

9. The alleged “new facts” to be considered by the Appeals Chamber are, in principle, limited to those raised by the Applicant in his requests filed *pro se* on 27 October 2004,<sup>12</sup> 7 February 2005,<sup>13</sup> and 17 August 2005,<sup>14</sup> as elaborated in the Additional Submissions filed by Defence Counsel within the scope of the Appeals Chamber’s Decisions of 20 June 2005<sup>15</sup> and 28 September 2005.<sup>16</sup> Exceptionally, the Appeals Chamber will nevertheless consider the alleged “new fact” raised by transcripts AV/908 and RSFO112, raised for the first time in the Additional Submissions, as they are intrinsically linked to the transcripts of cassettes AV/906 and AV/907 which formed the substance of the original request of 27 October 2004. The alleged “new fact” based on video tape KV-00-0030-0043, despite the deficiencies in the manner in which it was introduced, will also be considered given the Appeals Chamber’s

<sup>7</sup> *Delić*, Decision on Motion for Review, paras. 7-8; *Jelisić*, Decision on Motion for Review, pp. 2-3; *Tadić*, Decision on Motion for Review, para. 20; *Josipović*, Decision on Motion for Review, paras. 11-12; *Josipović*, Second Decision on Motion for Review, p. 3.

<sup>8</sup> *Josipović*, Decision on Motion for Review, para. 21.

<sup>9</sup> Appeal’s Chamber Decision of 20 June 2005, fn. 10; see also *Barayagwiza*, Decision on the Prosecutor’s Request for Review, para. 65; *Josipović*, Decision on Motion for Review, para. 13; *Tadić*, Decision on Motion for Review, para. 26; *Delić*, Decision on Motion for Review, para. 15.

<sup>10</sup> Applicant’s Additional Brief to request for Review, para. 17; *Requête en admission d’un élément de preuve nouveau*, 17 août 2005, para. 21; Applicant’s Request for Review, para. 33; Applicant’s Reply to Prosecution’s Response to Request for Review, para. 28.

<sup>11</sup> *Delić*, Decision on Motion for Review, para. 5; *Josipović*, Decision on Motion for Review, paras. 14-15; *Tadić*, Decision on Motion for Review, para. 24.

<sup>12</sup> Applicant’s Request for Review.

<sup>13</sup> Applicant’s Additional Brief to request for Review.

<sup>14</sup> Applicant’s Request for Admission of New Evidence.

<sup>15</sup> Appeal’s Chamber Decision of 20 June 2005.

<sup>16</sup> Appeal’s Chamber Decision of 28 September 2005.

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Decision of 2 November 2005,<sup>17</sup> which directed the Prosecution to disclose the CD-Roms labelled KV00-0030 and KV00-0030B in order to assist the Defence in replying to the Prosecution's Response to Additional Submissions.

10. The Appeals Chamber will now examine the "new facts" alleged by the Applicant.

1. First alleged "new fact": Transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994

11. The Applicant relies upon transcripts of the cassettes (AV/906, AV/907, AV/908 and RSFO122) of his radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 to prove that he was in Kigali that day,<sup>18</sup> contrary to the testimony of Prosecution Witness GGH,<sup>19</sup> and that, therefore, he could not have been 185 kilometers away in Rugarama, Gisovu *commune*, transporting arms, as the Trial Chamber found. The Applicant alleges that Prosecution Witness GGH gave false testimony within the meaning of Rule 91 of the Rules.<sup>20</sup> According to the Applicant, the transcripts amount to a "new fact" within the meaning of Article 25 and Rules 120 and 121.<sup>21</sup> Alternatively, the Applicant argues that the transcripts could be considered to be a "decisive factor" warranting substantive consideration of the application for review in order to prevent a miscarriage of justice.<sup>22</sup> The Applicant argues that the transcripts "could" or "would" have affected the original verdict. In response, the Prosecution submits that the transcripts do not amount to a "new fact" as they are merely new evidence of issues already discussed in the original proceedings, and that they "could" not have been a decisive factor in reaching the original decision.<sup>23</sup>

(a) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 constitute a "new fact"

12. The Applicant seeks to introduce the transcripts of cassettes in order to prove a fact that he already asserted, albeit without evidence, at trial: that he was in Kigali on 10 April 1994, attending a Cabinet Meeting.<sup>24</sup> This purported "new fact" was thus known to the Applicant at trial. The Appeals Chamber recalls that "(the) Jurisprudence of the Tribunal has elaborated on

<sup>17</sup> Second Appeal's Chamber Decision of 2 November 2005.

<sup>18</sup> Applicant's Additional Submissions, paras. 133-138.

<sup>19</sup> Applicant's Request for Review, paras. 12-15.

<sup>20</sup> Applicant's Reply to Prosecution's Response to Request for Review, para. 14; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 16; Applicant's Request for Admission of New Evidence, para. 20.

<sup>21</sup> Applicant's Request for Review, para. 8; Applicant's Reply to Prosecution's Response to Request for Review, para. 3.

<sup>22</sup> Applicant's Additional Submissions, paras. 121-131.

<sup>23</sup> Prosecutor's Response to Applicant's Request for Review, paras. 2, 24; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 15.

<sup>24</sup> Trial Judgement, para. 67.

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the difference between a new fact in the sense of Rule 119 [Rule 120 ICTR] and additional evidence in sense of Rule 115 of the Rules. In the *Delić* review, the Appeals Chamber held that: ‘the distinction is thus between a fact which was not in issue or considered in the original proceedings (a ‘new fact’ within the meaning of Rule 119) and additional evidence of a fact which was in issue or considered in the original proceedings but which evidence was not available to be given in those proceedings (‘additional evidence’ within the meaning of Rule 115).’ The Appeals Chamber in *Delić* further held that “(i)f the material proffered consists of additional evidence relating to a fact which was in issue or considered in the original proceedings, this does not constitute a “new fact” within the meaning of Rule 119, and the review procedure is not available.”<sup>25</sup> The transcripts of the cassettes are information of an evidentiary nature concerning the Applicant’s participation in the Cabinet Meeting of 10 April 1994. However, the transcripts relate to the alibi of the Applicant’s participation in the Cabinet Meeting of 10 April 1994 in relationship with the credibility of Prosecution Witness GGH,<sup>26</sup> both being matters that were already considered at trial.<sup>27</sup> Accordingly, the transcripts cannot amount to a “new fact” for the purposes of a review application and the Appeals Chamber is not obliged to examine them further. Nonetheless, the Appeals Chamber will consider whether, assuming the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 could be characterized as a new fact”, they could have been a decisive factor in reaching the original decision.

(b) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 could have been a decisive factor in reaching the original decision

13. The Applicant’s assertion that he made the radio broadcast of the said meeting at 2 p.m.<sup>28</sup> conflicts with Applicant’s Defence Counsel’s assertion that the said radio broadcast took place at 7 p.m.,<sup>29</sup> reinforcing the credibility of Prosecution Witness GGH. Accordingly, the Applicant’s allegation that the said witness gave false testimony, pursuant to Rule 91 of the Rules,<sup>30</sup> lacks foundation. Furthermore the particular factual finding of the Applicant transporting arms on 10 April 1994 was not critical to his conviction for any crime. It is briefly referenced in paragraph 411 of the Trial Judgement with respect to the crime of genocide, but no particular weight was placed upon it. The other evidence relating to the genocide count is

<sup>25</sup> *Delić*, Decision on Motion for Review, para. 11.

<sup>26</sup> Applicant’s Reply to Prosecution’s Response to Request for Review, paras. 2–3; Applicant’s Additional Submissions, para. 171.

<sup>27</sup> Trial Judgement, paras. 56–68; Appeal Judgement, paras. 108–117.

<sup>28</sup> Applicant’s Request for Review, para. 15(a); Applicant’s Additional Submissions, paras. 134–136, 138, 169.

<sup>29</sup> Trial Judgement, para. 67; Applicant’s Request for Review, para. 13.

<sup>30</sup> Applicant’s Reply to Prosecution’s Response to Request for Review, para. 14; Applicant’s Brief in Reply to Prosecution’s Response to Additional Brief to Request for Review, para. 16; Applicant’s Request for Admission of New Evidence, para. 20.

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overwhelming, such that the conviction on that count would stand even if the transcripts were credited and the factual finding on transport of arms on 10 April 1994 were quashed. Furthermore the finding on transport of arm was not at all relied upon with respect to the other counts.

14. In the opinion of the Appeals Chamber the Applicant has failed to establish that the contents of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 are such that the transcripts of said radio broadcast could have been a decisive factor in reaching the original decision.

2. Second alleged "new fact": Transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994

15. The Applicant relies upon transcripts of a cassette AV/917 of a radio broadcast of the *compte rendu* of a Cabinet Meeting of 16 April 1994 to prove that he was in Murambi (Gitarama) on that day, and that he gave an account thereof on Radio Rwanda on three successive occasions.<sup>31</sup> Accordingly, he argues that he could not have been 100 kilometers away in Kibuye, where Prosecution Witness KJ<sup>32</sup> had testified to seeing him on that day at the Gendarmerie camp requisitioning arms and *gendarmes* in order to launch an attack at Mubuga church in Gishyita *commune*.<sup>33</sup> The Applicant insists that the relevant transcripts not only discredit Prosecution Witness KJ's testimony,<sup>34</sup> but also prove that Prosecution Witness KJ gave false testimony.<sup>35</sup> The Applicant submits that the transcripts constitute a "new fact" within the meaning of Article 25 and Rules 120 and 121,<sup>36</sup> or, alternatively, that they are a "decisive factor" warranting review of the findings of the Trial and Appeals Chambers on the credibility of Prosecution Witness KJ and the alibi for 16 April 1994<sup>37</sup> in order to avoid a miscarriage of justice.<sup>38</sup> The Prosecution responds that the transcripts do not constitute a "new fact", being evidence of a fact already in issue during the proceedings and that the transcripts "could" and "would" not have been a decisive factor in reaching the original decision.<sup>39</sup>

<sup>31</sup> Applicant's Request for Review, paras. 19-21; Applicant's Additional Submissions, paras. 140, 173.

<sup>32</sup> Sometimes referred to by the Applicant by the incorrect pseudonym of JK.

<sup>33</sup> Applicant's Request for Review, paras. 17, 20.

<sup>34</sup> Applicant's Request for Review, para. 21; Applicant's Reply to Prosecution's Response to Request for Review, paras. 23, 26-27; Applicant's Additional Submissions, paras. 176, 199-200, 235-236.

<sup>35</sup> Applicant's Reply to Prosecution's Response to Request for Review, para. 23; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, paras. 16, 18; Applicant's Request for Admission of New Evidence, para. 20.

<sup>36</sup> Applicant's Request for Review, paras. 8, 21; Applicant's Reply to Prosecution's Response to Request for Review, para. 3.

<sup>37</sup> Applicant's Additional Submissions, paras. 176, 186-187, 199-200, 235-236 (referring to Trial Judgement, paras. 78, 83; Appeal Judgement, para. 132).

<sup>38</sup> Applicant's Additional Submissions, paras. 121, 129-130.

<sup>39</sup> Prosecutor's Response to Applicant's Request for Review, paras. 2, 30-31, 34; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 23.



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(a) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 constitutes a “new fact”

16. The Appeals Chamber is of the opinion that the transcripts of cassette AV/917 constitute information of an evidentiary nature, relating to the Applicant’s alibi of participation in the Cabinet Meeting of 16 April 1994 and the credibility of Prosecution Witness KJ. Nonetheless, the alibi and the implications it may have for the credibility of Prosecution Witness KJ, are not new facts, having already been pleaded during the proceedings.<sup>40</sup> Accordingly, the transcripts of cassette AV/917 relating to the said meeting do not amount to a “new fact” for the purposes of a review application and the Appeals Chamber is not obliged to examine them further. Nonetheless, the Appeals Chamber will consider whether, assuming the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could be characterized as a “new fact”, they could have been a decisive factor in reaching the original decision.

(b) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could have been a decisive factor in reaching the original decision

17. The identical contents of the radio broadcast transcripts presented by the Applicant suggest that he made only one radio broadcast regarding the said meeting, which radio broadcast was recorded and aired subsequently twice, without it being necessary for the Applicant to be present at the radio station each time to read out the same *compte rendu*.<sup>41</sup>

18. The Applicant’s contends that, before the meeting in the morning of 16 April 1994, he gave an interview which, according to him, was transcribed into a 10-page **document**.<sup>42</sup> However, he indicates neither the starting nor finishing time or the duration of the interview, making it impossible to determine when he was at the Cabinet Meeting.

19. In the Appeals Chamber’s view the Applicant has failed to demonstrate that the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could have been a decisive factor in reaching the original decision.

3. Third alleged “new fact”: Video footage KV00-0030 recorded on video tape KV-00-0030-0043 of the Cabinet Meeting/Press Conference presumably held on 13 May 1994

20. The Applicant submits BBC footage (recorded on video tape numbered KV-00-0030-0043) as proof that he was in a Cabinet Meeting/Press Conference on 13 May 1994 in

<sup>40</sup> Trial Judgement, paras. 69-83; Appeal Judgement, paras. 118-132.

<sup>41</sup> Prosecutor’s Response to Applicant’s Request for Review, para. 32.

<sup>42</sup> Applicant’s Request for Review, para. 20(c).

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Murambi (Gitarama). He argues that this confirms that he could not have been present on the same day at Muyira Hill (Kibuye), 100 kilometers away, participating in an attack, nor in Kucyapa, participating in a meeting. His presence at these events was alleged by Prosecution Witnesses GGY, HR, GGR, DAF, GGM and GGH.<sup>43</sup> The Applicant submits that the video not only discredits the testimonies of Prosecution Witnesses GGY,<sup>44</sup> HR,<sup>45</sup> GGR,<sup>46</sup> DAF,<sup>47</sup> GGM<sup>48</sup> and GGH,<sup>49</sup> but confirms that their testimony was false.<sup>50</sup> The Applicant submits that, should the Appeals Chamber not find that the video tape amounts to a "new fact", it may consider it to be a "decisive factor", and review the findings concerning the attack on 13 May 1994 and the credibility of the relevant Prosecution witnesses, in order to prevent a possible miscarriage of justice.<sup>51</sup> The Prosecution responds that it remains unconvinced that the recorded meeting was held on 13 May 1994.<sup>52</sup> In the Prosecution's view, the video is of questionable value as alibi evidence, and does not disclose any "new fact" that would have been a decisive factor in reaching the original decision.<sup>53</sup>

(a) Whether the video footage KV00-0030 recorded on video tape numbered KV-00-0030-0043 constitutes a "new fact"

21. In the Appeals Chamber's view, the video footage represents information of an evidentiary nature relating to the Applicant's alibi of participation in a Cabinet Meeting/Press Conference of 13 May 1994, and a factor in considering the testimonies of Prosecution Witnesses GGY, HR, GGR, DAF, GGM and GGH. Nonetheless, the Applicant's attendance at the Cabinet Meeting/Press Conference of 13 May 1994, which the Applicant aims to prove with the video footage, cannot be considered a "new fact" as the issue was discussed at trial<sup>54</sup> and the Appeals Chamber is not obliged to examine it further. Nevertheless, the Appeals Chamber will consider whether, assuming the video footage could be characterized as a new fact", it could have been a decisive factor in reaching the original decision.

<sup>43</sup> Applicant's Additional Submissions, paras. 118, 139, 163, 171, 284-285, 289-290; Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 56, 70, 75.

<sup>44</sup> Trial Judgement, paras. 131-133.

<sup>45</sup> Trial Judgement, paras. 134-135.

<sup>46</sup> Trial Judgement, paras. 136-138.

<sup>47</sup> Trial Judgement, paras. 139-140.

<sup>48</sup> Trial Judgement, paras. 141-144.

<sup>49</sup> Trial Judgement, paras. 145-146.

<sup>50</sup> Applicant's Reply to Prosecution's Response to Additional Submissions, para. 117(7).

<sup>51</sup> Applicant's Additional Submissions, paras. 121, 129-130, 171, 278, 290, 311, 342; Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 67-71.

<sup>52</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 51.

<sup>53</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 51.

<sup>54</sup> Trial Judgement, paras. 79-82.

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(b) Whether the video footage KV00-0030 recorded on video tape numbered KV-00-0030-0043 could have been a decisive factor in reaching the original decision

22. Even if the Cabinet Meeting/Press Conference<sup>55</sup> were held on 13 May 1994,<sup>56</sup> as testified to by Defence Witness TEN-10,<sup>57</sup> it does not imply that the Applicant could not have participated in the attack in Muyira and the meeting in Kucyapa on that day. Indeed the attack is supposed to have taken place on 13 May 1994 between 7:00 and 10:00 a.m.,<sup>58</sup> whereas according to Defence Witness TEN-10 the Cabinet Meetings were held usually from 8:00 a.m. to 2:00 p.m. or beyond.<sup>59</sup> The Applicant has failed to show that he participated in the said Cabinet Meeting/Press Conference from the beginning and that he could not have participated in the attack in Muyira and in the meeting in Kucyapa, and join the Cabinet Meeting/Press Conference at a later stage

23. The Appeals Chamber finds that the Applicant has failed to establish that video footage KV00-0030 relating to the Cabinet Meeting/Press Conference allegedly held on 13 May 1994 could have been a decisive factor in reaching the original decision.

4. Fourth alleged "new fact": Affidavit of a potential Defence Witness TEN-3 in the Applicant's trial

24. The Applicant produces an affidavit signed on 13 August 2005 by the potential Defence Witness TEN-3 as proof that, on 20 May 1994, he was on a mission in Gisenyi and Goma and thus cannot be the person who, according to Prosecution Witness DAF, raped and murdered a girl on that day in Bisesero, 150 kilometers away.<sup>60</sup> The Applicant claims that Prosecution Witness DAF gave false testimony within the meaning of Rule 91 of the Rules.<sup>61</sup> The Applicant submits that it was intended that the author of the affidavit would be a Defence witness TEN-3 at trial but could not appear,<sup>62</sup> and that this affidavit was not available at the time in spite of due diligence.<sup>63</sup> The Applicant asserts that the affidavit constitutes a "new fact",<sup>64</sup> and, in any case, a "decisive factor" affecting the Trial and the Appeals Chambers'

<sup>55</sup> Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 59-60, 70.

<sup>56</sup> Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 68, 71.

<sup>57</sup> Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 68 (b), 69.

<sup>58</sup> Trial Judgement, para. 178.

<sup>59</sup> Trial Judgement, para. 80.

<sup>60</sup> Applicant's Request for Admission of New Evidence, paras. 6, 8, 15; Applicant's Additional Submissions, paras. 249-254, 269; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 4.

<sup>61</sup> Applicant's Request for Admission of New Evidence, para. 20.

<sup>62</sup> Applicant's Request for Admission of New Evidence, para. 9. Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 28; Applicant's Additional Submissions, para. 269.

<sup>63</sup> Applicant's Request for Admission of New Evidence, para. 4; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 4.

<sup>64</sup> Applicant's Additional Brief to request for Review.

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findings on the credibility of Prosecution Witness DAF and his testimony,<sup>65</sup> as well as the Trial Chamber's finding on the murder of the girl on 20 May 1994.<sup>66</sup> The Prosecution responds that the affidavit is not reliable,<sup>67</sup> that its author is not credible,<sup>68</sup> and that the Applicant failed to exercise due diligence to have Witness TEN-3 testify as a *viva voce* witness during trial.<sup>69</sup> The Prosecution concludes that the affidavit is not a "new fact"<sup>70</sup> and that it could not have been a decisive factor in reaching the original decision.<sup>71</sup>

(a) Whether the affidavit of the potential Defence Witness TEN-3 in the Applicant's trial constitutes a "new fact"

25. The Appeals Chamber finds that the affidavit constitutes information of an evidentiary nature, relating to the Applicant's alibi of having been on mission in Goma and Gisenyi on 20 May 1994 as well as to the credibility of Prosecution Witness DAF. The Appeals Chamber is of the view that although the affidavit is "new" material, having been signed on 13 August 2005, the Applicant's alibi of being on mission in Goma and Gisenyi on 20 May 1994, which it seeks to corroborate, is not new, having already been considered during the original proceedings. Equally the issue of the credibility of Witness DAF has been examined at trial and on appeal.<sup>72</sup> The Appeals Chamber notes that the Applicant himself acknowledges that the affidavit is not a "new fact", but rather additional evidence of his alibi, which had already been considered in the light of the testimonies of Witnesses TEN-9 and TEN-10.<sup>73</sup> While the Appeals Chamber is not obliged to examine it further it will nonetheless consider whether, assuming the affidavit of the potential Defence Witness TEN-3 in the Applicant's trial could be characterized as a "new fact", it could have been a decisive factor in reaching the original decision.

(b) Whether the affidavit of the potential Defence Witness TEN-3 in the Applicant's trial could have been a decisive factor in reaching the original decision

26. Even assuming that the alleged mission of the Applicant and of the potential Witness TEN-3 to Goma and Gisenyi lasted from 19 to 20 May in the afternoon, or even to 21 May 1994, it has not been established that the Applicant remained at all times with the

<sup>65</sup> Applicant's Request for Admission of New Evidence, para. 4; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 4.

<sup>66</sup> Applicant's Additional Submissions, paras. 249-262, 269. For the findings see Trial Judgement, paras. 298, 301; Appeal Judgement, paras. 167-171.

<sup>67</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 5-11.

<sup>68</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 12-13.

<sup>69</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 23-27.

<sup>70</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 14.

<sup>71</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 28-31.

<sup>72</sup> Trial Judgement, paras. 162-168, 293; Appeal Judgement, paras. 164-172.

<sup>73</sup> Trial Judgement, paras. 292-302; Appeal Judgement, paras. 164-172.

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potential witness and could not have travelled to Bisesero without the latter's knowledge before returning to Gisenyi. Likewise, Dr. Zilimwabagabo's testimony, which the Applicant recalls in this connection, that a reception was held to mark an agreement with SHABAIR on a day which he no longer recalls "around 10 a.m." at *Hôtel Izuba* in the presence of the Applicant<sup>74</sup> who, moreover, has never mentioned the said reception, is not sufficient to establish that the said reception was held on 20 May 1994, nor does it rule out the possibility that the Applicant could have travelled to Bisesero after the reception. Furthermore, the receipt from the *Hôtel Méridien Izuba* in Gisenyi for the period from 15 May to 1 June 1994, does not show that the Applicant actually stayed at the hotel on 20 May 1994 and did not leave it at any point on that day.<sup>75</sup>

27. The indication at point 7 of the affidavit that potential Witness TEN-3 returned to Gisenyi with the Applicant in the *afternoon* of 20 May 1994,<sup>76</sup> and the statement at point 9 of the same affidavit that the mission to Gisenyi and Goma lasted from 19 May until 8 *a.m.* on 20 May, constitutes an inherent contradiction which undermines the credibility of its author (potential witness TEN-3),<sup>77</sup> as well as the probative value of the affidavit itself. The Applicant's explanation that there is a typographic mistake at point 9, and that it should read "from 19 until the morning of 2[1] May"<sup>78</sup> is not only unpersuasive, but also reinforces Witness DAF's credibility, as it contradicts Defence Witness TEN-10's testimony that the mission lasted from 10 to 20 May 1994.<sup>79</sup> Moreover, what is at issue is not when the Applicant allegedly returned from mission, but rather his schedule on 20 May 1994. Accordingly, it is irrelevant for the Applicant to argue that point 8 of the affidavit cures the contradiction between points 7 and 9 thereof,<sup>80</sup> as point 8 only indicates that the Applicant returned on 21 May, but contains no details as to his schedule on 20 May 1994.

28. The Appeals Chamber concludes that the Applicant has failed to demonstrate that the contents of the affidavit of the potential Defence Witness TEN-3 in his trial relating to the events of 20 May 1994 could have been a decisive factor in reaching the original decision.

<sup>74</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, see Annexe 1; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 20; Applicant's Additional Submissions, para. 272.

<sup>75</sup> Applicant's Request for Admission of New Evidence, para. 8; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, paras. 32-33; Prosecution's Response to Applicant's Request for Admission of New Evidence, para. 25, fn. 24.

<sup>76</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, para. 7.

<sup>77</sup> Prosecution's Response to Applicant's Request for Admission of New Evidence, para. 12; Applicant's Additional Submissions, para. 275; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, paras. 6-8.

<sup>78</sup> Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 9.

<sup>79</sup> Trial Judgement, para. 299; Applicant's Request for Admission of New Evidence, paras. 5, 20; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 35.

<sup>80</sup> Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 9.

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5. Fifth alleged "new fact": Transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994

29. The Applicant relies on the transcripts of cassettes AV/1040 and AV/1053 of the radio broadcast *comptes-rendus* of the Cabinet meetings of 10 and 17 June 1994 to prove his presence in Murambi that day. He claims that he gave an account of the meetings on radio on 11 and 18 June 1994,<sup>81</sup> and thus he could not have been with the *Interahamwe* and *bourgmestres* in Kibuye, 200 kilometers away, planning an attack against the Tutsi refugees at Bisesero as testified by Prosecution Witness GGV.<sup>82</sup> The Applicant contends that the said transcripts not only discredit Prosecution Witness GGV and his testimony, which is false,<sup>83</sup> but tend to corroborate the testimony of Defence Witness TEN-10. The Applicant submits that the transcripts constitute a "new fact" within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules.<sup>84</sup> Alternatively, he requests the Appeals Chamber to consider them as a "decisive factor" of such import that they warrant the review of the findings on the credibility of Prosecution Witness GGV and the Applicant's activities of 10 and 17 June 1994<sup>85</sup> in order to prevent a miscarriage of justice.<sup>86</sup> The Prosecution responds that the transcripts do not represent a "new fact", but evidence of a fact already in issue during the proceedings, not capable of being a decisive factor in the original decision.<sup>87</sup>

(a) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994 constitute a "new fact"

30. The Appeals Chamber is of the opinion that the transcripts constitute information of an evidentiary nature, relating to the Applicant's alibi of participation in the Cabinet Meetings of 10 and 17 June 1994 and, consequently, the credibility of Witness GGV. However, having been raised as such during the proceedings,<sup>88</sup> the Applicant's alibi based on his attendance at the Cabinet Meetings of 10 and 17 June 1994, in support of which the transcripts are introduced, is not a "new fact" within the meaning of Rule 120. Likewise, the contention that Prosecution Witness GGV's evidence was not credible is also not new as it was examined on

<sup>81</sup> Applicant's Additional Submissions, paras. 141-142, 193-195.

<sup>82</sup> Applicant's Request for Review, paras. 22-28.

<sup>83</sup> Applicant's Reply to Prosecution's Response to Request for Review, paras. 23, 27; Applicant's Additional Submissions, paras. 219-228, 231-236; Applicant's Request for Admission of New Evidence, para. 20; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 16.

<sup>84</sup> Applicant's Request for Review, para. 8; Applicant's Reply to Prosecution's Response to Request for Review, para. 3. Applicant's Additional Submissions, paras. 141-142.

<sup>85</sup> Applicant's Additional Submissions, paras. 213-228 (referring to Trial Judgement, paras. 213, 221, 225; Appeal Judgement, para. 156).

<sup>86</sup> Applicant's Additional Submissions, paras. 121-131

<sup>87</sup> Prosecutor's Response to Applicant's Request for Review, paras. 30-31; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 30, 42.

<sup>88</sup> See Trial Judgement, paras. 214, 222-224.

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appeal<sup>89</sup> and pleaded to some extent before the Trial Chamber.<sup>90</sup> While the Appeals Chamber is not obliged to examine them further it will nonetheless consider whether, assuming the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994 could be characterized as a “new fact”, they could have been a decisive factor in reaching the original decision.

(b) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994 could have been a decisive factor in reaching the original decision

31. The transcripts of the radio broadcasts of 11 and 18 June 1994 reporting on Cabinet Meetings respectively held on 10 and 17 June 1994 do not prove that the Applicant effectively participated in the said meetings,<sup>91</sup> held a day preceding each radio broadcast. Accordingly, even assuming that Cabinet Meetings were held on 10 and 17 June 1994 in Muramba, and that the Applicant gave an account thereof on the radio, the transcripts do not prove that the Applicant physically participated in the cabinet meetings<sup>92</sup> or that if he was a participant, that he was present throughout the day. Furthermore, the transcripts of the radio broadcast of the *compte rendu* of the cabinet meeting held on 17 June 1994, indicating that the said meeting lasted from 9 a.m. or 10 a.m. until 5 p.m. or 6 p.m.,<sup>93</sup> discredit the testimony of Defence Witness TEN-10 that the meeting lasted from 10 a.m. or 11 a.m. to 5 p.m. or 7 p.m., thereby confirming the Trial Chamber’s finding that the Witness is not credible.<sup>94</sup>

32. The Appeals Chamber finds that the Applicant has failed to establish that the contents of the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings held on 10 and 17 June 1994 could have been a decisive factor in reaching the original decision.

6. Sixth alleged “new fact”: The agenda of the Cabinet Meeting of 22 June 1994, the testimonies of Witness PP in the *Kayishema/Ruzindana* case and the testimonies of Witnesses BE, BH, BB and AT in the *Muhimana* case

33. The Applicant states that, at 09:00 a.m. on 22 June 1994, he participated in a Cabinet Meeting in Muramba (Gisenyi).<sup>95</sup> Consequently, he could not have been at the scene of the murder, decapitation and emasculation of Assiel Kabanda, executed on the same day, in a

<sup>89</sup> Appeal Judgement, paras. 146–157.

<sup>90</sup> Trial Judgement, paras. 214, 222–224; Prosecutor’s Response to Applicant’s Request for Review, para. 28.

<sup>91</sup> Prosecutor’s Response, with Confidential Appendices, to Applicant’s Additional Submissions, paras. 28, 40.

<sup>92</sup> Prosecutor’s Response, with Confidential Appendices, to Applicant’s Additional Submissions, paras. 28 and 40.

<sup>93</sup> Applicant’s Additional Submissions, para. 142.

<sup>94</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 214.

<sup>95</sup> Applicant’s Additional Submissions, paras. 246, 248.



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location 240 kilometers away from Muramba, contrary to the testimony of Prosecution Witness GGO.<sup>96</sup> The Applicant further claims that Witness PP in the *Kayishema and Ruzindana* case, as well as Witnesses BE, BB, BH and AT in the *Muhimana* case, did not testify that he was among those involved in the killing.<sup>97</sup> Thirdly, the Applicant notes that the witnesses in the *Muhimana* case gave a description of the location of the murder contradictory to that given by Prosecution Witness GGO.<sup>98</sup> The Applicant argues that the agenda of the Cabinet Meeting of 22 June 1994, as well as the testimonies of the various witnesses, not only affect the credibility of the Prosecution Witness GGO,<sup>99</sup> but also corroborate the credibility of Defence Witness TEN-10.<sup>100</sup> The Applicant claims that Prosecution Witness GGO gave false testimony within the meaning of Rule 91 of the Rules.<sup>101</sup> The Applicant submits that the agenda and the various testimonies of witnesses amount to a "new fact" under Article 25 of the Statute and Rule 120 of the Rules. Alternatively, the Appellant submits that the Appeals Chamber may admit them as "decisive factors" warranting review of the Chambers' findings on the credibility of Witness GGO and the murder of Kabanda on 22 June 1994, in order to avoid a miscarriage of justice.<sup>102</sup> The Prosecution responds that the testimonies of Prosecution witnesses are not a "new fact" but evidence of a fact known at trial,<sup>103</sup> that the said testimonies do not suggest the innocence or mitigate the guilt of the Applicant, or affect the credibility of Prosecution Witness GGO,<sup>104</sup> and that they could not have been a decisive factor in reaching the original decision.<sup>105</sup>

(a) Whether the agenda of the Cabinet Meeting of 22 June 1994 and the testimony of Witness PP in *Kayishema/Ruzindana* case and the testimony of Witnesses BE, BH, BB and AT in the *Muhimana* case constitutes a "new fact"

34. Regarding the alibi of the Applicant's participation in the Cabinet Meeting of 22 June 1994, and the credibility of Prosecution Witness GGO, the Appeals Chamber is of the view that the agenda of the said meeting constitutes information of an evidentiary nature. However, the Applicant's attendance at the Cabinet Meeting of 22 June 1994, which the

<sup>96</sup> Applicant's Additional Brief to request for Review, paras. 2-4; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, paras. 7-9; Applicant's Additional Submissions, paras. 241, 248. For a summary of the testimony see Trial Judgement, paras. 303-304.

<sup>97</sup> Applicant's Additional Brief to request for Review, para. 13(c); Applicant's Additional Submissions, para. 242.

<sup>98</sup> Applicant's Additional Brief to request for Review, paras. 2, 8-12, 13(a), 15; Applicant's Additional Submissions, para. 243.

<sup>99</sup> Applicant's Additional Brief to request for Review, paras. 1, 14; Applicant's Additional Submissions, para. 241.

<sup>100</sup> Applicant's Additional Submissions, paras. 245, 246, 248.

<sup>101</sup> Applicant's Additional Brief to request for Review, para. 13(d); Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 9; Applicant's Request for Admission of New Evidence, para. 20.

<sup>102</sup> Applicant's Additional Submissions, paras. 121, 129-130, 246-248.

<sup>103</sup> Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 8-9, 14, 18-20.

<sup>104</sup> Prosecutor's Response to Applicant's Additional Brief to Request for Review, para. 28.

<sup>105</sup> Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 21-22, 29-30.



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agenda seeks to establish, is not a "new fact", since it had been raised during the original proceedings.<sup>106</sup> Similarly, the credibility of Prosecution Witness GGO, which the agenda is argued to impugn, was dealt with during the original proceedings and on appeal.<sup>107</sup>

35. While the testimony of Witness PP in the *Kayishema and Ruzindana* case could be seen as information of an evidentiary nature, the fact that the Applicant was not named as being among the persons present at the scene of the crime, which the testimony seeks to corroborate, does not raise a new issue, having been specifically considered during the proceedings.<sup>108</sup> The testimonies of Prosecution Witnesses BE, BH, BB and AT in the *Muhimana* case, which seek to corroborate this argument and which might be considered as information of an evidentiary nature,<sup>109</sup> fail to meet the requirements of Rule 120 for the same reason.

36. Accordingly, the Appeals Chamber concludes that there is no merit in the Applicant's argument that both the agenda of the Cabinet Meeting of 22 June 1994 and the testimonies of witnesses in other cases constitute a "new fact".<sup>110</sup> While the Appeals Chamber is not obliged to examine them further it will nonetheless consider whether, assuming the agenda of the Cabinet Meeting of 22 June 1994 and the testimonies of witnesses in other cases could be characterized as a "new fact", they could have been a decisive factor in reaching the original decision.

**(b) Whether the agenda of the Cabinet Meeting of 22 June 1994 and the testimony of Witness PP in the *Kayishema/Ruzindana* case and the testimony of Witnesses BE, BH, BB and AT in the *Muhimana* case could have been a decisive factor in reaching the original decision**

37. Regarding the Applicant's attendance at the Cabinet Meeting of 22 June 1994, the entry "MININFOR" at point 4 of the agenda of the said meeting, which according to the Applicant, refers to the "Minister of Information"<sup>111</sup> is not unequivocal. The said entry in the agenda does not rule out the possibility that the Minister of Information may have sent a representative, or that the schedule of the meeting may have been subsequently amended to enable him to address the meeting earlier so that he could leave or that he did not attend the meeting at all. Even if considered to be of impeccable provenance, the agenda is not proof of anything other than the fact that a meeting was scheduled, but not that it actually took place with all anticipated participants present at all or throughout the meeting.

<sup>106</sup> Trial Judgement, para. 308.

<sup>107</sup> Appeal Judgement, paras. 93-96, 175, 182; Trial Judgement, para. 310.

<sup>108</sup> Trial Judgement, para. 309; Appeal Judgement, para. 180.

<sup>109</sup> Trial Judgement, para. 309; Appeal Judgement, para. 180.

<sup>110</sup> Applicant's Reply to Prosecution's Response to Request for Review, para. 3.

<sup>111</sup> Applicant's Additional Brief to request for Review, paras. 4-5.

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38. With regard to the issue of the Applicant's presence at the scene of Mr. Kabanda's murder, the Appeals Chamber has already ruled that the fact that Witness DAF, testifying in *Kayishema/Ruzindana* as Witness PP, did not specifically name the Applicant as being present at the scene of the murder<sup>112</sup> does not mean necessarily that he was absent.<sup>113</sup> The Applicant offers no reason why anything more should be inferred from the fact that Witnesses BE, BH, BB and AT in the *Muhimana* case did not say that he was present.

39. The letter convening the meeting of 22 June 1994, which was a Wednesday, cannot reinforce Defence Witness TEN-10's testimony that such meetings were usually held on Fridays.<sup>114</sup>

40. The Appeals Chamber finds that the Applicant has failed to show that the agenda of the Cabinet Meeting of 22 June 1994 and the testimony of Witness PP in the *Kayishema/Ruzindana* case and the testimony of Witnesses BE, BH, BB and AT in the *Muhimana* case could have been a decisive factor in reaching the original decision.

7. Supplementary arguments concerning other facts

41. In the Additional Submissions, the Applicant's Counsel makes arguments concerning facts outside the scope of the Applicant's three original requests for review and the mandate given to her in the Appeals Chamber's Decisions of 20 June 2005 and 28 September 2005. One of these arguments relates, in particular, to the integrity of a certain Prosecution Counsel involved in the trial, the merit of which is addressed further down.<sup>115</sup> Defence Counsel also contests the findings of the Appeals Chambers on his participation in the attack on the Muyira Hill between 17 and 30 April 1994, as well as his participation in the meeting held on 3 May 1994 in the office of Kibuye Préfecture.<sup>116</sup>

42. The Appeals Chamber notes that the opportunity granted to the Defence to file Additional Submissions was limited to those alleged "new facts" raised by the Applicant in his requests filed *pro se* on 27 October 2004,<sup>117</sup> 7 February 2005,<sup>118</sup> and 17 August 2005.<sup>119</sup> Accordingly, any other alleged "new fact" invoked for the first time in the Additional Submissions exceeds the scope of the additional submissions as permitted in the Appeals Chamber's Decisions of 20 June and 28 September 2005. As explained above, the Appeals

<sup>112</sup> Appeal Judgement, para. 94.

<sup>113</sup> Appeal Judgement, para. 180.

<sup>114</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 65.

<sup>115</sup> See *infra* paras. 72-75.

<sup>116</sup> Applicant's Additional Submissions, paras. 280, 343-345.

<sup>117</sup> Applicant's Request for Review.

<sup>118</sup> Applicant's Additional Brief to request for Review.

<sup>119</sup> Applicant's Request for Admission of New Evidence.

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Chamber has exceptionally considered the alleged new facts raised by transcripts AV/908 and RSFO112 and video footage KV-00-0030-0043. However, the Appeals Chamber recalls that review proceedings may not be used to re-litigate issues considered in the original proceedings and declines to address on review matters that are outside the alleged "new facts" raised by the Applicant and in respect of which the Applicant or his Counsel did not bring any new evidentiary information.

## **II. THE REQUEST FOR APPLICATION OF RULES 89 (C) AND 115 OF THE RULES AS ALTERNATIVE TO ARTICLE 25 AND RULES 120 AND**

### **121**

43. The Applicant suggests that Rules 89 (C) and 115 of the Rules can apply as alternatives to the provisions of Article 25 and Rules 120 and 121 governing the review proceedings.

#### **A. Application of Rule 89 (C) instead of Article 25 and Rule 120**

44. The Applicant requests the Appeals Chamber to issue an order admitting into evidence the materials submitted in support of his application,<sup>120</sup> pursuant Rule 89 (C) according to which "A Chamber may admit any relevant evidence which it deems to have probative value."

45. The Appeals Chamber considers that the general provision of Rule 89 (C) governing admission of evidence cannot supersede the *lex specialis* of Article 25 of the Statute and Rule 120 of the Rules in respect of review proceedings, for which the Statute and the Rules have set a different and more restrictive standard. It thus does not apply in this case.

#### **B. Application of Rule 115 instead of Article 25 and Rule 120**

46. In his submissions, the Applicant also referred to the provisions of Rule 115 of the Rules on the admission of additional evidence. Rule 115 of the Rules reads as follows:

- (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.
- (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.
- (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

<sup>120</sup> Applicant's Additional Submissions, paras. 31, 360(4); Applicant's Reply to Prosecution's Response to Additional Submissions, para. 117(6).

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47. The Appeals Chamber notes that there is a fundamental distinction between the admission of additional evidence on appeal and a review based on a "new fact".<sup>121</sup> Rule 115 provides for the admission of additional evidence in appellate proceedings only, and is related to Article 24 of the Statute. Rule 120, on the other hand, pertains to review proceedings under Article 25 of the Statute and constitutes an "exceptional" procedure; it does not represent a second appeal.<sup>122</sup> Further, there is a distinction in the nature of the additional material which may be considered under Rule 115 and that which may be considered during a review proceeding.<sup>123</sup> While Rule 115 accepts any relevant and credible additional evidence of an issue which has already been considered at trial,<sup>124</sup> Article 25 and Rule 120 require a "new fact", defined as "*new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings*".<sup>125</sup> As noted above, the Appeals Chamber will only permit review on the basis of new evidence of a fact known at trial under exceptional circumstances.

48. The Appeals Chamber holds that it is incorrect for parties to rely on the provisions of Rule 115 for the purpose of review instead of relying on Article 25 of the Statute and Rule 120 of the Rules.

### **III. ALLEGED RULE 68 VIOLATIONS AND RELATED MATERIAL PREJUDICE**

49. In an argument closely related to his submissions on the alleged "new facts", the Applicant further alleges that the Prosecution failed to disclose exculpatory evidence to the Defence, violating Rule 68 of the Rules and the Professional Code of Conduct to his prejudice within the meaning of Rule 5 of the Rules.<sup>126</sup>

#### **A. Applicable Law**

50. The relevant provisions are Rule 68 (A), (B), (D) and (E) read as follows:

Rule 68: Disclosure of Exculpatory Evidence (as amended in April 2004)

(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

<sup>121</sup> *Delić*, Decision on Motion for Review, para. 9.

<sup>122</sup> Review is frequently described as an "exceptional" procedure: *Tadić*, Decision on Motion for Review, para. 24.

<sup>123</sup> *Delić*, Decision on Motion for Review, para. 11.

<sup>124</sup> *Delić*, Decision on Motion for Review, paras. 11, 13.

<sup>125</sup> *Tadić*, Decision on Motion for Review, para. 25; *Josipović*, Decision on Motion for Review, paras. 18-19.

<sup>126</sup> Applicant's Request for Review, para. 30; Applicant's Reply to Prosecution's Response to Request for Review, para. 28; Applicant's Additional Submissions, para. 99.

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(B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.

(D) The Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

51. However, the Prosecution may be relieved of the obligations under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation.<sup>127</sup>

52. Once the Defence has satisfied a Chamber that the Prosecution failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any), must examine whether the Defence has been materially prejudiced by the breach of Rule 68.<sup>128</sup>

### **B. Submissions of the Parties and Discussion**

53. The Applicant submits that despite various orders of the Trial Chamber directing the Prosecution to disclose exculpatory materials pursuant to Rule 68, the Prosecution, notwithstanding its undertaking to comply,<sup>129</sup> withheld the transcripts of cassettes AV/906, AV/907, AV/908; purported to disclose the transcripts of cassettes RSFO122, AV/917, AV/1040, AV/1053 and video tape KV-0030-0043, but did so only partially;<sup>130</sup> and failed to disclose the testimonies of Prosecution Witnesses BE, BB, BH and AT in the *Muhimana* case. The Applicant contends that these failures<sup>131</sup> deprived him of exculpatory material supporting his alibis for 10 and 16 April, 13 May, 10, 17 and 22 June 1994, to his prejudice within the meaning of Rule 5 of the Rules.<sup>132</sup> According to the Applicant, the Prosecution violated the Prosecutor's Regulation No. 2 (1999).<sup>133</sup> The Prosecution responds that failure to disclose the transcripts of cassettes AV/906, AV/907, AV/908 was not wilful,<sup>134</sup> and that other similar

<sup>127</sup> Kordić, Decision on Appellant's Notice and Supplemental Notice, para. 20; Blaskić, Decision on the Appellant's Motions for the Production of Material, para. 38; see also Niyitegeka, Appeal's Chamber Decision of 28 September 2005, p. 8.

<sup>128</sup> Orić, Decision on Defence Motion on Non-Compliance with Rule 68, p. 4; see also Orić, Decision on Complaints About Non-Compliance with Rule 68 of the Rules, para. 24; Krstić, Appeal Judgement, para. 153.

<sup>129</sup> Applicant's Request for Review, para. 10.

<sup>130</sup> Applicant's Additional Submissions, paras. 106-20, 133-142; Prosecutor's Response to Applicant's Request for Review, paras. 2, 26, see also Annex 1, Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 16, 24, 32, 46, 50.

<sup>131</sup> Applicant's Additional Submissions, paras. 1, 3-4, 69, 346-358, 360.

<sup>132</sup> Applicant's Request for Review, paras. 16, 21, 30, 33; Applicant's Reply to Prosecution's Response to Request for Review, paras. 10, 28; Applicant's Additional Submissions, para. 99.

<sup>133</sup> Applicant's Reply to Prosecution's Response to Request for Review, paras. 6-7, 17, 19, 25, 28; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, paras. 1, 14-15.

<sup>134</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 11, 44.

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material, bearing upon the same alleged facts, was disclosed.<sup>135</sup> The Prosecution further submits that the transcripts of the other cassettes were disclosed to the Defence,<sup>136</sup> albeit in different versions or languages (Kinyarwanda), that there was no obligation under Rule 68 to communicate the testimonies of Prosecution witnesses in the *Muhimana* case to the Applicant, and that the Applicant did not suffer prejudice,<sup>137</sup> as none of the testimonies would have been a "decisive factor".<sup>138</sup> According to the Prosecution, the Applicant failed to demonstrate that the Prosecution did not adhere to the standard of professional conduct set out in the Prosecutor's Regulation No. 2 (1999).<sup>139</sup>

54. The Appeals Chamber will now examine the alleged violations of Rule 68.

1. Transcripts of cassettes AV/906, AV/907, AV/908 and RSFO122 relating to the Applicant's alibi for 10 April 1994

55. With regard to cassettes AV/906, AV/907 and AV/908, the Appeals Chamber finds that the Prosecution failed to fulfil its obligations under Rule 68(C) by its failure to make appropriate disclosure to the Applicant of material that was in its custody.<sup>140</sup> The Prosecution's argument that, as the Applicant possessed information regarding the meeting and its radio broadcast as indicated by the cross-examination of Witness GGH,<sup>141</sup> and there is no indication that the Defence prompted a search of Prosecution database, cannot excuse the Prosecution's breach of a fundamental obligation owed to the Applicant under the Rules.

56. The Applicant's allegation that the Prosecution made a tactical decision not to disclose the transcripts<sup>142</sup> is, however, unsubstantiated. It has also not been established that the Prosecution acted in bad faith in spite of the Trial Chamber's Decisions of 4 February 2000 and 27 February 2001, and the assurance given by the Prosecution itself to disclose any exculpatory evidence that came into its possession.<sup>143</sup> Accordingly, the Applicant's claim that the Prosecution violated paragraph 2 (a), (d) and (h) of the Prosecutor's Regulation No. 2 as well as general standards of professional conduct,<sup>144</sup> lacks foundation. The allegation by the

<sup>135</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 2, 6, 14.

<sup>136</sup> Prosecutor's Response to Applicant's Request for Review, paras. 2, 26-27, 34.

<sup>137</sup> Prosecutor's Response to Applicant's Request for Review, paras. 2, 6, 8, 24; Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 21; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 14.

<sup>138</sup> Prosecutor's Response to Applicant's Request for Review, paras. 14, 24, 30-31; Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 29, 30.

<sup>139</sup> Prosecutor's Response to Applicant's Additional Brief to Request for Review, para. 30.

<sup>140</sup> See Prosecutor's Response to Applicant's Request for Review, paras. 2, 6-7; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 11, 12, 43-44.

<sup>141</sup> Prosecutor's Response to Applicant's Request for Review, paras. 2, 7, 10, 12.

<sup>142</sup> Applicant's Reply to Prosecution's Response to Request for Review, para. 19.

<sup>143</sup> Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 11.

<sup>144</sup> Applicant's Reply to Prosecution's Response to Request for Review, paras. 5-8, 17, 23, 25, 28.

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Applicant of a conspiracy to fabricate evidence against him<sup>145</sup> is similarly lacking in substantiation and merits no further consideration.

57. The Appeals Chamber recalls its finding above that the finding during the original proceedings of transport of guns by the Applicant on 10 April 1994, which the transcripts of cassettes AV/906, AV/907 and AV/908 are meant to contest, was not critical to his conviction for any crime.<sup>146</sup> Therefore the said transcripts would have been disclosed during the original proceedings and they would not have affected the convictions.

58. In light of the foregoing, the Appeals Chamber finds that the Applicant has failed to show that the non-disclosure of the transcripts of cassettes AV/906, AV/907 and AV/908 caused him material prejudice.

59. Regarding the transcripts of cassette RSFO122, the Appeals Chamber finds the Applicant's allegation of non-disclosure<sup>147</sup> to lack foundation as the record shows that the transcripts were disclosed to him,<sup>148</sup> and that he also referred to them in his notices of alibi dated 25 September and 18 October 2002,<sup>149</sup> despite their being in Kinyarwanda.<sup>150</sup> The Appeals Chamber, therefore, does not find that non-compliance with the Rules has been established.

## 2. Transcripts of cassette AV/917 relating to the Applicant's alibi for 16 April 1994

60. On the basis of the record before it, the Appeals Chamber considers that an 11-page translation of the transcripts of cassette AV/917 was disclosed to the Applicant on 19 April 2000,<sup>151</sup> before the Applicant's key alibi witness testified. The Appeals Chamber notes that the same document was requested again by the Defence on 18 September 2002, and disclosed again on 25 October 2002.<sup>152</sup>

61. The Appeals Chamber finds that the Prosecution disclosed only the 11-page version of the translation and that it failed to disclose the full 29-page version of the transcripts, in its possession since, at the latest, 20 August 2001.<sup>153</sup> The Appeals Chamber notes the

<sup>145</sup> Applicant's Additional Submissions, paras. 77-79. See also Appeal Judgement, para. 252.

<sup>146</sup> See *supra* para. 13.

<sup>147</sup> Applicant's Additional Submissions, para. 137.

<sup>148</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 46.

<sup>149</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 46.

<sup>150</sup> Applicant's Additional Submissions, para. 138; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 45.

<sup>151</sup> Prosecutor's Response to Applicant's Request for Review, Annex I, Exhibits A, B and C; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 21-22, Appendix 8.

<sup>152</sup> Prosecutor's Response to Applicant's Request for Review, Annex 1, "Exhibits A, B, C"; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, Appendices 9-10.

<sup>153</sup> Applicant's Additional Submissions, para. 140; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 18.

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Prosecution's contention that, although the 29-page version may have been physically available at that time, it was not properly recorded in its database until 5 February 2004 and therefore could not have been discovered by an electronic search during the trial. The Appeals Chamber recalls that Rule 68 (B) requires the Prosecution to make available to the Appellant, "in electronic form, collections of relevant material held by the Prosecution, together with appropriate computer software with which the Defence can search such collections electronically" and as such the Prosecution cannot rely upon its failure to diligently update electronic records. Similarly, the Prosecution cannot prevail on its argument that the 11-page version of the transcripts disclosed to the Applicant is substantially the same as the 29-page version<sup>154</sup>

62. In considering Rule 5, however, the Applicant does not satisfy the Appeals Chamber that material prejudice was caused by the failure to disclose the 29-page version of the transcript of cassette AV/917. The Applicant has not demonstrated that the difference in content between the shorter and longer versions was such that having possession of the longer one would have made a material difference in the preparation of his case.

63. In light of the foregoing, the Appeals Chamber finds that the Applicant has failed to show that this Rule 68 violation caused him material prejudice.

3. Video footage KV-00-0030 relating to the Applicant's alibi for 13 May 1994

64. The Appeals Chamber notes that the material portion of the video tape relating to the Applicant's alibi for 13 May 1994 was disclosed to the Applicant as KV00-0030 and KV00-0030B.<sup>155</sup> The Appeals Chamber observes that the Applicant had requested the disclosure of a cassette identified as KV00-0030-0043. The Appeals Chamber notes that the Applicant invoked the said video tape in his notices of alibi dated 16 June, 25 September and 18 October 2002<sup>156</sup> and, therefore, the argument that it was not disclosed to him is not convincing. Given the similarity of names and content, and the prior notice provided by the Prosecution of when the relevant video would be disclosed, the Appeals Chamber finds unsustainable the Applicant's argument that neither he nor his Defence team would have recognised KV00-0030 and KV00-0030B to be the requested disclosure material. The Appeals Chamber considers that the Prosecution could have, as a matter of courtesy, alerted the Defence that the video footage disclosed under the names KV00-0030 and KV00-0030B is the

<sup>154</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 19.

<sup>155</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 50, Appendices 15, 16.

<sup>156</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 50, Appendices 4, 5, 6.



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relevant portion of the cassette requested as KV00-0030 0043. However, the Applicant's arguments that the Prosecution must have drawn his attention to the fact that the numbering and format of the video tape was different<sup>157</sup> or must have provided more specific guidance as to the importance of the said tape<sup>158</sup> is without merit, as there is no *prima facie* obligation for the Prosecution to identify the material being disclosed as potentially exculpatory.<sup>159</sup>

65. The Appeals Chamber concludes that the Applicant has failed to demonstrate a violation of Rule 68 of the Rules in this respect.

4. Transcripts of cassettes AV/1040 and AV/1053 of 11 and 18 June 1994 relating to the Applicant's alibi for 10 and 17 June 1994

66. Based on the submissions, the Appeals Chamber considers that Kinyarwanda transcripts of cassettes AV/1040 and AV/1053 were disclosed to the Applicant by 28 October 2002, before the Applicant's key alibi witness testified.<sup>160</sup>

67. The Appeals Chamber considers that, as the Applicant mentioned the transcripts of cassette AV/1040 in the notice of alibi dated 16 June 2002, and the transcripts of cassette AV/1053 in the notices of alibi dated 25 September, 16 June and 18 October 2002,<sup>161</sup> he must have been aware of their contents before they were disclosed to him by the Prosecution. Therefore, the Applicant's claim that cassette AV/1040 was blank<sup>162</sup> when it was first disclosed to him does not establish that he suffered material prejudice. Further, the Applicant's assertion that he received the transcripts of cassettes AV/1040 and AV/1053 only on 9 October 2004 thanks to another accused person to whom the cassettes had been disclosed, is also unpersuasive.<sup>163</sup>

68. The Appeals Chamber considers that even though the Applicant speaks Kinyarwanda as his mother tongue, and had chosen to rely on Kinyarwanda versions of transcripts in his notice of alibi,<sup>164</sup> the Prosecution is not justified in failing to disclose a translation in one of the official languages of the Tribunal as soon as it is available.<sup>165</sup> The Appeals Chamber notes, however, that the Applicant has not indicated that failure to supply a translation was an

<sup>157</sup> Applicant's Reply to Prosecution's Response to Additional Submissions, para. 72.

<sup>158</sup> Applicant's Reply to Prosecution's Response to Additional Submissions, para. 73.

<sup>159</sup> *Krstić*, Appeal Judgement, paras. 190-193.

<sup>160</sup> Prosecutor's Response to Applicant's Request for Review, paras. 26-27, 34; Annex I, Exhibits B and C; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 24-25, 32, 36.

<sup>161</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 26, 34-35.

<sup>162</sup> Applicant's Additional Submissions, para. 115; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 31.

<sup>163</sup> See Applicant's Reply to Prosecution's Response to Request for Review, para. 18.

<sup>164</sup> Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 29, 33.

<sup>165</sup> Pursuant to Rule 3 of the Rules, the working languages of the Tribunal shall be English and French.

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obstacle to making use of the transcripts. The fact that the transcripts were relied upon in the Notices of Alibi suggests that the Applicant and his defence team surmounted the difficulties of language and accordingly suffered no prejudice.

69. In light of the foregoing, the Appeals Chamber finds that the Applicant has failed to show that this Rule 68 violation caused him material prejudice.

5. Testimonies of witnesses in the *Kayishema and Ruzindana* case and *Muhimana* case pertaining to the Applicant's alibi for 22 June 1994

70. The Appeals Chamber recalls its earlier finding that the failure of Prosecution Witness PP in the *Kayishema and Ruzindana* case to implicate the Applicant directly in Assiel Kabanda's murder did not foreclose the possibility of the Applicant's presence at the scene.<sup>166</sup> By the same analysis, the testimony of Prosecution Witnesses BE, BB, BH and AT in the *Muhimana* case, which also do not implicate the Applicant in the same event do not necessarily suggest an exculpatory factor and the Prosecution was under no obligation under Rule 68 to disclose the said testimonies to the Applicant.

71. In light of the foregoing, the Appeals Chamber finds that, the Applicant has failed to demonstrate that Prosecution Counsel did not adhere to the standards of professional conduct set out under Prosecutor's Regulation No. 2 and a material prejudice within the meaning of Rule 5 of the Rules has not been shown.

6. Integrity of a certain Prosecution Counsel involved in the Applicant's Trial

72. The Appeals Chamber is of the opinion that most of the arguments relating to the involvement in this case of a certain prosecuting Counsel who had been subject to professional discipline in her home jurisdiction were already raised by the Applicant and rejected at the appeals stage and the Appeals Chamber will not consider them *de novo* as review proceedings is not an opportunity simply to re-litigate unsuccessful appeals.

73. Therefore the Appeals Chamber will address the merit of the Applicant's arguments only insofar as they relate to the recently discovered communications showing that the said Counsel was not consistently supervised at trial - as was suggested by the Appeals Chamber - and insofar as they relate to the existence of disclosure violations that may have occurred as a result of the involvement of said Counsel in his case.

74. As to the supervision of the prosecuting Counsel, the Appeals Chamber notes that it was not critical to its disposition of this ground of the Applicant's appeal. The Appeals

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<sup>166</sup> Appeal Judgement, para. 180.

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Chamber rather held that the attorney's suspension from the New York bar did not preclude the prosecutor from entrusting her with authority under Rule 37(B) of the Rules, that she remained bound by the ethical constraints imposed on all counsel before the International Tribunal, that her suspension was for reasons unrelated to the Applicant's case and that the attorney's involvement in his case did not in any event compromise the Applicant's right to a fair trial. None of those conclusions of the Appeals Chamber at the appeal stage is put in question by the materials submitted at the review stage.

75. Regarding the prejudice which would have resulted from the disclosure violations, the Appeals Chamber recalls its above finding that they did not materially prejudice the Applicant.

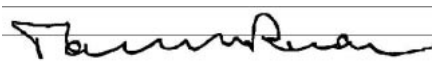
#### **IV. DISPOSITION**

76. The Appeals Chamber

**DISMISSES** all requests of the Applicant and the Prosecution;

**REMINDS** the Prosecution of its fundamental obligations in respect of disclosure of exculpatory material pursuant to Rule 68 of the Rules.

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



**Fausto Pocar**  
Presiding Judge

Done this 30<sup>th</sup> day of June 2006  
at The Hague, The Netherlands.



[Seal of the Tribunal]

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## DECLARATION OF JUDGE SHAHABUDDEN

1. I agree with the outcome of today's decision and with the greater part of its reasoning. I write to clarify my views on two interrelated points. First, the Appeals Chamber repeatedly states that, if evidence does not "amount to a 'new fact' for the purposes of a review application", "the Appeals Chamber is not obliged to examine [it] further".<sup>1</sup> Second, the Appeals Chamber holds that "in 'wholly exceptional circumstances', where the impact of a 'new fact' on the decision would be such that to ignore it would lead to a miscarriage of justice, review might be possible even though the 'new fact' was known to the moving party, or was discoverable by it through the exercise of due diligence."<sup>2</sup> These two positions are not reconcilable.

2. Article 25 authorizes review only "[w]here a new fact has been discovered which was not known at the time of the proceedings". In other words, it requires that a new fact be established, as well as that that new fact must have been unknown at the time of the proceedings. If the matter concerned does not meet these criteria, article 25 gives no power of review even if a miscarriage of justice would have been perpetrated. But since, as it seems to me, it is necessary to avert a miscarriage of justice however it arises, the power to do so must derive from a source other than article 25 where this provision does not reasonably cover the case. That power can only be the inherent jurisdiction of the Appeals Chamber.

3. The inherent jurisdiction is familiar to the Tribunal. It need not be thought that, because it is styled "inherent", it comes from nowhere: it is impliedly given by the Statute to the Tribunal as a judicial body, being an understood accompaniment of the jurisdiction which the Statute expressly grants. In exceptional circumstances, the Appeals Chamber ought to be able to correct its errors without artificially and awkwardly disguising what it is doing as an article 25 review. And it need not be feared that the floodgates will be opened: As stated in my declaration appended to a recent decision of the ICTY Appeals Chamber in *Žigić*,<sup>3</sup> the ICTY Appeals Chamber's judgement in *Čelebići* (relating to sentencing) set appropriate limiting standards for evaluating requests for reconsideration of judgements on the basis of the Tribunal's inherent powers.

4. It bears noting that in *Žigić*, in which the ICTY Appeals Chamber disagreed with the rule established by it in *Čelebići*, the ICTY Appeals Chamber reasoned that article 25 alone provided a sufficient remedy for injustice because "the requirement of the existence of a 'new fact' has been

<sup>1</sup> Decision of the Appeals Chamber, paras. 12, 16, 21, 25, 30, 36.

<sup>2</sup> Decision of the Appeals Chamber, para. 7.

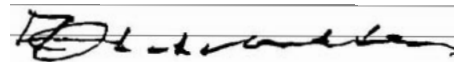
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interpreted broadly.” Today’s decision, however, neither invokes nor illustrates a “broad” interpretation of that requirement, which is instead rather strictly enforced. I do not object to strict enforcement that is consistent with article 25. What I do object to is the notion that, where the determination is that article 25 is inapplicable, that ends the Appeals Chamber’s obligation to ensure that justice is done.

5. I do not suggest that the present decision is unjust in its actual consequences. I agree with the Appeals Chamber’s analysis that none of the evidence the applicant now seeks to introduce could have been a decisive factor in the Appeals Chamber’s judgement. I therefore support the outcome of the case. But I reaffirm my declaration in *Žigić*.

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



Mohamed Shahabuddeen

Dated this 30 June 2006  
At The Hague  
The Netherlands



[Seal of the Tribunal]

<sup>5</sup> Decision on Zoran Žigić’s Motion for Reconsideration of Appeals Chamber Judgement, Case No. IT-98-30/1-A, 26 June 2006.

**1054/H****VI. ANNEX A - PROCEDURAL BACKGROUND**

1. On 27 October 2004, the Applicant personally, and without the assistance of Counsel, filed a "Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes" (the "Applicant's Request for Review"). In that filing he asserts that the transcripts of radio broadcasts concerning Cabinet Meetings in which he had allegedly participated on 10 and 16 April 1994, as well as on 10 and 17 June 1994, and which were not disclosed to him by the Prosecution, constitute "new facts" pursuant to Article 25 of the Statute of the Tribunal (the "Statute") and Rules 120 and 121 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"). He also claims that these transcripts represent a "decisive factor" in that they impugn the credibility of various witnesses. He argues that to ignore the said transcripts "could" or "would" lead to a miscarriage of justice.

2. On 6 December 2004, the Prosecution filed the "Prosecutor's Response to *Requête en Révision du Jugement/Réparation du Préjudice causé par la Violation, par le Procureur, du Règlement et des Règlements Internes*" (the "Prosecution's Response to Applicant's Request for Review"), stating that some of the transcripts had been disclosed to the Applicant in the original proceedings and that, in any event, nothing in them amounts to a "new fact" or a "decisive factor". On 29 December 2004, the Applicant filed his "*Réplique à la réponse du Procureur à la Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes*" (the "Applicant's Reply to the Prosecution's Response to Applicant's Request for Review") in which he reiterates that the transcripts in question had not been communicated to him and that the facts in them amounted to "new facts". He submits that the transcripts "could" or "would" have been a "decisive factor".

3. On 7 February 2005, the Applicant filed his "*Mémoire supplémentaire à la «Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes»*" (the "Applicant's Additional Brief to Request for Review"). He claims that the testimony of Witness PP in the *Kayishema and Ruzindana* case, and of Witnesses BE, BH, BB and AT in the *Muhimana* case, also amount to a "new fact" warranting a review of the Trial Chamber's finding on his alibi for the murder of Assiel Kabanda on 22 June 1994. The Applicant alleges that these exculpatory materials had not been disclosed to him by the Prosecution. The Prosecution responded on 18 March 2005, in the "Prosecutor's Response to *Mémoire supplémentaire à la «requête en révision du Jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et*

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*des règlements internes»*) (the “Prosecution’s Response to Applicant’s Additional Brief to Request for Review”), stating that the relevant witness testimonies do not represent a “new fact” warranting review within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules. The Applicant replied on 31 March 2005 in his “*Mémoire en Réplique à la Réponse du Procureur du 18 mars 2005 au Mémoire supplémentaire à la «Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes»*” (the “Applicant’s Brief in Reply to Prosecution’s Response to the Additional Brief to Request for Review”). He reiterates his original position that the testimonies do constitute a “new fact” warranting review.

4. On 6 May 2005, the Applicant filed *pro se* a “*Requête urgente en assistance de l’équipe de la défense*” (the “Applicant’s Urgent Request for Legal Assistance”), pursuant to Article 20 of the Statute and Rules 54 and 107 of the Rules. He requested the Appeals Chamber to order that his Defence team be allowed to resume their representation of him at the preliminary examination stage of his Request for Review.<sup>1</sup> By its “Decision on Niyitegeka’s Urgent Request for Legal Assistance” filed on 20 June 2005 (the “Appeals Chamber’s Decision of 20 June 2005”), the Appeals Chamber granted the Urgent Request for Legal Assistance and instructed the Registry to assign Counsel, Ms. Geraghty, for a limited period for the purpose of assisting the Applicant at the stage of the preliminary examination. Therein, the Applicant was instructed, should he deem it necessary, to file additional submissions to his application no later than 20 days from the date of assignment of Ms. Geraghty. The Appeals Chamber further ordered the Prosecution to respond to the Applicant’s additional submissions (if it chose to do so) no later than 15 days after the date of the Applicant’s filing, and directed the Applicant to reply to any such response no later than 7 days subsequently.

5. On 15 August 2005, the Prosecution filed the “Prosecutor’s Motion to Move for Decision on Niyitegeka’s Requests for Review pursuant to Rules 120 and 121” (the “Prosecution’s Motion to Move for Decision”). It stated that Counsel for the Applicant had not filed any additional submissions within the 20 day deadline and had also not moved for an extension of time by showing good cause pursuant to Rule 116 of the Rules.<sup>2</sup> It therefore requested the Appeals Chamber to render a decision, pursuant to Rule 121, on the basis of the record before it.<sup>3</sup> It also requested the Appeals Chamber not to consider the merits of a late filing unless good cause was shown pursuant to Rule 116 of the Rules, in which case it

<sup>1</sup> Applicant’s Urgent Request for Legal Assistance, para. 11.

<sup>2</sup> Prosecution’s Motion to Move for Decision on the Applicant’s Request for Review, paras. 4-6.

<sup>3</sup> Prosecution’s Motion to Move for Decision on the Applicant’s Request for Review, para. 7.

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sought to file further submissions with regard to the issue of good cause.<sup>4</sup> On 18 August 2005, the Applicant filed the "Extremely Urgent Defence Motion Pursuant to Rule 116 for an Extension of Time Limit and Rule 68 (a), (b) and (e) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant" (the "Defence Extremely Urgent Motion for Extension of Time Limit and for Disclosure of Exculpatory Evidence"). It asserted that the terms of Counsel's contract with the Tribunal, dated 20 July 2005, varied or interpreted the 20 days granted to the Applicant by the Appeals Chamber's Decision of 20 June 2005 to mean working days,<sup>5</sup> that the opportune date for filing the additional submissions was thus 19 August 2005,<sup>6</sup> and that, accordingly, the Defence had not failed to comply with the Appeals Chamber's orders.<sup>7</sup> Counsel also requested the Appeals Chamber to order the Prosecution to make full and complete disclosure of exculpatory material, as well as to grant an extension of time for the filing deadline on the grounds, *inter alia*, of allowing the Defence to obtain an affidavit and English translation of all pleadings since 26 October 2004.

6. On 28 September 2005, by its "Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to Rule 116 for [an] Extension of Time Limit and Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant" (the "Appeals Chamber's Decision of 28 September 2005"), the Appeals Chamber instructed the Applicant to file, through Counsel, his additional submissions no later than ten days from receipt of the decision. The Defence motion was dismissed in all other respects, and the decision on the Prosecution's Motion to Move for Decision deferred. The Appeals Chamber further instructed the Prosecution to respond to the Applicant's additional submissions no later than 15 days from the date of filing, and the Applicant to make any reply within the following 7 days.

7. On 17 August 2005, the Applicant filed, *pro se* and confidentially, his "*Requête de*

<sup>4</sup> Prosecution's Motion to Move for Decision on the Applicant's Request for Review, para. 8.

<sup>5</sup> Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence, para. 12.

<sup>6</sup> Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence, para. 16.

<sup>7</sup> Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence, para. 17.



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*Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau*" (the "Applicant's Request for Admission of New Evidence") pursuant to Rules 54, 89, 107 and 120 of the Rules, submitting an affidavit signed by a potential Defence Witness TEN-3 which he claims represents a "new fact", decisive with regard to the charge of murder of a 13-15 year old girl on 20 May 1994. On 26 September 2005, the Prosecution confidentially filed its "*Réponse du Procureur à la «Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau»*" (the "Prosecution's Response to Applicant's Request for Admission of New Evidence"), contesting the credibility both of the affidavit and of its author (potential Defence Witness TEN-3), and asserting that the said affidavit would not have affected the original verdict. On 11 October 2005, the Applicant filed *pro se* his confidential "*Mémoire en réplique à la Réponse du Procureur à la «Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau»*" (the "Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence") in which he contests the Prosecution's arguments made in its Response.

8. Two confidential documents appended to the Applicant's Request for Admission of New Evidence prompted the Prosecution to file, on 26 August 2005, a "Motion to Request for an Investigation into Breach of Confidentiality pursuant to Rules 33 (A), 54, 73 (A) and 107" (the "Prosecution's Motion for Investigation into Breach of Confidentiality"). The Prosecution requested that the Appeals Chamber direct the Registrar to conduct an investigation into the manner in which the Applicant received the two confidential documents and to inform the Chamber and the Prosecution of the outcome of the investigation; the Prosecution also requested that the Appeals Chamber disregard the two documents in considering the merits of the Applicant's Third Request for Review (made in the Applicant's Request for Admission of New Evidence). The Applicant responded on 2 September 2005, again confidentially and *pro se*, in the "*Réponse de Monsieur Eliézer Niyitegeka à la requête du Procureur intitulée 'Motion to Request [an] Investigation into Breach of Confidentiality Pursuant to Rules 33 (A), 54, 73 (A) and 107'*" (the "Applicant's Response to the Prosecution's Motion for Investigation into Breach of Confidentiality"). By its confidential "Decision on the Prosecutor's Motion to Request an Investigation into Breach of Confidentiality Pursuant to Rules 33 (A), 54, 73 (A) and 107" filed on 2 November 2005 (the "Appeals Chamber Decision of 2 November 2005"), the Appeals Chamber directed the Prosecution to conduct an investigation into both the circumstances and extent of the breach of confidentiality, and requested the Registrar to provide the Prosecution with the cooperation required in the conduct of the investigations. The Appeals Chamber deferred its decision on whether to disregard the content of the two documents to its decision on the Applicant's

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Request for Admission of New Evidence and dismissed the remainder of the Prosecution's Motion.

9. On 10 October 2005, Defence Counsel filed "Additional Submissions of Applicant made pursuant to Appeals Chamber Decision dated 20 June 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence Pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 115, Rule 54 and Rule 107" (the "Applicant's Additional Submissions"). Defence Counsel elaborates extensively on the alleged "new facts" and the "violations of Rule 68" previously argued by the Applicant, and relies on various additional arguments to show that the alleged "new facts" would have been "decisive factors" in both the decisions of the Trial Chamber and the Appeals Chamber, and thus that to ignore them would lead to a miscarriage of justice. On 25 October 2005, the Prosecution filed its "Prosecutor's Response, with Confidential Appendices, to 'Additional Submissions of Applicant made pursuant to Appeals Chamber Decision dated 20 June 2005 in the matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 115, Rule 54 and Rule 107'" (the "Prosecution's Response with Confidential Appendices to the Applicant's Additional Submissions") further contesting the allegations of Rule 68 violations and noting that the additional submissions exceed the scope of the Appeals Chamber's decisions of 20 June and 28 September 2005.

10. On 31 October 2005, the Applicant filed an "Extremely Urgent Defence Motion Pursuant to Rule 116 of the Rules of the International Criminal Tribunal for Rwanda, Seeking an Extension of Time" (the "Defence Motion for Extension of Time") to seek an extension of time to reply to the Prosecutor's Response with Confidential Appendices to the Additional Submissions. On 31 October 2005, the Prosecution filed the "Prosecutor's Response to Extremely Urgent Defence Motion pursuant to Rule 116 of the Rules of the International Criminal Tribunal for Rwanda, Seeking an Extension of Time" (the "Prosecution's Response to Defence Motion for Extension of Time") in which it did not oppose the extension of time requested by the Defence. By the "Prosecutor's Motion for Filing of Additional Material" (the "Prosecution's Motion for Additional Material"), filed on the same date, the Prosecution sought to file video footage (labelled KV00-0030 and KV00-0030B) in response to a request from the Defence. In its "Decision on [the] Extremely Urgent Defence Motion Seeking an Extension of Time pursuant to Rule 116 of the Rules of Procedure and Evidence and the Prosecution's Motion for Filing of Additional Material" filed on 2 November 2005 (the Second Appeals Chamber Decision of 2 November 2005), the Appeals Chamber granted the Defence motion and ordered the Defence to file a reply to the Prosecution's Response with Confidential Appendices to the Additional Submissions no later than 9 November 2005;

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secondly, it granted the Prosecution's Motion and directed the Prosecution to file two sets of the video footage referred to therein immediately upon receipt of the decision; and, thirdly, it requested the Registrar immediately to communicate to Defence Counsel, by an express courier, one set of the additional material. On the same day, the Defence confidentially filed its "Provisional Applicant's Reply to Prosecutor's Response [dated 25/10/2005] to 'Additional Submissions' of Applicant made pursuant to Appeals Chamber Decisions of 20 June 2005 and 28 September 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89(c), Rule 54 and Rule 107" (the "Provisional Reply to Prosecution's Response to the Additional Submissions").

11. On 10 November 2005, the Defence filed the updated "Applicant's Reply to Prosecutor's Response [dated 25/10/2005] to 'Additional Submissions' of Applicant Made Pursuant to Appeals Chamber Decision of 20 June 2005 and 28 September 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 54 and Rule 107" (the "Applicant's Reply to Prosecution's Response to Additional Submissions"), as corrected on 18 November 2005, to replace the Provisional Reply to Prosecution's Response to the Additional Submissions. Defence Counsel further elaborated on the alleged disclosure failure by the Prosecution, alleging in particular that the Prosecution had still not disclosed a "true and full copy" of the video footage labelled KV00-0030 and further requesting that the Prosecution be directed to make continuing disclosure of all matters highlighted by the Applicant.

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## VII. ANNEX B – CITED MATERIALS/DEFINED TERMS

A. JurisprudenceICTRBARAYAGWIZA / NAHIMANA ET AL.

*Jean Bosco Barayagwiza v. the Prosecutor*, Case No. ICTR-97-19-AR72, Decision on the Prosecutor's Request for Review or Reconsideration, 31 March 2000 (*Barayagwiza*, Decision on the Prosecutor's Request for Review)

*Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005 (*Nahimana et al.*, Decision on Appellant's Motion for Leave to Present Additional Evidence)

KAMUHANDA

*Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Decision on the Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005 (*Kamuhanda*, Decision on Motion for Additional Evidence)

NTAGERURA ET AL.

*Prosecutor v. Ntagerura, et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 (*Ntagerura, et al.*, Decision on Prosecution Motion for Admission of Additional Evidence)

NIYITEGEKA

*The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgement and Sentence, 16 May 2003 (Trial Judgement)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Appeal Judgement, 9 July 2004 (Appeal Judgement)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005 (Appeals Chamber's Decision of 20 June 2005)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review pursuant to Rules 120 and 121 and the Defence Extremely Urgent Defence Motion Pursuant to Rule 116 for an Extension of Time Limit and Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant, 28 September 2005 (Appeals Chamber's Decision of 28 September 2005)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on the Prosecutor's Motion to Request an Investigation into Breach of Confidentiality Pursuant to Rules 33 (A), 54, 73 (A) and 107" filed on 2 November 2005 (Appeals Chamber's Decision of 2 November 2005)

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on [the] Extremely Urgent Defence Motion Seeking an Extension of Time pursuant to Rule 116 of the Rules of Procedure and Evidence and the Prosecution's Motion for Filing of Additional Material" filed on 2 November 2005 (Second Appeals Chamber's Decision of 2 November 2005)

NTAKIRUTIMANA ELIZAPHAN AND NTAKIRUTIMANA GÉRARD

*Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10A and ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence, 8 September 2004 (*Ntakirutimana E. and G.*, Reasons for the Decision on Request for Admission of Additional Evidence)

SEMANZA

*Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision on Laurent Semanza's Motion of Additional Evidence, 5 April 2005 (*Semanza*, Decision on Motion of Additional Evidence)

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*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (*Blaškić*, Decision on the Appellant's Motions for the Production of Material)

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (*Blaškić*, Appeal Judgement)

DELIĆ

*Prosecutor v. Hazim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 (*Delić*, Decision on Motion for Review)

JELIŠIĆ

*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-R, Decision on Motion for Review, 2 May 2002 (*Jelisić*, Decision on Motion for Review)

JOSIPOVIĆ

*Prosecutor v. Drago Josipović*, Case No. IT-95-16-R2, Decision on Motion for Review, 7 March 2003 (*Josipović*, Decision on Motion for Review)

*Prosecutor v. Drago Josipović*, Case No. IT-95-16-R2, Decision on Motion for Review, 2 April 2004 (*Josipović*, Second Decision on Motion for Review)

KORDIĆ

*Prosecutor v. Dario Kordić*, Case No. IT-95-14/2-A, Decision on Appellant's Notice and Supplemental Notice on Prosecution's Non-Compliance with its Disclosure Obligation under Rule 68 of the Rules, 11 February 2004 (*Kordić*, Decision on Appellant's Notice and Supplemental Notice)

KRSTIĆ

*Prosecutor v. Radislav Krstić*, Decision on Applications for Admission of Additional Evidence on Appeal, Case No. IT-98-33-A, 5 August 2003 (*Krstić*, Decision on Applications for Additional Evidence)

*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 (*Krstić*, Appeal Judgement)

ORIĆ

*Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005 (*Orić*, Decision on Defence Motion on Non-Compliance with Rule 68)

*Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Ongoing Complaints About Prosecutorial Non-Compliance with Rule 68 of the Rules (*Orić*, Decision on Complaints About Non-Compliance with Rule 68 of the Rules)

TADIĆ

*Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002 (*Tadić*, Decision on Motion for Review)

**B. Defined Terms**

Eliézer Niyitegeka (Applicant)

Prosecutor (Prosecution)

Applicant's Defence Counsel (Defence Counsel)

*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A (*Kayishema and Ruzindana* case)

*The Prosecutor v. Mika Muhimana*, Case No. ICTR-95-1B-T (*Muhimana* case)

SM

**1046/H****C. Defined Submissions of Parties**

*Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes, 27 October 2004 (Applicant's Request for Review)*

Prosecutor's Response to *Requête en Révision du Jugement/Réparation du Préjudice causé par la Violation, par le Procureur, du Règlement et des Règlements Internes*, 6 December 2004 (Prosecution's Response to Applicant's Request for Review)

*Réplique à la réponse du Procureur à la Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes, 29 December 2004 (Applicant's Reply to Prosecution's Response to Request for Review)*

*Mémoire supplémentaire à la «Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes, 7 February 2005 (Applicant's Additional Brief to Request for Review)*

Prosecutor's Response to *Mémoire supplémentaire à la «requête en révision du Jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes»*, 18 March 2005 (Prosecution's Response to Applicant's Additional Brief to Request for Review)

*Mémoire en Réplique à la Réponse du Procureur du 18 mars 2005 au Mémoire supplémentaire à la «Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes»*, 31 March 2005 (Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review)

*Requête urgente en assistance de l'équipe de la défense, 6 May 2005 (Applicant's Urgent Request for Legal Assistance)*

Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review pursuant to Rules 120 and 121, 15 August 2005 (Prosecution's Motion to Move for Decision on the Applicant's Request for Review)

*Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau, 17 August 2005 (Applicant's Request for Admission of New Evidence)*

Extremely Urgent Defence Motion Pursuant to Rule 116 for an Extension of Time Limit and Rule 68 (a), (b) and (e) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant, 18 August 2005 (Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence)

Motion to Request for an Investigation into Breach of Confidentiality pursuant to Rules 33 (A), 54, 73 (A) and 107", 26 August 2005 (Prosecution's Motion for Investigation into Breach of Confidentiality)

*Réponse de Monsieur Eliézer Niyitegeka à la requête du Procureur intitulée 'Motion to Request [an] Investigation into Breach of Confidentiality Pursuant to Rules 33 (A), 54, 73 (A) and 107', 2 September 2005 (Applicant's Response to the Prosecution's Motion for Investigation into Breach of Confidentiality)*

*Réponse du Procureur à la «Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau», 26 September 2005 (Prosecution's Response to Applicant's Request for Admission of New Evidence)*

Additional Submissions of Applicant made pursuant to Appeals Chamber Decision dated 20 June 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence Pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 115, Rule 54 and Rule 107", 10 October 2005 (Applicant's Additional Submissions)

*Mémoire en réplique à la Réponse du Procureur à la «Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau», 11 October 2005 (Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence)*

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Prosecutor's Response, with Confidential Appendices, to 'Additional Submissions of Applicant made pursuant to Appeals Chamber Decision dated 20 June 2005 in the matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 115, Rule 54 and Rule 107', 25 October 2005 (Prosecution's Response, with Confidential Appendices, to Applicant's Additional Submissions)

Extremely Urgent Defence Motion Pursuant to Rule 116 of the Rules of the International Criminal Tribunal for Rwanda, Seeking an Extension of Time, 31 October 2005 (Defence Motion for Extension of Time)

Prosecutor's Response to Extremely Urgent Defence Motion pursuant to Rule 116 of the Rules of the International Criminal Tribunal for Rwanda, Seeking an Extension of Time, 31 October 2005 (Prosecution's Response to Defence Motion for Extension of Time)

Prosecutor's Motion for Filing of Additional Material, 31 October 2005 (Prosecution's Motion for Additional Material)

Provisional Applicant's Reply to Prosecutor's Response [dated 25/10/2005] to 'Additional Submissions' of Applicant made pursuant to Appeals Chamber Decisions of 20 June 2005 and 28 September 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89(c), Rule 54 and Rule 107, 31 October 2005 (Applicant's Provisional Reply to Prosecution's Response to the Additional Submissions)

Applicant's Reply to Prosecutor's Response [dated 25/10/2005] to 'Additional Submissions' of Applicant Made Pursuant to Appeals Chamber Decision of 20 June 2005 and 28 September 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 54 and Rule 107, 10 November 2005 (Applicant's Reply to Prosecution's Response to Additional Submissions)

RM



**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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