UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-13-36-R

Date: 9 April 2018

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IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Jean-Claude Antonetti
Judge Mparany Mamy Richard Rajohnson
Judge Aydin Sefa Akay
Judge Seymour Panton

Registrar: **Mr. Olufemi Elias**

Decision of: **9 April 2018**

LAURENT SEMANZA

v.

PROSECUTOR

PUBLIC

DECISION ON A REQUEST FOR ACCESS AND REVIEW

Counsel for Mr. Laurent Semanza:

Mr. Luciano Terreri Mendonça Junior

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Veronic Wright
Ms. Thembile Segoete
Ms. Sunkarie Ballah-Conteh

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of a request for access and review filed by Mr. Laurent Semanza ("Semanza") on 9 October 2017.[1] The Prosecution responded to the Request on 20 November 2017,[2] to which Semanza did not reply.

I. BACKGROUND

2. In 1994, Semanza, a former *bourgmestre* of Bicumbi commune, was a member of the *Mouvement Républicain National et Démocratique* and nominated to be a representative of it to the National Assembly, which was to be established pursuant to the 1993 Arusha Accords.[3]

3. In its Judgement of 20 May 2005, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR Appeals Chamber" and "ICTR", respectively), *inter alia*, upheld Semanza's convictions for instigating murder as a crime against humanity with respect to killings at Bicumbi commune on 8 April 1994 and murder and torture as crimes against humanity in relation to the 13 April 1994 attack at Musha church ("Musha Church Attack").[4] The ICTR Appeals Chamber, by majority, further entered convictions for: (i) ordering genocide, extermination as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II with respect to the Musha Church Attack;[5] and (ii) committing murder and torture as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II as it concerned the torture and killing of a Tutsi called "Rusanganwa" ("Rusanganwa") during the Musha Church Attack.[6] The ICTR Appeals Chamber, by majority, increased Semanza's sentence from 25 to 35 years of imprisonment, subject to a six-month reduction as ordered by the Trial Chamber for violations of fundamental pre-trial rights.[7]

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[1] Request for Review, 9 October 2017 (confidential) ("Request"). *See also* Order Assigning Judges to a Case Before the Appeals Chamber, 13 October 2017, p. 1; Order Replacing a Judge in a Case Before the Appeals Chamber, 27 February 2018, p. 1. The Appeals Chamber ordered that the Request be re-classified as confidential. *See* Order on a Prosecution Request for Reclassification of a Filing, 27 November 2017 ("Order of 27 November 2017"), p. 2.

[2] Prosecution Response to Request for Review, 20 November 2017 ("Response").

[3] *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("Appeal Judgement"), para. 2; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("Trial Judgement"), para. 15.

[4] Appeal Judgement, p. 126. *See also* Appeal Judgement, paras. 263-271, 291-298.

[5] Appeal Judgement, pp. 125, 126. *See also* Appeal Judgement, paras. 355-371. In entering convictions for ordering genocide and extermination as crimes against humanity with respect to the Musha Church Attack, the ICTR Appeals Chamber set aside convictions entered by Trial Chamber III of the ICTR ("Trial Chamber") for complicity in genocide and aiding and abetting extermination as a crime against humanity. Appeal Judgement, pp. 125, 126. *See also* Appeal Judgement, paras. 362-364, 369-371.

[6] Appeal Judgement, p. 126. *See also* Appeal Judgement, paras. 370, 371.

[7] Appeal Judgement, p. 126. *See also* Appeal Judgement, paras. 388, 389; Trial Judgement, paras. 585-590. The ICTR Appeals Chamber also affirmed Semanza's convictions for complicity in genocide and for aiding and abetting extermination as a crime against humanity and, by majority, entered a new conviction for aiding and abetting murder as

4. Through the Request, Semanza seeks access to Prosecution Witness KF's unredacted transcripts in the ICTR case of *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56 ("*Ndindiliyimana et al.* case") in order to assist in his request for review.[8] He further seeks review of his convictions in relation to the Musha Church Attack, including the torture and killing of Rusanganwa, and the killings in Bicumbi commune on 8 April 1994.[9]

5. The Prosecution responds that the Request should be dismissed as Semanza has not satisfied the criteria for access to confidential materials from another case and fails to meet any of the criteria for review under Article 24 of the Statute of the Mechanism ("Statute") and Rule 146 of the Rules of Procedure and Evidence of the Mechanism ("Rules").[10]

II. REQUEST FOR ACCESS

6. Semanza requests access to the unredacted transcripts of Prosecution Witness KF's testimony from the *Ndindiliyimana et al.* case, submitting that the witness may be able to provide "vital" information related to the Musha Church Attack in support of his request for review.[11] Specifically, Semanza argues that portions of Witness KF's testimony, to which he has access, indicate that the witness, a gendarme at Camp Kacyiru, may have been implicated in the Musha Church Attack.[12] Semanza submits that, upon obtaining Witness KF's transcripts, he may decide to call the witness to testify regarding the responsibility of gendarmes for attacks in the area during a review proceeding.[13]

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a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the attack at Mwulire hill on 18 April 1994. *See* Appeal Judgement, pp. 125, 126. *See also* Appeal Judgement, paras. 367-371.

[8] Request, paras. 42-48, 93.

[9] Request, paras. 1-25, 35-48, 94, 95.

[10] Response, paras. 7, 10, 14, 23, 28, 33, 35, 43, 44.

[11] Request, paras. 42-48, 93.

[12] Request, paras. 43-45, 47. Semanza further points to portions of the trial judgement in the *Ndindiliyimana et al.* case to suggest that that trial chamber considered that "there were claims that the activities from the *Interahamwe* in the area were conducted by gendarmes from inside of the camp" and that this can constitute a new fact. Request, paras. 46, 93, *referring to The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Judgement and Sentence, pronounced on 17 May 2011 and filed in writing on 17 June 2011, para. 1580.

[13] Request, para. 48. Semanza also claims that he is unable to access Prosecution Witness KF's testimony in the *Ndindiliyimana et al.* case from February 2009. Request, para. 47. However, the Appeals Chamber observes that the Ndindiliyimana Defence ultimately declined to recall Witness KF in February 2009. *See Ndindiliyimana et al.* case, Transcript ("T.") 18 February 2009 p. 58.

7. The Prosecution responds that Semanza has failed to establish a legitimate forensic purpose or provide any other basis that would justify the disclosure of Witness KF's unredacted transcripts in the *Ndindiliyimana et al.* case.[14]

8. The Appeals Chamber recalls that a party is entitled to seek material from any source, including from another case before the ICTR, to assist in the preparation of its case.[15] Where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose must be demonstrated in order to obtain it.[16] Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.[17] Further, the requesting party must establish that this material is likely to assist its case materially, or that there is at least a good chance that it would.[18] Where an applicant's conviction or convictions have been adjudicated in a final judgement, access to confidential material in another case may still be requested; however, the only legitimate forensic purpose for obtaining access in this instance is to establish a "new fact" capable of constituting the basis for a review of the applicant's convictions.[19]

9. The Appeals Chamber finds that Semanza has sufficiently identified the material to which he seeks access – namely Witness KF's unredacted testimony. As to the nexus, Witness KF's publicly available testimony reflects counsel accusing the witness of having participated in various attacks, including an attack on Musha church, and that the witness denied these accusations,

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[14] Response, paras. 39-43. The Prosecution also submits that, had the closed session transcripts of Witness KF included potentially exculpatory information, they would have been disclosed to Semanza in February 2010 and February 2014 when other potentially exculpatory material was disclosed to him. Response, para. 43.

[15] *See, e.g., Prosecutor v. Eliézer Niyitegeka and Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case Nos. MICT-12-16-R86G.1, MICT-12-15-R86G.1, MICT-12-10-R86G.1, Decision on Motions for Access to Confidential Materials in the *Niyitegeka* and *Kayishema and Ruzindana* Cases, 27 February 2018 ("*Niyitegeka* and *Kayishema and Ruzindana* Decision of 27 February 2018"), para. 5; *Prosecutor v. Radovan Karadžić*, Case Nos. MICT-13-55-A & MICT-15-85, Decision in Vujadin Popović's Request for Access to Confidential Material in the *Prosecutor v. Radovan Karadžić* Case, 17 February 2017 ("*Karadžić* Decision of 17 February 2017"), para. 8 and references cited therein. *See also The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-A, Decision on Georges A. N. Rutaganda's Motion for Access to Confidential Material of Witness CSH from the *Rukundo* Case, 18 February 2010 ("*Rukundo* Decision of 18 February 2010"), para. 11.

[16] *Niyitegeka and Kayishema and Ruzindana* Decision of 27 February 2018, para. 5; *Prosecutor v. Zdravko Tolimir*, Case Nos. MICT-15-95 & MICT-15-85, Decision on Request for Access to Confidential Material in *The Prosecutor v. Zdravko Tolimir* Case Presented by Vujadin Popović, 4 July 2017 (original French version filed on 17 May 2017), para. 14 and references cited therein. *See also Rukundo* Decision of 18 February 2010, para. 11.

[17] *Niyitegeka and Kayishema and Ruzindana* Decision of 27 February 2018, para. 5; *Karadžić* Decision of 17 February 2017, para. 8 and references cited therein. *See also Rukundo* Decision of 18 February 2010, para. 11.

[18] *Niyitegeka and Kayishema and Ruzindana* Decision of 27 February 2018, para. 5; *Karadžić* Decision of 17 February 2017, para. 8 and references cited therein. *See also Rukundo* Decision of 18 February 2010, para. 12.

[19] *Niyitegeka and Kayishema and Ruzindana* Decision of 27 February 2018, para. 7, *referring to Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on Stanislav Galić's Motion for Access to Confidential Materials in the *Karadžić* Case, 9 June 2016, para. 10 and references cited therein.

asserting that she did not leave her post at Camp Kacyiru.[20] Given the relatively low threshold for establishing this criterion,[21] the Appeals Chamber is satisfied that Semanza has demonstrated a sufficient nexus between the material he seeks and his request for review in relation to the Musha Church Attack.

10. However, Semanza fails to demonstrate that additional information from Witness KF's unredacted transcripts that might reveal that she or gendarmes generally participated in the Musha Church Attack is likely to assist a request for review, or that there is at least a good chance that it would. The Trial Chamber already considered evidence that gendarmes participated in the Musha Church Attack.[22] Thus, additional testimony from Witness KF to this effect would not amount to a new fact that might support a request for review because it does not present "new information [...] that was not in issue during the trial or appeal proceedings".[23] Based on the foregoing, the Appeals Chamber dismisses Semanza's request for access to Witness KF's unredacted transcripts.[24]

III. REQUEST FOR REVIEW

11. Semanza submits that his convictions in relation to the Musha Church Attack, including the torture and killing of Rusanganwa, and the killings in Bicumbi commune on 8 April 1994 should be reviewed in light of new facts that were unknown and could not have been discovered through an exercise of due diligence during his proceedings.[25] The Appeals Chamber will address these contentions after recalling the relevant legal principles.

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[20] *Ndindiliyimana et al.* case, T. 18 January 2006 pp. 4-9, 15, 16.

[21] *See Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 23 ("The Appeals Chamber emphasises that a requesting party is not required to establish a 'significant' overlap between the cases – be it factual, geographic or temporal – in order to demonstrate a legitimate forensic purpose.").

[22] Trial Judgement, paras. 183-188, 191, 196, 197, 199, 206, 425.

[23] *See infra* para. 13. For the reasons stated above, the Appeals Chamber further fails to see how the consideration of claims in the *Ndindiliyimana et al.* case that gendarmes conducted the activities of *Interahamwe* in "the area" would further support Semanza's requests for access or review.

[24] To the extent that Semanza seeks access to the unredacted transcripts of Witness KF's testimony from the *Ndindiliyimana et al.* case pursuant to the Prosecution's positive and continuous obligation to disclose potentially exculpatory material under Rule 73 of the Rules, the Prosecution argues that it has already turned over all potentially exculpatory material. Semanza's brief submissions do not demonstrate otherwise and the Appeals Chamber dismisses the Request to the extent Semanza is relying on this rule in relation to it. *See Prosecutor v. Eliézer Niyitegeka*, Case No. MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2017, para. 18 ("The determination as to which material is subject to disclosure under Rule 73 of the Rules is a fact-based enquiry made by the Prosecution. A chamber will not intervene in the exercise of the Prosecution's discretion unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will presume that the Prosecution is acting in good faith.") (Internal references omitted).

[25] Request, paras. 52-54, 56, 61-78, 80, 81, 88, 92. Semanza further submits that filings in the ICTR case of *The Prosecutor v. Juvénal Rugambarara*, Case No. ICTR-00-59-T, related to and including Juvénal Rugambarara's amended indictment, plea agreement, and sentencing judgement ("Rugambarara" and "Rugambarara Plea Documents", respectively) further undermine the credibility of evidence related to Mwulire hill and Mabare mosque. *See* Request,

A. Applicable Law

12. Review proceedings are governed by Article 24 of the Statute and Rules 146, 147, and 148 of the Rules. A request to have the Appeals Chamber review a final judgement will be granted if the moving party shows that the following cumulative conditions are met: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the trial or appeal proceedings before the ICTR, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), or the Mechanism; (iii) the new fact could not have been discovered through the exercise of due diligence; and (iv) the new fact could have been a decisive factor in reaching the original decision.[26]

13. A review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed on trial or on appeal.[27] A "new fact", within the meaning of the relevant provisions, consists of "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".[28] The requirement that the new fact was not in issue during the proceedings means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict.[29] It is irrelevant whether the new fact already existed before the original proceedings or during such proceedings.[30] What matters is "whether the deciding body and the moving party knew about the fact or not" in reaching its decision.[31]

14. In "wholly exceptional circumstances", review may still be permitted even though the "new fact" was known to the moving party or was discoverable by it through the exercise of due diligence

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paras. 30, 34-36. The Appeals Chamber observes that, although Semanza was found to have been at the attack on Mabare mosque on 12 April 1994, he was not convicted in relation to it. Trial Judgement, paras. 244, 434, 456-459, 533, 534. Moreover, Semanza's submissions relating to Mwulire hill are brief, and he does not clearly request review of his conviction related to it on the basis of the Rugambarara Plea Documents. *See* Request, paras. 1, 2, 79-87, 94, 95. In any event, for the reasons set forth below, the Rugambarara Plea Documents do not amount to a new fact that could support a review of Semanza's criminal responsibility. *See infra* para. 23.

[26] *See Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Public Redacted Version of the Decision on Ngirabatware's Motion for Review, 19 June 2017, p. 2; *Prosecutor v. Ferdinand Nahimana*, Case No. MICT-13-37-R.1, Decision on Nahimana's Request for Review, 16 November 2015 ("*Nahimana* Decision of 16 November 2015"), para. 6; *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-R.1, Decision on Sreten Lukić's Application for Review, 8 July 2015 ("*S. Lukić* Decision of 8 July 2015"), para. 5; *Prosecutor v. Milan Lukić*, Case No. MICT-13-52-R.1, Decision on Milan Lukić's Application for Review, 7 July 2015 ("*M. Lukić* Decision of 7 July 2015"), para. 5; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Review, 29 May 2013, para. 7; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Decision with Respect to Veselin Šljivančanin's Application for Review, 14 July 2010, p. 2.

[27] *Nahimana* Decision of 16 November 2015, para. 7; *S. Lukić* Decision of 8 July 2015, para. 6. *See also Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015 ("*Niyitegeka* Decision of 13 July 2015"), para. 8.

[28] *Nahimana* Decision of 16 November 2015, para. 7; *S. Lukić* Decision of 8 July 2015, para. 6. *See also Niyitegeka* Decision of 13 July 2015, para. 7.

[29] *Nahimana* Decision of 16 November 2015, para. 7; *Niyitegeka* Decision of 13 July 2015, para. 7.

[30] *Nahimana* Decision of 16 November 2015, para. 7; *S. Lukić* Decision of 8 July 2015, para. 6.

[31] *Nahimana* Decision of 16 November 2015, para. 7; *S. Lukić* Decision of 8 July 2015, para. 6. *See also Niyitegeka* Decision of 13 July 2015, para. 7.

if a chamber is presented with "a new fact that is of such strength that it *would* affect the verdict" and determines that "review of its judgement is necessary because the impact of the new fact on the decision is such that to ignore it would lead to a miscarriage of justice".[32]

15. Finally, the Appeals Chamber considers that it is bound to interpret the Statute and the Rules in a manner consistent with the jurisprudence of the ICTR and the ICTY.[33] Consequently, while not bound by the jurisprudence of the ICTR or the ICTY, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTR or the ICTY Appeals Chambers and depart from them only for cogent reasons in the interests of justice.

B. Discussion

1. Musha Church

16. The Trial Chamber convicted Semanza of complicity in genocide and aiding and abetting extermination as a crime against humanity for gathering *Interahamwe* and directing assailants, which included soldiers, gendarmes, and *Interahamwe*, to kill Tutsi refugees at Musha church on 13 April 1994.[34] In reaching its findings, the Trial Chamber relied on evidence from Witnesses VA and VM who saw Semanza: (i) go to Musha church on 13 April 1994 around midmorning, accompanied by Paul Bisengimana ("Bisengimana"), *Interahamwe*, soldiers, and gendarmes; (ii) participate in the separation of Tutsi from Hutu refugees at Musha church; and (iii) direct the killing of the Tutsi refugees.[35] The Trial Chamber found that the testimony of Witnesses VA and VM were further corroborated by, *inter alia*, Witness VD, who saw Semanza and Bisengimana gathering *Interahamwe* on the morning of the 13 April 1994 attack, and Witness VV, who saw Semanza, in the company of Bisengimana, *Interahamwe*, and soldiers, head towards Musha church from where she saw smoke and heard explosions.[36] The ICTR Appeals Chamber dismissed

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[32] *Nahimana* Decision of 16 November 2015, para. 8; *S. Lukić* Decision of 8 July 2015, para. 7. *See also Niyitegeka* Decision of 13 July 2015, para. 6.
[33] *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012"), para. 6; *Augustin Ngirabatware v. The Prosecutor*, Case No. MICT-12-29-A, Judgement, 18 December 2014, para. 6.
[34] Trial Judgement, paras. 206, 425-430, 435, 436, 463-465, p. 165. *See also* Trial Judgement, paras. 194-205, 207, 208.
[35] Trial Judgement, paras. 166-178, 195, 196.
[36] Trial Judgement, paras. 179, 180, 197.

Semanza's challenges that the Trial Chamber erred in relying on Witnesses VA, VM, VD, and VV with respect to the Musha Church Attack.[37]

17. Semanza contends that declarations given in 2007 and 2008 by Evariste Micoyabagabo, François Rwabukumba, and Amandin Mbonyintwali in the ICTR case of *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44 ("First *Karemera et al.* Declarations"), Gabriel Manisha's testimony as recounted in his Rwandan *gacaca* judgement from 2007 ("Manisha's *Gacaca* Testimony"), and the Rugambarara Plea Documents (collectively, "Musha Church Documents") contain new facts warranting review of his convictions related to the Musha Church Attack.[38] Semanza argues that the Musha Church Documents contradict the evidence of Witnesses VA, VM, VD, and VV that, *inter alia*, Semanza was present at and participated in the attack and therefore undermine their credibility.[39] Semanza further argues that the Musha Church Documents came into existence after the 2005 issuance of the Appeal Judgement, and that the information contained in them, given the difficulties ICTR defence counsel face in Rwanda, could not have been discovered through an exercise of due diligence.[40]

18. The Prosecution responds that the First *Karemera et al.* Declarations and Manisha's *Gacaca* Testimony do not constitute new facts as their content was considered during Semanza's case.[41] It further contends that the Rugambarara Plea Documents are not "information of an evidentiary nature" that can be used to disprove allegations or have any bearing on the credibility of witnesses in Semanza's case.[42] The Prosecution adds that, even if the Musha Church Documents are considered to be new facts, they could not have been a decisive factor in Semanza's trial and appeal proceedings.[43]

19. The Appeals Chamber first considers whether the First *Karemera et al.* Declarations and Manisha's *Gacaca* Testimony constitute a new fact. The First *Karemera et al.* Declarations as well as Manisha's *Gacaca* Testimony present information to the effect that Semanza was not present

[37] Appeal Judgement, paras. 202-243, 249-252. As noted above, with respect to the Musha Church Attack, the ICTR Appeals Chamber reversed Semanza's convictions for complicity in genocide and aiding and abetting extermination and, by majority, entered convictions for ordering genocide, extermination as a crime against humanity, and murder as a serious violation of Common Article 3 of the Geneva Conventions and of Additional Protocol II. *See supra* para. 3, n. 5.
[38] Request, paras. 6-15, 52, 53, 56, 57, 59, 60, 79-81, 85-87, 95.
[39] Request, paras. 10, 11, 27-29, 35, 36, 60, 82, 87. In addition to providing information contradicting the evidence of Witnesses VA, VM, VD, and VV that Semanza participated in the Musha Church Attack, Semanza further argues that the declaration given by Evariste Micoyabagabo contradicts Witness VD's testimony that he had told Witness VD that he, Micoyabagabo, had participated in this attack. *See* Request, paras. 7, 10. He further asserts that Manisha's *Gacaca* Testimony undermines the Prosecution evidence as to Rugambarara's and Bisengimana's presence at the attack. Request, paras. 13-15, 59, 60.
[40] Request, paras. 15, 32, 52-54, 59, 61, 62, 80, 81. *See also* Request, paras. 63-78.
[41] Response, paras. 7, 15-20.
[42] Response, paras. 7, 33, 34.
[43] Response, paras. 7, 35-38.

during the Musha Church Attack.[44] Semanza submits that this undermines the credibility of Witnesses VA, VM, VD, and VV. However, this information does not amount to a "new fact" as the credibility of Witnesses VA, VM, VD, and VV and Semanza's presence during the Musha Church Attack were litigated throughout his proceedings.

20. Specifically, the Trial Chamber and the ICTR Appeals Chamber considered and rejected credibility challenges against Witnesses VA, VM, VD, and VV with respect to the Musha Church Attack.[45] In so doing, the Trial Chamber evaluated and rejected Defence evidence that Semanza was not present during the Musha Church Attack[46] as well as alibi evidence that Semanza was in Gitarama when the attack occurred.[47] The ICTR Appeals Chamber further rejected Semanza's submissions on appeal that the Trial Chamber failed to consider evidence corroborating Defence accounts that Semanza was not present during the Musha Church Attack[48] and affirmed the Trial Chamber's rejection of Semanza's alibi relevant to this attack.[49]

21. Although the First *Karemera et al.* Declarations and Manisha's *Gacaca* Testimony may not have been before the Trial Chamber and the ICTR Appeals Chamber, they do not constitute new information of a fact that was not in issue during Semanza's proceedings; rather they constitute additional information on issues litigated throughout Semanza's trial and appeal.[50] Consequently, they do not amount to a new fact justifying review.

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[44] *See* Request, Annex 1, Registry pagination ("RP.") 615; Request, Annex 4, RP. 597; Request, Annex 5, RP. 591; Request, Annex 8, RP. 561.

[45] Trial Judgement, paras. 162-208; Appeal Judgement, paras. 175-180, 185, 202-224. The Appeals Chamber also notes that, in his declaration, Evariste Micoyabagabo states that he never told Witness VD that he had seen Semanza recruiting people to attack Musha church. *See* Request, Annex 1, RP. 615. Witness VD testified that "Micoyabgagabo", who had participated in the attack at Musha church, told him that the attack against the Tutsis was successful because of the *Interahamwe* brought by Semanza. *See* Witness VD, T. 14 March 2001 pp. 49, 50. *See also* Trial Judgement, para. 179. The Trial Chamber did not rely on this aspect of Witness VD's evidence in convicting Semanza. Given the numerous, corroborating accounts relating to Semanza's participation in the Musha Church Attack, the Appeals Chamber does not consider that this information, even if it amounts to a new fact, could have been a decisive factor in reaching the original decision. *See* Trial Judgement, paras. 182, 188-190, 192, 193, 198-205. Likewise, information from Manisha's *Gacaca* Testimony suggesting that Rugambarara and Bisengimana were not at the Musha Church Attack is, as acknowledged by Semanza, duplicative of evidence presented at trial and does not amount to a new fact. *See* Trial Judgement, paras. 192, 203; Request, paras. 14, 59, 60.

[46] Trial Judgement, paras. 183-193, 198-203.

[47] Trial Judgement, paras. 121-137, 182, 204, 205.

[48] Appeal Judgement, paras. 253-255.

[49] Appeal Judgement, paras. 143-148, 185. The ICTR Appeals Chamber admitted additional evidence on appeal pertaining to Semanza's alibi relevant to the Musha Church Attack but considered that it did not impact the findings in relation to his participation in that attack. *See* Appeal Judgement, paras. 179, 180.

[50] *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("*Rutaganda* Decision of 8 December 2006"), paras. 29, 30. *See also Prosecutor v. Hazim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 11 ("If 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' [...], and the review procedure is not available.") (Emphasis in original).

22. Turning to the Rugambarara Plea Documents,[51] the Appeals Chamber notes that Rugambarara's amended indictment did not charge him with direct participation in the Musha Church Attack and he was not convicted on this basis.[52] Semanza submits that this contradicts Prosecution evidence that Rugambarara accompanied Semanza to the Musha Church Attack and during the killing and torture of Rusanganwa.

23. The Appeals Chamber recalls that an indictment simply contains allegations of facts with which an accused is charged and the Appeals Chamber of the ICTR has found it to have "no evidentiary value" in the context of review proceedings.[53] This conclusion is particularly persuasive when considering the broad discretion the Prosecution has in selecting information and crimes to be included in indictments[54] and the fact that Rugambarara's amended indictment was drafted with the intention of securing a plea agreement. Similarly, the facts relied upon to convict Rugambarara were also agreed to by the parties[55] and "such facts are merely *accepted* by the Trial Chamber upon a less burdensome level of scrutiny than one applied in instances where the Prosecution must prove facts upon which convictions are based beyond reasonable doubt."[56] Given the particular context in which the Rugambarara Plea Documents were created, the Appeals Chamber finds that they do not constitute new information of an "evidentiary nature" that would support a basis for review of Semanza's convictions.[57]

24. In light of the foregoing, the Appeals Chamber finds that the Musha Church Documents do not constitute new facts warranting review of Semanza's convictions in relation to the Musha Church Attack. Consequently, the Appeals Chamber need not consider whether the Musha Church

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[51] The Appeals Chamber observes that the Rugambarara plea agreement was reached and accepted by Trial Chamber II of the ICTR after Semanza's appeal proceedings. *See The Prosecutor v. Juvénal Rugambarara*, Case No. ICTR-00-59-T, Sentencing Judgement, 16 November 2007 ("*Rugambarara* Sentencing Judgement"), paras. 4-9.

[52] *Rugambarara* Sentencing Judgement, para. 5; *The Prosecutor v. Juvénal Rugambarara*, Case No. ICTR-00-59-I, Amended Indictment, 2 July 2007, paras. 14, 15.

[53] *François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Reconsideration and Review, 26 March 2012, para. 30.

[54] *See The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-04-A, Judgement, 23 November 2001 (original French version filed on 1 June 2001), para. 94 and references cited therein.

[55] *See Rugambarara* Sentencing Judgement, paras. 4, 5, 8.

[56] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 11 (emphasis in original).

[57] Semanza's attempt to establish a new fact on the basis of the Rugambarara Plea Documents could also be dismissed because the issues raised by them were at issue in Semanza's underlying proceedings. Specifically, although Witness VA provided evidence that Rugambarara went to Musha church with Semanza and was present during the attack, including the torture and killing of Rusanganwa, the Trial Chamber did not rely on this aspect of Witness VA's evidence. Trial Judgement, paras. 168, 169, 196, 197, 206, 211, 213. Furthermore, Defence Witness MTP testified that she did not see Rugambarara, whom she knew, during the Musha Church Attack. Trial Judgement, para. 192. Consequently, the Rugambarara Plea Documents fail to present new information that was not among the factors the Trial Chamber could have taken into account in reaching its verdict and, therefore, do not support the existence of a new fact.

Documents satisfy the remaining, cumulative requirements necessary for granting a request for review.

2. Torture and Killing of Rusanganwa

25. In connection with Semanza's participation in the Musha Church Attack, the Trial Chamber found that Semanza inflicted serious injuries on Rusanganwa, who died as a result of those injuries.[58] The Trial Chamber relied on the evidence of Witness VA who testified, *inter alia*, that: (i) Semanza took a machete from "Hatageka" and cut one of Rusanganwa's legs and an arm; (ii) Bisengimana took the machete and cut Rusanganwa's other limbs; (iii) the *Interahamwe* put Rusanganwa in a vehicle where they were throwing other dead bodies; and (iv) she did not see Rusanganwa alive again.[59] The Trial Chamber convicted Semanza of committing torture and murder as crimes against humanity.[60] The ICTR Appeals Chamber affirmed the Trial Chamber's reliance on Witness VA's evidence and the convictions entered by the Trial Chamber.[61]

26. Semanza submits that Bisengimana's December 2005 amended indictment before the ICTR ("*Bisengimana* Indictment")[62] and Witness VA's 2007 testimony as reflected in a Rwandan *gacaca* judgment ("Witness VA's *Gacaca* Testimony") undermine Witness VA's credibility in relation to the killing of Rusanganwa and constitute a basis for review of his convictions.[63] He contends that, contrary to Witness VA's testimony that Bisengimana participated in the torture and killing of Rusanganwa, the *Bisengimana* Indictment only charged him with being present during the attack.[64] Semanza also argues that Witness VA's *Gacaca* Testimony contradicts her evidence in his case that "Hatageka" participated in the killing of Rusanganwa.[65] Semanza further argues that the *Bisengimana* Indictment and Witness VA's *Gacaca* Testimony were unavailable as they came into existence in December 2005 and 2007, respectively, after the May 2005 issuance of his Appeal Judgement.[66]

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[58] Trial Judgement, paras. 209-213.
[59] Trial Judgement, para. 170.
[60] Trial Judgement, paras. 486-488, 493, 494, p. 165.
[61] Appeal Judgement, paras. 370, 371, pp. 125, 126. As noted above, the Appeals Chamber, by majority, entered additional convictions for committing murder and torture as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the torture and killing of Rusanganwa. *See supra* para. 3.
[62] Request, para. 38, *referring to The Prosecutor v. Paul Bisengimana*, Case No. ICTR 00-60-I, Amended Indictment, 1 December 2005, para. 39
[63] Request, paras. 37-41, 58, 88-91. Semanza's arguments that the Rugambarara Plea Documents contradict Witness VA's evidence in relation to the torture and killing of Rusanganwa have been addressed above. *See supra* para. 23, n. 57.
[64] Request, paras. 37-40.
[65] Request, paras. 41, 92.
[66] Request, paras. 88, 92.

27. The Prosecution responds that the *Bisengimana* Indictment does not present a new fact warranting review as it is not "information of an evidentiary nature" and cannot disprove allegations or have any bearing on the credibility of witnesses.[67] The Prosecution argues that, in any case, the alleged new facts could not have been a decisive factor in reaching the original decision.[68]

28. The Appeals Chamber observes that the *Bisengimana* Indictment does not charge Bisengimana with his physical participation in the torture and killing of Rusanganwa.[69] Semanza contends that this contradicts the findings underpinning his convictions for this event. However, and as noted above, because an indictment simply contains allegations of facts with which an accused is charged, it has been found to have no evidentiary value in the context of review proceedings.[70] The Appeals Chamber finds this conclusion particularly persuasive in relation to the *Bisengimana* Indictment, which was drafted on the basis of a plea agreement between Bisengimana and the ICTR Prosecutor and removed allegations contained in a prior indictment of Bisengimana's direct participation in the killing of Rusanganwa.[71] Indeed Semanza himself concedes that "[o]bviously, the Accused who takes a guilty plea is favored in some way".[72] In view of the particular circumstances in which the *Bisengimana* Indictment was created, the Appeals Chamber finds that it does not present new information of an "evidentiary nature" supporting a basis for review of Semanza's convictions.[73]

29. Turning to Witness VA's *Gacaca* Testimony, the summary contained in the Rwandan *gacaca* judgement reflects the witness referring to "Saïd Hategekimana" killing two persons named "Burasa" and "Mutuyinkingi".[74] Semanza contends that this contradicts Witness VA's evidence as the witness referred to a "Hategeka" rather than "Hategekimana" giving Semanza a machete that he used to strike Rusanganwa.[75]

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[67] Response, paras. 7, 33, 34.
[68] Response, paras. 35-38.
[69] *Bisengimana* Indictment, para. 39.
[70] *See supra* para. 23.
[71] *Compare Bisengimana* Indictment, para. 39 *with The Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-I, Indictment, 10 July 2000, p. 12. *See also* Request, para. 38.
[72] Request, para. 40.
[73] Semanza's attempt to establish a new fact on the basis of the *Bisengimana* Indictment could also be dismissed because the issue raised by it was considered and rejected in Semanza's appeal proceedings. Specifically, the ICTR Appeals Chamber dismissed arguments that the Trial Chamber failed to account for discrepancies between a prior Bisengimana indictment and the charges and facts attributed to Semanza. *See* Appeal Judgement, paras. 44, 45. Consequently, Semanza is only presenting additional material of an issue that was disposed of in his appeal – that an indictment against Bisengimana differed from the charges and convictions against him. This is insufficient to establish a new fact. *See Aloys Ntabakuze v. The Prosecutor*, Case No. MICT-14-77-R, Decision on Ntabakuze's *Pro Se* Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review, 19 January 2015, para. 12.
[74] Request, Annex 12, RP. 534.
[75] The Appeals Chamber notes that Semanza uses "Hategeka" whereas the witness used "Hatageka". *Compare* Request, para. 41 *with* Trial Judgement, para. 170.

30. The Appeals Chamber observes that Witness VA's *Gacaca* Testimony, which is only three sentences long, discusses attacks on persons other than Rusanganwa, on an unspecified date, and makes no reference to Semanza.[76] Given the vagueness of this testimony, Semanza fails to show that the "Hategekimana" referred to in Witness VA's *Gacaca* Testimony is the same "Hatageka" she referred to in Semanza's proceedings. Furthermore, to the extent that Semanza argues that Witness VA's *Gacaca* Testimony contains material omissions related to Semanza's involvement in the killing of Rusanganwa, the Appeals Chamber does not consider any lack of reference to Semanza's activities in a brief statement taken during a separate trial involving a different accused constitutes a new fact for the purposes of review.[77] As previously recalled by the ICTR Appeals Chamber, "to suggest that if something were true a witness would have included it in a statement [...] is obviously speculative".[78]

31. Based on the foregoing, the Appeals Chamber finds that the *Bisengimana* Indictment and Witness VA's *Gacaca* Testimony do not constitute new facts that would support a basis for review of Semanza's convictions in relation to the torture and killing of Rusanganwa. Consequently, the Appeals Chamber need not consider whether the *Bisengimana* Indictment and Witness VA's *Gacaca* Testimony satisfy the remaining, cumulative requirements necessary for granting a request for review.

3. Bicumbi Commune

32. The Trial Chamber, relying on the testimony of Witness VAM, found that, on the morning of 8 April 1994, Semanza met Rugambarara and a group of *Interahamwe* in front of a certain house in Bicumbi commune and that Semanza told the *Interahamwe* that "a certain Tutsi family had not yet been killed, that no Tutsi should survive, and that the Tutsis should be sought out and killed".[79] The Trial Chamber further relied on Witness VAM's evidence to find that, later the same day, *Interahamwe* killed four members of that family as well as two of their neighbours.[80] In so finding, the Trial Chamber rejected alibi evidence that Semanza was at his home on 8 April 1994.[81] The Trial Chamber convicted Semanza of instigating murder as a crime against humanity in relation to this incident.[82] The ICTR Appeals Chamber dismissed Semanza's challenges to the Trial

[76] *See* Request, Annex 12, RP. 534.
[77] *Rutaganda* Decision of 8 December 2006, para. 13.
[78] *Rutaganda* Decision of 8 December 2006, para. 13, *quoting Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 176.
[79] Trial Judgement, paras. 269, 271.
[80] Trial Judgement, paras. 269, 271.
[81] Trial Judgement, para. 270. *See also* Trial Judgement, paras. 94-111.
[82] *See* Trial Judgement, paras. 271, 272, 496, 499. *See also* Trial Judgement, para. 267.

Chamber's reliance on Witness VAM's evidence, affirmed the Trial Chamber's rejection of Semanza's alibi relevant to this event, and affirmed the conviction.[83]

33. Semanza submits that declarations given by Antoine Rutikanga, Callixte Bitegwamaso, and Jean Nsanzumuhire in 2007 in the ICTR case of *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44 ("Second *Karemera et al.* Declarations") and the Rugambarara Plea Documents (collectively, "Bicumbi Documents") contain new facts warranting review of his conviction for the murders in Bicumbi commune on 8 April 1994.[84] Specifically, Semanza submits that the Second *Karemera et al.* Declarations refute Witness VAM's evidence as to Semanza's involvement in the 8 April 1994 killings in Bicumbi commune.[85] Semanza further argues that, contrary to Witness VAM's evidence, the Rugambarara Plea Documents reflect that Rugambarara was not charged with or convicted for physically participating in this attack.[86] Semanza submits that the Bicumbi Documents came into existence after the issuance of his Appeal Judgement in 2005 and that the information contained in them, given the particular difficulties ICTR defence counsel faced in Rwanda, could not have been discovered earlier despite an exercise of due diligence.[87]

34. The Prosecution responds that the Second *Karemera et al.* Declarations do not constitute new facts but only additional evidence of facts related to his whereabouts during this attack and Witness VAM's credibility, which were litigated in his proceedings.[88] It further contends that the Rugambarara Plea Documents are not "information of an evidentiary nature" that can be used to disprove allegations or have any bearing on the credibility of witnesses.[89] The Prosecution concludes that, even if the Bicumbi Documents could qualify as "new facts", they could not have been a decisive factor in reaching the original decision.[90]

35. The Appeals Chamber will first consider whether the Second *Karemera et al.* Declarations constitute a new fact. The Second *Karemera et al.* Declarations reflect that each of the declarants were present when the *Interahamwe* killed members of the Tutsi family, that none saw Semanza near the house referred to by Witness VAM or in its vicinity at any time during that day, and that each stated that he would have known had Semanza been present.[91] Semanza argues that this

[83] Appeal Judgement, paras. 136-139, 291-298, p. 126.
[84] Request, paras. 22-25, 31-36, 52-57, 60, 79-81, 83, 87, 94, 95.
[85] Request, paras. 21, 22, 56, 57, 83, 85-87.
[86] Request, paras. 30-36.
[87] Request, paras. 21, 32, 33, 52-54, 61-78, 81.
[88] Response, paras. 7, 14, 23-26, 33, 34.
[89] Response, paras. 7, 33, 34.
[90] Response, paras. 7, 28-30, 35-38.
[91] Request, Annex 9, RP. 553; Request, Annex 10, RP. 543; Request, Annex 11, RP. 541.

evidence contradicts Witness VAM's evidence as to Semanza's involvement in the 8 April 1994 killings and raises issues related to her credibility.

36. During the original proceedings, the Trial Chamber underlined that Witness VAM had provided a detailed first-hand account and could observe the events from a short distance.[92] Accordingly, the Trial Chamber found Witness VAM's testimony credible and reliable.[93] The ICTR Appeals Chamber further concluded that Semanza had failed to demonstrate that Witness VAM testified untruthfully and failed to show that the Trial Chamber was unreasonable in relying on her testimony.[94] Therefore, Witness VAM's credibility was extensively litigated at trial and on appeal. Furthermore, Semanza's presence in relation to this attack was also contested at trial and appeal on the basis of alibi evidence.[95] In addition to the alibi witnesses,[96] other witnesses suggested that Semanza was not in Bicumbi commune on the day of the attack and this issue was litigated in Semanza's proceedings.[97] Consequently, Witness VAM's credibility as well as Semanza's involvement in these killings and his whereabouts at the time of them were litigated at trial and on appeal. Therefore, the Second *Karemera et al.* Declarations do not amount to a new fact for the purposes of review.[98]

37. As it concerns the Rugambarara Plea Documents, the Appeals Chamber notes that Rugambarara was not charged with or convicted for the murders of 8 April 1994 in Bicumbi commune. Semanza argues that this contradicts evidence relied upon in convicting him for this event. However, for the reasons stated above,[99] the Appeals Chamber finds that Rugambarara Plea Documents do not amount to new information of "evidentiary nature" that would support a basis for review of Semanza's conviction.[100]

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[92] Trial Judgement, para. 269.
[93] Trial Judgement, para. 269.
[94] Appeal Judgement, para. 297.
[95] *See supra* para. 32.
[96] *See* Trial Judgement, paras. 83-90, 94-104.
[97] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, *Conclusions de la Défense après la clôture des débats suite à la décision de la 3ème Chambre en date du 2 mai 2002*, 12 June 2002, pp. 50, 93; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Defence Appeal Brief, 21 October 2003, para. 343; Appeal Judgement, paras. 293, 298.
[98] *See, e.g., M. Lukić* Decision of 7 July 2015, paras. 8-15, 17 (rejecting that, *inter alia*, information from witnesses denying Lukić's presence at a crime scene constituted a new fact as Lukić had led evidence to challenge his involvement in the crimes and in support of an alibi at trial and these issues were also litigated on appeal). *See also Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009, paras. 136-166, 192-230; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT98-31/1-A, Judgement, 4 December 2012, paras. 65-115, 121-145.
[99] *See supra* para. 23.
[100] Semanza's attempt to establish a new fact on the basis of the Rugambarara Plea Documents could also be dismissed because the issue raised by them was considered and rejected in Semanza's appeal proceedings. Specifically, the ICTR Appeals Chamber previously dismissed arguments that the Trial Chamber failed to account for discrepancies between

38. Based on the foregoing, the Appeals Chamber finds that the Bicumbi Documents are not new facts in relation to Semanza's conviction for instigating killings in Bicumbi commune on 8 April 1994. Consequently, the Appeals Chamber need not consider whether the Bicumbi Documents satisfy the remaining, cumulative requirements necessary for granting a request for review.

IV. DISPOSITION

39. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Request in its entirety and **REMINDS** Semanza to file a public redacted version of the Request as soon as practicable after redacting any confidential information.[101]

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

Done this 9th day of April 2018,
At The Hague,
The Netherlands

Judge Theodor Meron, Presiding

[Seal of the Mechanism]

an accomplice's indictment and the charges and facts attributed to Semanza. *See* Appeal Judgement, paras. 44, 45. Consequently, the Rugambarara Plea Documents are simply additional material in support of an issue that was previously adjudicated by the ICTR Appeals Chamber – that charges against an accomplice differed from the charges and convictions against Semanza. This is insufficient to establish a new fact. *See supra* n. 73.

[101] Order of 27 November 2017, p. 2.

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