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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-01-76-A
9 January 2007
(1607/H - 1598/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 9 January 2007

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THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-A

**DECISION ON ALOYS SIMBA'S REQUESTS FOR SUSPENSION OF
APPEAL PROCEEDINGS AND REVIEW**

Counsel for the Prosecution

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. George William Mugwanya
Ms. Inneke Onsea
Ms. Evelyn Kamau

Counsel for the Appellant

Mr. Sadikou Ayo Alao
Mr. Wencslas de Souza
Mr. Jean Kiwallo
Mr. Salim A. Kolawolou

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM: Patricia T. Chidimba	
SIGNATURE:	DATE: 09/01/07

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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 Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Tribunal") is seized of the "*Requête de la Défense en vue de la suspension de tous les délais de la procédure en Appel en cours (Article 25 du Statut, articles 116, 120, 121 et 123 du RPP)*", filed on 22 July 2006, by Counsel for Aloys Simba ("Request for Suspension of Appeal Proceedings" and "Defence" respectively), and the "*Requête en Extrême Urgence de la Défense en vue de la Révision du Jugement en date du 13 Décembre 2005 pour cause de faits nouveaux et/ou de renvoi de la cause devant la 1ère Chambre du TPIR pour en connaître au fond (Art. 25 du Statut du TPIR: 120, 121 et 123 du RPP)*", filed on 11 September 2006 ("Request for Review"), by the Defence.¹

L INTRODUCTION

1. On 13 December 2005, Trial Chamber I ("Trial Chamber") rendered its Judgement in the case *Prosecutor v. Aloys Simba*, finding him guilty of a count of genocide and a count of extermination as a crime against humanity ("Trial Judgement"). The convictions related to crimes committed in Murambi Technical School and Kaduha Parish, in Gikongoro Prefecture, in April 1994.² Both the Prosecution³ and the Defence⁴ filed appeals challenging the Trial Judgement.
2. On 22 July 2006, the Defence filed before the Trial Chamber the "*Requête en extrême urgence de la défense en vue de la révision du jugement de la Chambre de première instance du TPIR en date du 13 décembre 2005 pour cause de faits nouveaux (art. 25 du Statut du TPIR; 120 & 121 du RPP)*" ("Request for Review before the Trial Chamber"), requesting a review of the Trial Judgement pursuant to Rule 120 of the Rules of Procedure and Evidence of the Tribunal ("Rules"). This request is currently pending before the Trial Chamber.
3. On 22 July 2006, the Defence also filed the Request for Suspension of Appeal Proceedings, requesting a suspension of the time limits in the appeal proceedings and the return of the case to the Trial Chamber for the purpose of conducting a review.⁵
4. In the Request for Review, the Defence requests that the Appeals Chamber:

¹ On 15 September 2006, the Defence also filed a "*Liste des Annexes*" containing 17 annexes to the Request for Review.

² Trial Judgement, paras 419 and 426.

³ Prosecutor's Notice of Appeal, 12 January 2006.

⁴ Act d'appel de la Défense, on 21 June 2006.

⁵ Request for Suspension of Appeal Proceedings, p. 3.

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- i. Find that the Trial Chamber has competence to rule on the Request for Review;
- ii. Send the Request for Review to the Trial Chamber for the consideration of its merits; and
- iii. Grant a stay of the proceedings in the appeal lodged by the Defence;⁶

Alternatively, should the Appeals Chamber consider that it has competence to consider the Request for Review, the Defence requests the Appeals Chamber to:

- i. Admit the Request for Review and find that it has merit;
- ii. Find that the report produced by the witness-investigator (TER) and his statement constitute new facts within the meaning of Article 25 of the Statute of the Tribunal ("Statute") and Rule 120 of the Rules, calling into question the Trial Judgement;
- iii. Order the extension to the witness-investigator (TER) of the protective measures for Defence witnesses;
- iv. Schedule a date for hearing the presentation of new evidence and for review of the Trial Judgement, pursuant to Rule 121 of the Rules; and
- v. Conduct a site visit to cross-check the merits of the Defence findings, should it be deemed necessary.⁷

The Prosecution opposes the requests and submits that the Appeals Chamber should dismiss both motions.⁸

⁶ Request for Review, p. 12.

⁷ *Ibid.*

⁸ The Prosecution filed the "Prosecutor's Response to 'Requête de la Défense en vue de la suspension de tous les délais de la procédure en Appel en cours (Article 25 du Statut, articles 116, 120, 121 et 123 du RPP)'" on 1 August 2006 ("Response to the Request for Suspension of Appeal Proceedings") and the "Prosecutor's Response to « Requête en Extrême Urgence de la Défense en vue de la Révision du Jugement en date du 13 Décembre 2005 pour cause de faits nouveaux et/ou de renvoi de la cause devant la 1ère Chambre du TPIR pour en connaître au fond (Art. 25 du Statut du TPIR: 120, 121 et 123 du RPP) »" was filed on 21 September 2006 ("Prosecution's Response to the Request for Review") opposing the motion. See also the "Réplique de la défense à la Réponse du Procureur suite à la « Requête de la Défense en vue de la suspension de tous les délais de la procédure en appel en cours (Articles 25 du statut, Articles 116, 120, 121 et 123 du RPP) »" which was confidentially filed on 7 August 2006. A corrigendum by the same title was filed on the same date. The Defence also filed the "Réplique de la défense à la Réponse du Procureur suite à la 'Requête en extrême urgence de la Défense en vue de la révision du Jugement en date du 13 décembre 2005 pour cause de faits nouveaux et/ou renvoi de la cause devant la 1ère Chambre du TPIR pour en connaître au fond (Articles 25 du statut, Articles 116, 120, 121 et 123 du RPP)'" on 25 October 2006.

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II. APPLICABLE LAW

5. The Appeals Chamber deems it necessary to consider, as a preliminary matter, which Chamber has jurisdiction to dispose of a request for review of a Trial Judgement when the appeal is pending, pursuant to Rules 120 and 123.

6. The Appeals Chamber recalls Article 25 of the Statute and Rules 120(A) and 123 of the Rules:

Article 25: 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.

Rule 120(A): Request for Review

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.

Rule 123: Return of the Case to the Trial Chamber

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

7. The Appeals Chamber recalls that the proper forum for the filing of a request for review is the judicial body which rendered the final judgement.⁹ When the parties have not lodged an appeal, this body is the Trial Chamber.¹⁰ However, when the judgement has been appealed, a request

⁹ *Prosecutor v. Dusko Tadić*, Case No.: IT-94-1-R, Decision on Motion for Review, 30 July 2002 ("*Tadić* Decision on Motion for Review"), para. 22. The Appeals Chamber notes that Rule 123 of the ICTR Rules is identical to Rule 122 referred to in the *Tadić* Decision on Motion for Review.

¹⁰ *Ibid.*

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pursuant to Rule 123 should be filed before the Appeals Chamber.¹¹ It will then be for the Appeals Chamber to determine, pursuant to Rule 123 of the Rules, whether to consider the motion for review itself or whether to refer the case to the Trial Chamber or, should this not be possible, to a new Trial Chamber.¹² Since both parties in this case appealed the Trial Judgement, the Request for Review was properly filed before the Appeals Chamber. Having considered the parties' submissions, the Appeals Chamber finds, pursuant to its discretionary power, that it is in the interests of justice and of judicial economy in the circumstances of this case to consider the Request for Review itself.

8. According to the jurisprudence of this Tribunal and that of the ICTY Appeals Chamber, in order for a Chamber to review a decision under Rules 120 and 121 of the Rules, the moving party must demonstrate that:

- a) There is a new fact;¹³
- 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;¹⁴
- 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;¹⁵ and
- d) The new fact, if proved, could have been a decisive factor in reaching the original decision.¹⁶

These criteria are cumulative.¹⁷ However, the Appeals Chamber recalls that in "wholly exceptional circumstances", where the impact of a new fact is of such strength that it would affect the verdict 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.¹⁸

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Tadić* Decision on Motion for Review, para. 25; *Eliézer Niyitegeka v. Prosecutor*, Case No.: ICTR-96-14-R, Decision on Request for Review, 30 June 2006 ("*Niyitegeka* Decision on Request for Review"), para. 6.

¹⁴ *Tadić* Decision on Motion for Review, para. 25; *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"), para. 11; *Niyitegeka* Decision on Request for Review, para. 6.

¹⁵ *Niyitegeka* Decision on Request for Review, para. 6.

¹⁶ *Delić* Decision on Motion for Review, paras. 7-8; *Prosecutor v. Gorun Jelisić*, Case No.: IT-95-10-R, Decision on Motion for Review, 2 May 2002 ("*Jelisić* Decision on Motion for Review"), pp. 2-3; *Tadić* Decision on Motion for Review, para. 20; *Niyitegeka* Decision on Request for Review, para. 6.

¹⁷ *Josipović* Decision on Motion for Review, para. 21; *Niyitegeka* Decision on Request for Review, para. 7.

¹⁸ *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 Motion for Review"), para. 65; *Prosecutor v. Drago Josipović*, Case No. IT-95-16-R2, Decision on Motion for Review, 7 March 2003 ("*Josipović* Decision on

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III. ANALYSIS

9. The new fact submitted by the Defence consists of a redacted *procès-verbal* of a Rwandan "investigator-witness" with the pseudonym TER ("TER") and a redacted statement signed by Lead Counsel for the Defence and TER, which allegedly show that it is materially impossible to go from Murambi Technical School to Kaduha Parish in about 40 minutes, contrary to the implication of the Trial Chamber findings based on the testimonies of Prosecution Witnesses KEI, KSY, YH and KXX.¹⁹ The Defence submits that if the proffered evidence of TER had been known to the Defence and submitted to the Trial Chamber, it would not have found that Aloys Simba ("Appellant"), on 21 April 1994, travelled from Murambi Technical School to Kaduha Parish in 40 minutes between 8:20 a.m. and 9:00 a.m., and consequently would not have convicted him for the crimes that occurred at these places.²⁰

10. The Defence submits that the Trial Chamber primarily based its conviction for the killings at Murambi Technical School on the testimonies of Witnesses KEI and KSY who testified respectively that the Appellant came to Murambi Technical School on 21 April 1994 at 7 a.m. and "between 8:00 a.m. and 9 a.m." to distribute weapons and encourage the assailants.²¹ It further submits that the Trial Chamber also found credible Witness YH who testified that the Appellant was at Kaduha Parish on that same day addressing the assailants and distributing weapons at 8:20 a.m. and Witness KXX who testified that the Appellant was at Kaduha Parish at 9:00 a.m.²² The Defence submits that the statement signed by TER fundamentally calls into question the above findings of the Trial Chamber and constitutes a new element warranting a review of the Trial Judgement.²³

11. The Defence further submits that, according to the statement provided by TER, a four-wheel drive vehicle can take two routes from Murambi Technical School to Kaduha Parish during the dry season.²⁴ One route,²⁵ which is 79 km long, takes four hours to drive while the other,²⁶ which is 72 km long, takes 2 hours and 55 minutes to drive. The Defence contends that in the rainy season, the

Moulin for Review"), para. 13; *Tadić* Decision on Motion for Review, para. 26; *Delić* Decision on Motion for Review, para. 15; *Niyitegeka* Decision on Request for Review, para. 7.

¹⁹ Request for Review, p. 10.

²⁰ *Ibid.*, pp. 2 and 10.

²¹ *Ibid.*, pp. 3 and 4, referring to paras 87-121 of the Trial Judgement.

²² *Ibid.*, p. 5, referring to the Trial Judgement, para. 142; T. 21 September 2004, pp. 34-37 (Annex 5); Request for Review, p. 10, referring to the Trial Judgement, para. 149; T. 23 September 2004, pp. 42-45 (Annex 6).

²³ *Ibid.*, p. 11.

²⁴ *Ibid.*, p. 9.

²⁵ *Ibid.*, p. 9. According to the Defence, this route goes through Murambi Technical School- Gikongoro- Gasarendra-Kitabi- Musebeya- Kaduha Parish.

²⁶ *Ibid.*, p. 9. According to the Defence this other route goes through Murambi Technical School- Gikongoro- Gasarendra- Musebeya- Kaduha Parish.

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travel time is longer, perhaps double,²⁷ and thus concludes that it would have been materially impossible for the Appellant to go from Murambi Technical School to Kaduha Parish in about 40 minutes on 21 April 1994 as found by the Trial Chamber on the basis of the testimonies of Witnesses KEI, KSY, YH and KXX.²⁸

12. In response, the Prosecution argues that the alleged new facts, consisting of the distance between Murambi Technical School and Kaduha Parish and the ability of the Appellant to travel between the two locations within the time frame found by the Trial Chamber, are not "new" within the meaning of Rule 120 of the Rules, given that they clearly relate to a factor or an issue that was raised and considered during the trial.²⁹ It submits that it is indisputable that the distance between Murambi Technical School and Kaduha Parish, the credibility of Prosecution witnesses, and the Applicant's participation in the crimes at the two locations are factors that were considered during trial.³⁰ The Defence cross-examined the relevant Prosecution witnesses, made two requests for an on-site visit to Rwanda, and introduced evidence of an expert witness who stated that the distance covered by the Appellant on 21 April 1994 would take at least five days.³¹

13. The Appeals Chamber recalls that a new fact within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules refers to "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".³² This means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict, or been in issue during the original proceedings.³³ In other words, "[w]hat is relevant is whether the deciding body [...] knew about the fact or not" in arriving at its decision.³⁴ Thus, where the "new facts" are identical to facts already at issue, then review under Rule 119 is not available.³⁵

14. The Appeals Chamber considers that the Defence seeks to introduce new evidence in order to prove a fact that was previously litigated at trial, namely that, contrary to the testimony of Witnesses KEI, KSY, YH and KXX, who asserted the Appellant's presence at both places, it was not physically possible for the Appellant to travel from Murambi Technical School to Kaduha

²⁷ *Ibid.*, p. 10.

²⁸ *Ibid.*, p. 10.

²⁹ Response, para. 18.

³⁰ *Ibid.*, para. 19, referring to the Trial Judgment, paras 134, 399, 401 and 402; T. 8 November 2004, pp. 3-7; T. 9 November 2004, p. 8. The Prosecution also refers to the 2 requests for site visits.

³¹ *Ibid.*, para. 19. See also Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005; and Decision on the Defence Request for Site Visits in Rwanda, 4 May 2005.

³² *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 ("*Blaškić* Review Decision"), para. 14; *Prosecutor v. Jelisić*, Case No. IT-95-10-R, Decision on Motion for Review, 2 May 2002 ("*Jelisić* Review Decision"), p. 3.

³³ *Blaškić* Review Decision, paras 14 and 15; *Tadić* Review Decision, para. 25.

³⁴ *Ibid.*; see also *Niyitegeka* Review Decision, para. 6.

³⁵ *Blaškić* Review Decision, para. 17.

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Parish in about 40 minutes.³⁶ The Appeals Chamber recalls that Witness KSY testified that he saw the Appellant address and distribute weapons to the attackers who proceeded to attack the refugees at approximately 7 a.m. on 21 April 1994.³⁷ Witness KEI also placed the Appellant at or near Murambi Technical School at approximately the same time.³⁸ Witnesses YH and KXX similarly testified that on the morning of 21 April 1994, the Appellant arrived at Kaduha Parish between 8 a.m. and 9 a.m., brought weapons to the attackers and instructed them to "get rid of the filth".³⁹

15. At trial, the Appellant submitted evidence regarding this particular alleged new fact. As mentioned by the Defence in the Request for Review, the impossibility of travelling in 40 minutes between these two places was raised in its report by M. Pascal Ndengejeho, a Defence expert witness.⁴⁰ It was further submitted by the Defence that the distance allegedly covered by him would have taken at least five days.⁴¹ The Defence also filed two requests seeking a site visit to Kaduha and Murambi,⁴² as well as the roads leading up to them.⁴³ The Defence asserted, in support of both site visit requests that it was impossible or at least improbable that the Appellant would have travelled in short periods of time between the various places relevant to the Prosecution case, including Murambi and Kaduha, especially during the rainy season.⁴⁴ Furthermore, Prosecution Witness Herbert Rheno Karugaba, a former investigator in the Office of the Prosecutor in Kigali, testified that the distance from Gikongoro (Murambi) to Kaduha is approximately 25 to 30 kilometres.⁴⁵ This witness was cross-examined by the Defence about the state of the roads between the two places in 1994.⁴⁶

16. The distance between various places relevant to the case and the time necessary for travelling these distances was further addressed by the parties during closing arguments. On 4 July 2005, the Defence filed an annex to its Defence Closing Brief containing tables and maps showing the alleged distances between various relevant places and crime scenes, and showing the time of the Appellant's alleged presence by Prosecution witnesses at some places. The map title "*Illustration des distances*" is particularly relevant since it shows the alleged distance between Kaduha and Murambi (100 km), and indicates the time of the Appellant's alleged presence at both places on 20

³⁶ Request for Review, p. 6.

³⁷ Trial Judgement, para. 118.

³⁸ *Ibid.*, para. 118.

³⁹ *Ibid.*, paras 142 and 150; T. 23 September 2004, pp. 44-45; T. 24 September 2004, pp. 6, 41, 43, 60.

⁴⁰ Request for Review, p. 7; Exhibit D.156, *Rapport de l'expert Ndengejeho*, filed on 5 April 2005, p. 49.

⁴¹ *Rapport de l'expert Ndengejeho*, filed on 5 April 2005, p. 49; Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005; and Decision on the Defence Request for Site Visits in Rwanda, 4 May 2005.

⁴² *Requête en extrême urgence de la Défense en vue du transport sur les lieux (article 73 du RPP)*, filed 7 January 2005 (First Site Visit Request) and *Requête en extrême urgence de la Défense en vue du transport sur les lieux (article 73 du RPP)*, filed 22 March 2005 (Second Site Visit Request).

⁴³ Second Site Visit Request, p. 3.

⁴⁴ First Site Visit Request, pp. 2 and 3; Second Site Visit Request, p. 3.

⁴⁵ T. 8 November 2004, p. 7.

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and 21 April 1994.⁴⁷ In their closing arguments, both the Prosecution and the Defence made oral submissions on the issue of the presence of the Appellant at various places at the same time or during a short period of time on 21 April 1994.⁴⁸

17. The purported "new fact" as it relates to the distance between Murambi Technical School and Kaduha Parish and the time it would have taken the Appellant to travel between the two places was thus in issue before the Trial Chamber. The Appeals Chamber recalls that in *Delić*, the ICTY Appeals Chamber 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 [Rule 120 ICTR], and the review procedure is not available."⁴⁹ In the *Delić* review, the ICTY Appeals Chamber concluded 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)."⁵⁰

18. The statement of TER is information of an evidentiary nature concerning the distance and length of time it would take to travel between Murambi Technical School and Kaduha Parish. As discussed above, this issue was litigated at trial. Accordingly, the statement of TER does not amount to a "new fact" for the purposes of a review motion, but is additional evidence of a fact already litigated at trial. The Request for Review is therefore dismissed in this respect.

19. Furthermore, as previously noted, in the Request for Review, the Defence requests:

- i. The extension to TER of the protective measures for Defence witnesses;
- ii. A date for hearing the presentation of new evidence and for review of the Judgement and Sentence rendered on 13 December 2005, pursuant to Rule 121 of the Rules; and
- iii. If the Court deems it necessary, to proceed with a site visit prior to the review of the Judgement to cross-check the merits of the Defence findings.⁵¹

Also, in the Request for Suspension of Appeal Proceedings, the Defence requests that the case be returned to the Trial Chamber for a ruling on the Request for Review pursuant to Rule 123 and that

⁴⁶ T. 9 November 2004, p. 8.

⁴⁷ *Corrigendum à l'annexe des conclusions de la Défense de Aloys Simba*, 4 July 2005, *Annexe Ia, « Illustration des distances » (Tableau Ia)*, index 4598bis.

⁴⁸ T. 7 July 2005, pp. 11-12 and 57-59.

⁴⁹ *Delić* Decision on Motion for Review, para. 11. See also *Niyitegeka* Decision on Request for Review, para. 12.

⁵⁰ *Delić* Decision on Motion for Review, para. 11. The Defence does not bring its request pursuant to Rule 115 but only pursuant to Rule 120.

⁵¹ Request for Review, p. 12.

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the appeal proceedings be suspended pending the outcome of the Trial Chamber's decision on that request.⁵²

20. In light of its decision on the merits of the Request for Review above with regard to the alleged new fact, the Appeals Chamber dismisses the additional matters raised in the Request for Review and Request for Suspension of Appeal Proceedings as moot.

IV. DISPOSITION

21. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Request for Review and Request for Suspension of Appeal Proceedings.

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



Judge Fausto Pocar
Presiding Judge

Dated this 9th day of January 2007,
At The Hague, The Netherlands.



[Seal of the Tribunal]

⁵² Request for Suspension of Appeal Proceedings, p. 3. This request is also repeated in the Request for Review, p. 12.

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