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Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

ICTR-96-14-R

23 January 2008

{1466/H - 1453/H}

IN THE APPEALS CHAMBER

Before:

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

Registrar:

Mr. Adama Dieng

Decision of:

23 January 2008

Ellézer NIYITEGEKA

v.

THE PROSECUTOR

Case No. ICTR-96-14-R

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DECISION ON THIRD REQUEST FOR REVIEWThe Applicant

Mr. Ellézer Niyitegeka, pro se

Office of the Prosecutor

Mr. Hassan Bubacar Jallow  
Mr. George Mugwanya  
Ms. Ineke Onsea

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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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 Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized with the *"Requête aux fins d'une révision de l'Arrêt rendu par la Chambre d'appel le 09 juillet 2004 ou, alternativement, aux fins d'une ordonnance d'enquête sur les faux témoignages des témoins de l'Accusation"*, filed confidentially on 22 August 2007 ("Third Request for Review" or "Request") by Eliézer Niyitegeka ("Applicant"). The Prosecution responded on 1 October 2007,<sup>1</sup> and the Applicant filed his Reply on 11 October 2007.<sup>2</sup>

## I. BACKGROUND

2. On 16 May 2003, Trial Chamber I convicted the Applicant, the former Minister of Information in the Rwandan Interim Government in 1994, of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder, extermination, and other inhumane acts as crimes against humanity, and sentenced him to imprisonment for the remainder of his life.<sup>3</sup> In its Judgement of 9 July 2004, the Appeals Chamber dismissed the Applicant's appeal against his convictions and affirmed his sentence.<sup>4</sup>

3. On 27 October 2004, the Applicant filed his First Request for Review,<sup>5</sup> alleging new facts and violations of the Prosecution's obligation to disclose exculpatory evidence, which the Appeals Chamber dismissed in its entirety on 30 June 2006.<sup>6</sup> In a decision of 27 September 2006, the Appeals Chamber dismissed the Applicant's request for reconsideration of the First Review Decision.<sup>7</sup> On 8 December 2006, the Applicant filed his Second Request for Review,<sup>8</sup> which was

<sup>1</sup> Prosecutor's Response to Niyitegeka's *"Requête aux fins d'une Révision de l'Arrêt rendu par la Chambre d'appel le 09 Juillet 2004 ou, alternativement, aux fins d'une ordonnance d'enquête sur les faux témoignages des témoins (sic) de l'Accusation (Articles 20 et 25 du Statut; Articles 68, 91, 107 et 120 du Règlement)"*, 1 October 2007 ("Prosecution Response").

<sup>2</sup> *Réplique à la « Prosecutor's Response to Niyitegeka's 'Requête aux fins d'une Révision de l'Arrêt rendu par la Chambre d'appel le 09 Juillet 2004 ou, alternativement, aux fins d'une ordonnance d'enquête sur les faux témoignages des témoins de l'Accusation' »*, 11 October 2007 ("Reply").

<sup>3</sup> *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 ("Trial Judgement"), paras. 420, 429, 437, 447, 454, 467, 480, 502.

<sup>4</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("Appeal Judgement"), para. 270.

<sup>5</sup> Request for Review, 26 October 2004 ("First Request for Review"), which was supplemented with additional briefing, including written submissions from assigned counsel.

<sup>6</sup> Decision on Request for Review, 30 June 2006 ("First Review Decision"), paras. 1, 76.

<sup>7</sup> Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006.

<sup>8</sup> *Requête en révision de l'Arrêt rendu par la Chambre d'appel le 9 juillet 2004 et, subséquemment, de la décision de la Chambre d'appel du 30 juin 2006*, 8 December 2006 ("Second Request for Review").

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denied by the Appeals Chamber on 6 March 2007.<sup>9</sup> Likewise, on 17 April 2007, the Appeals Chamber denied the Applicant's request for clarification of the Second Review Decision on the ground that the request was a veiled attempt to seek reconsideration of the final Appeal Judgement as well as the subsequent First and Second Review Decisions.<sup>10</sup>

4. The Applicant now files his Third Request for Review of the Appeal Judgement rendered on 9 July 2004. The Applicant requests the Appeals Chamber to admit excerpts of the testimonies of Witnesses DD in the *Muhimana* case,<sup>11</sup> AMM in the *Karemura et al.* case,<sup>12</sup> and D/G in the *Bizimungu et al.*<sup>13</sup> and *Karemura et al.* cases, as "new facts" and grant his request for review pursuant to Article 25 of the Statute of the Tribunal ("Statute") and Rule 120 of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>14</sup> He also requests the Appeals Chamber to find that there have been flagrant violations of Rule 68 of the Rules and of Prosecutor's Regulation No. 2,<sup>15</sup> to impose "appropriate sanctions" against the Prosecution, and grant him an equitable remedy.<sup>16</sup> In the alternative, the Applicant calls for the appointment of an *amicus curiae* pursuant to Rule 91 of the Rules to investigate the allegations of false testimony.<sup>17</sup> Further, the Applicant alleges that certain practices led to the denial of his right to a fair trial under Article 20(2) of the Statute.<sup>18</sup> The Applicant also requests that he be assigned counsel to assist him with his Request.<sup>19</sup>

## II. PRELIMINARY MATTERS

5. As preliminary matters, the Appeals Chamber will address the Applicant's general allegation regarding the violation of his right to a fair trial<sup>20</sup> and the Prosecution's contention that the Applicant has impermissibly availed himself of confidential material.<sup>21</sup>

### A. Alleged Violation of the Applicant's Right to a Fair Trial

6. The Applicant alleges that certain practices led to the denial of his right to a fair trial, namely: (1) the use of a Prosecution counsel who had been suspended from the practice of law in

<sup>9</sup> Decision on Request for Review, 6 March 2007, para. 31 ("Second Review Decision").

<sup>10</sup> Decision on Request for Clarification, 17 April 2007, paras. 4-5.

<sup>11</sup> *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1H-T.

<sup>12</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T.

<sup>13</sup> *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T.

<sup>14</sup> Third Request for Review, paras. 2-3, 22, 49(ii).

<sup>15</sup> Third Request for Review, paras. 22, 44-49, referring to Prosecutor's Regulation No. 2, Standards of Professional Conduct for Prosecution Counsel (1999) ("Prosecutor's Regulation No. 2").

<sup>16</sup> Third Request for Review, para. 49(iii).

<sup>17</sup> Third Request for Review, para. 49(v).

<sup>18</sup> Third Request for Review, paras. 16-21.

<sup>19</sup> Third Request for Review, para. 1.

<sup>20</sup> Third Request for Review, para. 16.

<sup>21</sup> Prosecution Response, para. 9.

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her domestic jurisdiction;<sup>22</sup> (2) the Prosecution's failure to disclose to him Mr. Kambanda's agenda pursuant to Rule 68 of the Rules;<sup>23</sup> (3) the Prosecution's failure to disclose to him the identity of the victim murdered on 20 May 1994 although this information was valuable for the preparation of his defence;<sup>24</sup> and (4) the Prosecution's refusal to investigate the possibility that its witnesses gave false testimony, despite the Applicant's repeated requests.<sup>25</sup> He submits that the Judges were regularly apprised of his complaints but failed to safeguard his right to a fair trial.<sup>26</sup>

7. The Appeals Chamber notes that the Applicant's arguments relating to the involvement in his case of a suspended prosecuting counsel and to the Prosecution's failure to disclose to him Mr. Kambanda's agenda and the identity of the victim murdered on 20 May 1994 were already raised by the Applicant and rejected at the appeals stage and in the First and/or Second Review Decisions.<sup>27</sup> The Appeals Chamber reiterates that review proceedings are not an opportunity to re-litigate unsuccessful appeals or requests.<sup>28</sup> The Appeals Chamber further notes that the Applicant's argument related to the Prosecution's refusal to investigate the possibility of false testimony is not substantiated. Accordingly, the Appeals Chamber dismisses the Applicant's submissions regarding the alleged violation of his right to a fair trial without further consideration.

#### B. Access to Confidential Material

8. In its response, the Prosecution notes that the Applicant has impermissibly availed himself of confidential material.<sup>29</sup> After his Request for Clarification<sup>30</sup> was denied, the Applicant filed a Request for Disclosure of confidential closed session material, which the Appeals Chamber also denied, indicating that the Applicant should direct his request to the President of the Tribunal as the Appeals Chamber was no longer seized of his case or of the *Muhimana* case.<sup>31</sup> The Prosecution alleges that the Applicant did not direct a request to the President of the Tribunal to obtain closed session material but instead filed the present request for review based on closed session material from the *Muhimana* and *Karmera et al.* cases.<sup>32</sup> The Prosecution argues that this approach is

<sup>22</sup> Third Request for Review, para. 16(a).

<sup>23</sup> Third Request for Review, para. 16(b).

<sup>24</sup> Third Request for Review, para. 16(c).

<sup>25</sup> Third Request for Review, paras. 16(d), 17-21. See also Reply, para. 5.

<sup>26</sup> Third Request for Review, para. 16.

<sup>27</sup> See Appeal Judgement, paras. 12-18 (suspended prosecuting Counsel) and 239-242 (identity of the victim murdered on 20 May 1994); First Review Decision, para. 72 (suspended prosecuting Counsel); Second Review Decision, para. 29 (Mr. Kambanda's agenda).

<sup>28</sup> See First Review Decision, para. 72.

<sup>29</sup> Prosecution Response, para. 9.

<sup>30</sup> *Requête en clarification aux fins d'obtenir une opinion autorisée sur certaines positions de la Chambre d'appel dans sa 'Decision on Request for Review' rendue le 6 mars 2007, 28 March 2007 ("Request for Clarification").*

<sup>31</sup> Decision on Request for Disclosure, 11 July 2007, p. 3.

<sup>32</sup> Prosecution Response, para. 9.

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impermissible and notes that the Applicant does not provide any explanation as to how he obtained the confidential information.<sup>33</sup> The Applicant does not address this matter in his Reply.

9. Contrary to the Prosecution's argument, the Appeals Chamber observes that the Applicant did file a motion before the President of the Tribunal requesting access to the closed session material from the *Muhimana* case attached to his Third Request for Review.<sup>34</sup> However, no decision has been rendered yet by the bench designated by the President of the Tribunal to rule on the Applicant's request.<sup>35</sup> As to the closed session material from the *Karemera et al.* case, the Appeals Chamber notes that the relevant Trial Chamber was never seized of any motion for access from the Applicant. Therefore, the Applicant alleges as new facts closed session material from the *Muhimana* and *Karemera et al.* cases to which he was not granted access. The submission of material obtained in direct violation of Trial Chambers' orders, namely:

- the Decision on Defence Motion for Protective Measures for Defence Witnesses filed on 6 July 2004, in which the *Muhimana* Trial Chamber ordered measures to safeguard the safety and security of Defence witnesses pursuant to Rules 69 and 75 of the Rules such as the non-disclosure by the parties of any document or information which could reveal or lead to the identification of protected Defence witnesses,<sup>36</sup> and
- the Order on Protective Measures for Prosecution Witnesses filed on 10 December 2004, in which the *Karemera et al.* Trial Chamber ordered measures to safeguard the safety and security of Prosecution witnesses pursuant to Rule 75 of the Rules such as the non-disclosure by the parties of any document or information which could reveal or lead to the identification of protected Prosecution witnesses.<sup>37</sup>

seriously undermines the integrity of the Tribunal's proceedings. In these circumstances, the Appeals Chamber declines to examine the confidential material attached in support of the Applicant's Third Request for Review which should not have been in his possession. As a result, the alleged new facts and the allegations of violations of the Prosecution's disclosure obligations related to the testimonies of Witnesses DD and AMM, in, respectively, the *Muhimana* and *Karemera et al.* cases will not be addressed.

<sup>33</sup> Prosecution Response, para. 3.

<sup>34</sup> *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, *Requête urgente de Mr. Elédzer Niyitaga* (ICTR-96-14-R) aux fins de communication du procès-verbal de l'audience à huis-clos et d'une pièce déposée sous scellée lors de la déposition du témoin DD, signed 17 July 2007 and filed 18 July 2007.

<sup>35</sup> *The Prosecutor v. Elédzer Niyitaga*, Case No. ICTR-96-14-R75, Designation of a Trial Chamber to Consider the Request for Disclosure of Closed Session Transcripts, 15 November 2007.

<sup>36</sup> *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004.

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10. Rule 77(A)(ii) of the Rules provides that the Tribunal may hold in contempt those who disclose information relating to the Tribunal's proceedings in knowing violation of an order of a Chamber. As mentioned above, the disclosure of the *Muhimana* and *Karemara et al.* closed session material to the Applicant was a breach of orders for protective measures imposed pursuant to Rule 75 of the Rules.<sup>38</sup> The Appeals Chamber notes that the Prosecution does not request the Appeals Chamber to exercise its discretion to initiate contempt proceedings in the present case. However, the Appeals Chamber stresses that protective measures pursuant to Rule 75 of the Rules are ordered to safeguard the privacy and security of victims or witnesses. Revealing closed session material without prior authorization vitiates the protective measures and, consequently, constitutes a grave interference with the Tribunal's administration of justice. Accordingly, the Appeals Chamber deems it necessary to direct the Prosecution, pursuant to Rule 77(C)(i) of the Rules, to investigate the unauthorized disclosure of confidential material.

### III. DISCUSSION

#### A. Request for Assignment of Counsel

11. The Applicant requests the Appeals Chamber to direct the Registrar to assign counsel under the Tribunal's legal aid system to assist him with his Request.<sup>39</sup> The Prosecution responds that there is no justifiable basis for the appointment of counsel in this matter since the Applicant has already made extensive and detailed submissions in his Request and since the Request should be summarily dismissed.<sup>40</sup>

12. The Appeals Chamber stresses that review is an exceptional remedy and that an applicant is only entitled to assigned counsel at the Tribunal's expense if the Appeals Chamber authorises the review.<sup>41</sup> Nonetheless, counsel may be assigned at the preliminary examination stage, normally for a very limited duration, if it is necessary to ensure the fairness of the proceedings.<sup>42</sup> The Appeals

<sup>37</sup> *The Prosecutor v. Édouard Karemara et al.*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses, 10 December 2004.

<sup>38</sup> *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004 and *The Prosecutor v. Édouard Karemara et al.*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses, 10 December 2004.

<sup>39</sup> Third Request for Review, para. 1.

<sup>40</sup> Prosecution Response, paras. 3, 59-60. The Prosecution observes that the Applicant is not prohibited from obtaining the assistance of counsel at his own expense or on a *pro bono* basis provided counsel files a power of attorney with the Registrar and satisfies the requirements to appear before the Tribunal: Prosecution Response, fn. 110.

<sup>41</sup> *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 Review Decision"), para. 41. See also Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005, p. 4.

<sup>42</sup> *Rutaganda Review Decision*, para. 41. See also Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005, p. 4.

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Chamber notes that the Applicant's submissions in his Third Request for Review are extensive and detailed, and that the Applicant does not express the need to file additional submissions prior to the examination of his Request. Further, for reasons explained below, the Appeals Chamber finds that the Applicant's present Request should be dismissed. The Appeals Chamber therefore finds that the assignment of counsel under the auspices of the Tribunal's legal aid system is not warranted in this case.

## B. Request for Review

### 1. Standard of Review

13. The Appeals Chamber recalls that review proceedings are governed by Article 25 of the Statute and Rules 120 and 121 of the Rules. Review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.<sup>43</sup> In order for review to be granted, the moving party must show that: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of the original proceedings; (3) the lack of discovery of that new fact was not the result of a lack of due diligence by the moving party; and (4) the new fact could have been a decisive factor in reaching the original decision.<sup>44</sup> In wholly exceptional circumstances, the Appeals Chamber may nonetheless grant review, even where the new fact was known to the moving party at the time of the original proceedings or the lack of discovery of the fact was the result of a lack of due diligence by the moving party, if ignoring the new fact would result in a miscarriage of justice.<sup>45</sup>

14. The Appeals Chamber further recalls that the term "new fact" refers to new evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings.<sup>46</sup> The requirement that the fact was not in issue during the proceedings means that "it must not have been

<sup>43</sup> *Rutaganda Review Decision*, para. 8. See also *First Review Decision*, paras. 5-7; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 43.

<sup>44</sup> *Rutaganda Review Decision*, para. 8; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007, para. 8; *First Review Decision*, paras. 5-7. See also *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. 7; *Prosecutor v. Mlado Radčić*, Case No. IT-98-30/1-R.1, Decision on Defence Request for Review, 31 October 2006 ("*Radčić Review Decision*"), paras. 9-11; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review under Rule 119, 25 August 2006, para. 8; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Request for Review, 30 July 2002 ("*Tadić Review Decision*"), para. 20.

<sup>45</sup> *Rutaganda Review Decision*, para. 8; *First Review Decision*, para. 7; *Blaškić Review Decision*, para. 8; *Radčić Review Decision*, para. 11; *Tadić Review Decision*, paras. 26-27.

<sup>46</sup> *Rutaganda Review Decision*, para. 9; *First Review Decision*, para. 6; *Blaškić Review Decision*, paras. 14-15; *Tadić Review Decision*, para. 25.

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among the factors that the deciding body could have taken into account in reaching its verdict.<sup>47</sup> Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.<sup>48</sup>

## 2. Alleged New Facts

15. The Applicant alleges that the testimony of Prosecution witnesses in other trials before the Tribunal have revealed inconsistencies in the testimony submitted at his trial. Specifically, the Applicant argues that the testimonies of Witnesses DD in *Muhimana*, AMM in *Karemara et al.*, and D/G in the *Bizimungu et al.* and *Karemara et al.* cases should be regarded as new facts warranting review.<sup>49</sup> The Prosecution responds that none of these testimonies constitute new facts, and argues that, even if they were to be characterized as new facts, they could not have been a decisive factor in reaching the original decision.<sup>50</sup> As discussed above, the Appeals Chamber will not address the testimonies of Witnesses DD and AAM and will limit its examination to the alleged new fact related to the public testimony of Witness D/G.

16. The Applicant alleges that the testimony of a witness, appearing as Witness D in *Bizimungu et al.* and as Witness G in *Karemara et al.* ("Witness D/G"), supports his alibi for 10 April 1994.<sup>51</sup> The Applicant submits that contrary to what Witness GGH said at trial regarding the Applicant's presence in Gisovu in the afternoon of 10 April 1994, Witness D/G testified in *Bizimungu et al.* that he saw the Applicant in the afternoon of 10 April 1994 at the *Hôtel des Diplomates* in Kigali (approximately 185 kilometres from Gisovu).<sup>52</sup> Further, the Applicant alleges that this witness testified for the Prosecution in *Karemara et al.* and affirmed the same, specifically that he "personally" saw the Applicant in Kigali on 10 April 1994.<sup>53</sup> The Applicant argues that both testimonies are consistent and confirm his alibi for 10 April 1994.<sup>54</sup> He affirms that, had the information been presented at trial, it would have had an effect on the Trial Chamber's and Appeals Chamber's findings regarding his presence in Gisovu.<sup>55</sup>

17. The Prosecution responds that the testimony that the Applicant seeks to introduce is not a new fact in that it only purports to prove his alibi and to impeach a witness's credibility, which are

<sup>47</sup> *Rutaganda* Review Decision, para. 9; First Review Decision, para. 6; *Blaskić* Review Decision, paras. 14-15; *Tadić* Review Decision, para. 25.

<sup>48</sup> *Rutaganda* Review Decision, para. 9; First Review Decision, para. 6; *Blaskić* Review Decision, para. 14.

<sup>49</sup> Third Request for Review, paras. 22, 49; Reply, paras. 3, 9, 12.

<sup>50</sup> Prosecution Response, para. 3.

<sup>51</sup> Third Request for Review, para. 40.

<sup>52</sup> Third Request for Review, para. 41, referring to *Bizimungu et al.*, T. 15 June 2004 pp. 25-28. See also Reply, para. 12.

<sup>53</sup> Third Request for Review, para. 41, referring to *Karemara et al.*, T. 18 October 2005 pp. 28-29, 31-32. See also Reply, para. 12.

<sup>54</sup> Third Request for Review, para. 41.

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facts that were already raised and considered at trial.<sup>56</sup> The Prosecution further submits that, in any event, the witness's testimony could not have been a decisive factor in reaching the original decision. It adds that even if the testimony of Witness D/G could impeach the credibility of Witness GGH's testimony in the Applicant's case, the Applicant's convictions and life sentence would still stand.<sup>57</sup>

18. The Applicant replies that Witness D/G's testimony constitutes a new fact since it contains new information. He contends that this new information supplements the documentary evidence already adduced before the Appeals Chamber in support of his alibi.<sup>58</sup>

19. The Trial Chamber found that the Applicant was transporting firearms in Gisovu with three soldiers on 10 April 1994, notwithstanding the Applicant's argument that this was impossible given that he was at a government meeting in Kigali on that day.<sup>59</sup> The Trial Chamber relied on this factual finding as well as on several others in order to support the Applicant's conviction for genocide and extermination as a crime against humanity.<sup>60</sup>

20. The Appeals Chamber observes that Witness D/G's testimony in *Bizimungu et al.* and *Karemura et al.* supports the Applicant's claim that he participated in a meeting in Kigali on 10 April 1994. This issue was not only litigated at trial but also throughout the first and second review proceedings.<sup>61</sup> In his First and Second Requests for Review, the Applicant submitted material allegedly demonstrating that he attended a government meeting in Kigali on 10 April 1994. In both instances the Appeals Chamber found that the material introduced by the Applicant did not amount to new facts warranting review as they were merely aimed at proving a fact that had already been asserted at trial.<sup>62</sup>

21. The Applicant again seeks to adduce additional evidence to support his alibi for 10 April 1994 and to place Witness GGH's credibility at issue. The Appeals Chamber reiterates that the Applicant's alibi for 10 April 1994 and Witness GGH's credibility are matters that have been

<sup>55</sup> Third Request for Review, paras. 46-47; Reply, para. 13.

<sup>56</sup> Prosecution Response, para. 43, referring to Trial Judgement, paras. 56-67; Appeal Judgement, paras. 108-117. See also *ibid.*, para. 45. The Prosecution notes that the Appeals Chamber has previously refused to admit evidence submitted by the Applicant in his earlier requests for review for the same reasons, i.e. that the evidence was submitted merely to bolster the Applicant's alibi and did not constitute new facts. Prosecution Response, para. 44, referring to First Review Decision, para. 12; Second Review Decision, paras. 11-12.

<sup>57</sup> Prosecution Response, paras. 48-49, referring to First Review Decision, para. 13; Second Review Decision, para. 11. The Prosecution points to the Appeals Chamber's statement in the First Review Decision that "the particular factual finding of the Applicant transporting arms on 10 April 1994 was not critical to his conviction for any crime".

<sup>58</sup> Reply, paras. 11-12.

<sup>59</sup> Trial Judgement, paras. 67-68.

<sup>60</sup> Trial Judgement, paras. 411 (genocide), 451 (extermination). See Trial Judgement, paras. 412-418 for other factual findings in support of the Applicant's conviction for genocide.

<sup>61</sup> Trial Judgement, para. 67; First Request for Review, para. 12; Second Request for Review, paras. 10-12.

<sup>62</sup> First Request for Review, para. 12; Second Request for Review, paras. 10-12.

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litigated extensively throughout the proceedings in the present case. Accordingly, Witness D/G's testimony does not amount to a new fact for purposes of review.

### C. Alleged Violation of Rule 68 of the Rules

22. The Applicant further submits that the Prosecution breached its obligation to disclose the testimony of Witness D/G in *Bizimungu et al.* and in *Karemera et al.* as exculpatory material pursuant to Rule 68 of the Rules and in accordance with Prosecutor's Regulation No. 2.<sup>63</sup> He argues that this caused him substantial prejudice since, as discussed above, the witness's testimony confirms his alibi and places Witness GGH's credibility at issue.<sup>64</sup> In addition to this specific alleged violation, the Applicant submits a *Tableau récapitulatif* of eight alleged violations of the Prosecution's disclosure obligations, which refers notably to the non-disclosure of the testimony of Witness AMM in *Karemera et al.* and of Witness DD in *Muhimana*.<sup>65</sup> The Applicant requests the Appeals Chamber to impose "appropriate sanctions" against the Prosecution and to grant him relief that is commensurate with the principles of fairness.<sup>66</sup>

23. The Prosecution responds that the Applicant's argument is, for the most part, a repetition of previous arguments which the Appeals Chamber rejected in the First and Second Review Decisions.<sup>67</sup> As for the new facts the Applicant alleges in his Third Request for Review, the Prosecution responds that it has not failed to disclose exculpatory evidence to the prejudice of the Applicant.<sup>68</sup> The Prosecution argues that it is not obligated to disclose open session transcripts, even if they were to include Rule 68 material, and that the fact that the Applicant is using the said open session transcripts shows that this material was "reasonably accessible" to him.<sup>69</sup> It further argues that the closed session transcripts relating to Witness DD in *Muhimana* and Witness AMM in *Karemera et al.* contain no exculpatory material.<sup>70</sup>

24. In reply, the Applicant submits that, unless the Prosecution is allowed to take advantage of the fact that he is a prisoner without legal assistance or access to the Tribunal's archives, nothing

<sup>63</sup> Third Request for Review, paras. 44-45, referring to Prosecutor's Regulation No. 2, para. 2(c).

<sup>64</sup> Third Request for Review, paras. 46-48.

<sup>65</sup> Third Request for Review, p. 22. See also *ibid.* para. 16(b)-(c).

<sup>66</sup> Third Request for Review, paras. 48, 49(iii), referring to *Rutaganda* Review Decision, para. 37 ("The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 of the Rules. [...] However, the Prosecution should take this as a clear warning that, in the future, the Appeals Chamber may impose appropriate sanctions should it be found to be in violation of its Rule 68 obligation.").

<sup>67</sup> Prosecution Response, paras. 3, 52-53, referring to First Review Decision, paras. 49-69; Second Review Decision, para. 29.

<sup>68</sup> Prosecution Response, paras. 3, 54, 57.

<sup>69</sup> Prosecution Response, para. 55, referring to *Prosecutor v. Thomas Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 296.

<sup>70</sup> Prosecution Response, paras. 54, 56.

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relieves it of its obligation to disclose exculpatory material to him.<sup>71</sup> He further argues that all four testimonies attest to his innocence or, at the very least, call into question the credibility of Prosecution witnesses, and, therefore, constitute Rule 68 material that should have been disclosed.<sup>72</sup>

25. In the *tableau récapitulatif*, the Applicant refers to the video footage KV-00-0030, the transcripts of cassettes AV/917, AV/1040, AV/1053, AV/906, and AV/907, and Mr. Kambanda's agenda as material that the Prosecution failed to disclose. The Appeals Chamber recalls that it has already examined and dismissed the Applicant's arguments regarding the Prosecution's alleged failure to disclose this material in its First and Second Review Decisions.<sup>73</sup> The Appeals Chamber therefore declines to address these arguments again. For reasons stated above, the Appeals Chamber also declines to address the Applicant's arguments related to closed session material from the *Muhimana* and *Karemara et al.* cases.

26. To establish a violation of the Rule 68 disclosure obligation, an applicant must: (1) establish that the material was in the possession of the Prosecution; and (2) present a *prima facie* case that the material is exculpatory.<sup>74</sup> The Appeals Chamber notes that Witness D/G testified in the *Karemara et al.* and *Bizimungu et al.* cases as a Prosecution witness and that the Prosecution does not dispute that the material in question was in its possession. It further finds that Witness D/G's testimony in those two cases constitutes exculpatory evidence, as it *prima facie* bolsters the Applicant's alibi for 10 April 1994.<sup>75</sup>

27. The Appeals Chamber stresses that the Prosecution's disclosure obligation generally encompasses open session testimonies of witnesses in other proceedings conducted before the Tribunal.<sup>76</sup> The Prosecution may be relieved of its disclosure obligation only if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the applicant, as the applicant would not be prejudiced materially by such non-disclosure.<sup>77</sup> The Prosecution has not

<sup>71</sup> Reply, para. 16.

<sup>72</sup> Reply, para. 17.

<sup>73</sup> First Review Decision, paras. 55-69; Second Review Decision, para. 29.

<sup>74</sup> *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 Review Decision"), para. 36. See also *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005 ("Kajelijeli Appeal Judgment"), para. 262; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para. 268.

<sup>75</sup> Third Request for Review, paras. 44, 47. See also *ibid.*, para. 40.

<sup>76</sup> Cf. *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, para. 20.

<sup>77</sup> First Review Decision, para. 51. See also Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Request for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion pursuant to (i) Rule 116 for Extension of Time Limit; (ii) 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 (iii) 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, p. 8; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Ongoing Complaints About Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 December 2005, para. 27; *Prosecutor v. Dario Kordić*, Case No. IT-95-14/2-

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demonstrated that the Applicant was in some way put on notice that Witness D/G had given evidence in *Bizimungu et al.* and *Karemera et al.* tending to exculpate him. Therefore, the Appeals Chamber finds that, even though the transcripts of Witness D/G's testimony were accessible to the Applicant because they were public, the Prosecution was not relieved of its obligation to disclose them to him. The Appeals Chamber finds that the Prosecution failed to fulfil its obligation under Rule 68 to disclose this material to the Applicant.

28. The Appeals Chamber finds, however, that the Prosecution's failure to disclose such material has not caused material prejudice to the Applicant, as the information contained in Witness D/G's testimony does not warrant review. Accordingly, the Appeals Chamber considers that the Prosecution's failure to disclose the material does not require that relief be granted.

29. The Appeals Chamber notes that the Applicant also makes reference to paragraph 2(c) of Prosecutor's Regulation No. 2., which reads: "should Prosecution Counsel become aware that a statement made to the Tribunal is incorrect, or that evidence presented to the Tribunal is false, he or she shall take all the necessary steps to inform the Tribunal as soon as possible".<sup>78</sup> The Appeals Chamber considers that the Applicant has failed to provide any evidentiary basis to support his allegation that Witness GGH gave false evidence at trial. His allegation does not warrant further examination.

**D. Request to Appoint *Amicus Curiae* to Investigate the Possibility of False Testimony**

30. In the alternative, the Applicant requests the Appeals Chamber to appoint an *amicus curiae* to conduct field investigations to determine if the testimonies of the Prosecution witnesses in his case were wrongly held credible, and, where need be, indicate to the Appeals Chamber whether there are sufficient grounds for instigating proceedings pursuant to Rule 91 of the Rules.<sup>79</sup> The Prosecution responds that the Applicant has failed to provide any evidentiary basis to support his allegation that the Prosecution presented falsified evidence at trial.<sup>80</sup> It submits that the appointment of *amicus curiae* is not warranted and that it would amount to a re-litigation of the credibility of evidence.<sup>81</sup>

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, para. 20; *Prosecutor v. Thomin Blaskic*, Case No. IT-95-14-A, Decision on the Applicant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 38.

<sup>78</sup> Prosecutor's Regulation No. 2, para. 2(c).

<sup>79</sup> Third Request for Review, paras. 21, 49(v).

<sup>80</sup> Prosecution Response, paras. 3, 63.

<sup>81</sup> Prosecution Response, paras. 3, 63.

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## 31. Rule 91(B) of the Rules reads:

If a Chamber has strong grounds for believing that a witness may have knowingly and wilfully given false testimony, it may:

[...]

(ii) [...] direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

32. The Appeals Chamber recalls that the onus lies on the party pleading a case of false testimony to prove the alleged falsehood of the witness's statements and that the testimony was given knowingly and wilfully.<sup>82</sup> In the Appeals Chamber's view, this onus has not been discharged by the Applicant. First, the Applicant fails to specify which of the Prosecution witnesses may have given false testimony. In fact, he appears to request that an investigation be conducted in order to verify the testimony of *all* Prosecution witnesses.<sup>83</sup> Second, by merely arguing that the testimony of Witness D/G raises doubt as to the credibility of Witness GGH, the Applicant does not demonstrate that this witness may have given false testimony. In this regard, the Appeals Chamber stresses that there is a clear distinction between the credibility of a witness with regard to some of his statements and the false testimony of a witness: the testimony of a witness may lack credibility without such testimony amounting to false testimony within the meaning of Rule 91 of the Rules.<sup>84</sup> The Appeals Chamber concludes that there are no strong grounds have been made out for it to believe that Witness GGH may have given false testimony in the instant case. The Appeals Chamber therefore denies the Applicant's alternative request.

<sup>82</sup> Appeal Judgement, para. 253. See also *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-I, Decision on the Defence to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "AEN" in terms of Rule 91(B), 27 February 2001.

<sup>83</sup> Third Request for Review, para. 49 ("pour vérifier les témoignages des témoins du Procureur déclarés, à tort, crédibles"). See also *ibid.*, para. 21 ("diligenter une enquête indépendante sur les dires des témoins de l'Accusation").

<sup>84</sup> *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Decision on Appeals against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by witnesses "E" and "CC", 8 June 1998, para. 28. The Appeals Chamber notes that such distinction was pointed out by the Trial Chamber in the Applicant's case at paragraph 42 of the Trial Judgement.

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#### IV. DISPOSITION

33. For the foregoing reasons, the Appeals Chamber **DENIES** the Applicant's Third Request for Review in its entirety; **DIRECTS** the Prosecution to investigate the unauthorized disclosure of confidential material from the *Muhimana* and *Karemera* cases pursuant to Rule 77(C)(1) of the Rules; and **REQUESTS** the Prosecution to confidentially inform the Appeals Chamber of the results of its investigation as soon as practicable, and no later than 29 February 2008.

Done this twenty-third day of January 2008,  
at The Hague,  
The Netherlands.



Judge Fausto Pocar  
Presiding



[Seal of the Tribunal]