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APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Date filed: 31 August 2010

JUDICIAL RECORDS/ARCHIVES
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FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-R

PROSECUTOR'S RESPONSE

To "Requête de demande en révision du Jugement et demande de renouvellement du mandat des Conseils"

Office of the Prosecutor

Hassan Bubacar Jallow
Deborah Wilkinson
Christine Graham
Abdoulaye Seye

The Applicant

François Karera

A.— PROSECUTOR'S POSITION ON THE APPLICATION

(i) *Overview of the Application and Prosecutor's Position*

1. The Applicant, François Karera, filed a *Requête de demande en révision du Jugement et de demande de renouvellement du mandat des conseils* on 22 July 2010 ("Request for Review"). He seeks a review, pursuant to Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence ("the Rules"), of the final Judgement rendered by the Appeals Chamber on 2 February 2009.¹

2. The Applicant's submissions are unclear and rest on mere conjectures. He appears to contend that:

(1) The Prosecutor failed to disclose, under Rule 68 of the Rules, various judgements and materials containing new facts showing that he was not involved in the events that unfolded at Nyamirambo, Nyamata and Rushashi, in 1994. He proffered an affidavit from a Rwandan lawyer, which purports to establish that his name, presence and involvement in the killings at Ntarama were not mentioned during a trial before the Tribunal of First Instance of Nyamata and the judgement delivered on 29 May 2002.

(2) Trial Chamber III rendered a decision in *The Prosecutor v. Karemera et al.*, which constitutes a "new fact" contradicting Trial Chamber I's finding in his case that he acted as *de facto* prefect before 17 April 1994.

(3) The description of the killing of Joseph Murekezi, in a book authored by Murekezi's wife, constitutes a new fact showing that the Applicant and policeman Kalimba were not involved in that killing.

(4) Tharcisse Renzaho's statement of 11 June 2009 that Conseiller Gakuru assisted people from Kimisange sector while they were refugees in Nyamirambo sector constitutes a "new fact" contradicting the Trial Chamber's finding regarding the events at Rushashi. In addition, the convictions for instigating genocide and extermination should be dismissed in the absence of the identification of any specific Tutsi victim or a perpetrator at Rushashi.

3. The Applicant also requests the Appeals Chamber to order the re-assignment of his previous counsel for the purpose of this Request for Review.

¹ *François Karera v. The Prosecutor*, Case No. ICTR-2001-74-A, Judgement, 2 February 2009 ("Karera Appeal Judgement").

4. The Prosecutor opposes the Request for Review, which fails to meet any of the cumulative criteria set for the exceptional procedure of review of a final judgement. The Applicant does not proffer any specific new fact warranting a review or show how any such fact could have been a decisive factor in the Appeal Judgement. The Prosecutor therefore requests the Appeals Chamber to dismiss both the requests for a review of the Appeal Judgement on a preliminary examination, pursuant to Rule 121 of the Rules, and the re-assignment of the Applicant's previous counsel, for the following reasons:

- None of the allegations raised constitute "new facts" warranting review under Article 25 of the Statute and Rule 120 of the Rules. There is also no showing that the Prosecutor obtained and failed to disclose exculpatory evidence under Rule 68 of the Rules.
- The Applicant fails to establish the existence of any "new fact" that *could* have been a decisive factor in the decision of the Appeals Chamber. In addition, the Applicant does not show any exceptional circumstances such that ignoring the alleged "new facts" *would* result in a miscarriage of justice.
- The re-assignment of the Applicant's previous counsel is unwarranted in the circumstances of this case.

(ii) Procedural Background

5. The Applicant, who was appointed sub-prefect in Kigali prefecture on 9 November 1990, and prefect of Kigali prefecture on or around 17 April 1994, was arrested in Kenya on 20 October 2001. His trial commenced before Trial Chamber I on 9 January 2006.

6. Trial Chamber I pronounced its Judgement in the Applicant's case on 7 December 2007. The written Judgement was rendered on 14 December 2007. The Trial Chamber found him guilty, under Article 6(1) of the Statute, of genocide (Count 1) and extermination and murder as crimes against humanity (Counts 3 and 4, respectively).² It also found him responsible as a superior pursuant to Article 6(3) of the Statute, which it

² Trial Judgement, paras. 540, 544, 548, 557, 560, 561.

considered as an aggravating factor in sentencing.³ It imposed a single sentence of imprisonment for the remainder of his life.⁴

7. Following an appeal by the Applicant, the Appeals Chamber rendered its final Judgement on 2 February 2009. It allowed, in parts, the Applicant's appeal against convictions and reversed, *inter alia*, his conviction for instigating murder as a crime against humanity, based on the murder of Gakuru. It also reversed, *proprio motu*, his conviction for ordering genocide and extermination as a crime against humanity, based on the killing of Murekezi.⁵

8. The Appeals Chamber affirmed, *inter alia*, the Applicant's convictions for instigating and committing genocide during the attack against Tutsi refugees at Ntarama Church on 15 April 1994; instigating and committing extermination and murder as crimes against humanity through the killings of Tutsi refugees at Ntarama Church on 15 April 1994; ordering murder as a crime against humanity based on the killing of Murekezi; aiding and abetting murder as a crime against humanity based on the killing of Gakuru; and instigating genocide and extermination as a crime against humanity, based on his alleged conduct at meetings held in Rushashi commune between April and June 1994.⁶ It also affirmed the sentence of imprisonment for the remainder of the Applicant's life.⁷

B.—APPLICABLE LAW

9. In order for a Chamber to proceed with the exceptional procedure of review of its final decision, the moving party must demonstrate *all* of the following: (i) that there is a new fact; (ii) that 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; (iii) that the absence of discovery of the new fact must not have been through the lack of due

³ Trial Judgement, paras. 566, 577.

⁴ Trial Judgement, para. 585.

⁵ *Karera* Appeal Judgement, Disposition, para. 398.

⁶ *Karera* Appeal Judgement, Disposition, para. 398.

⁷ *Karera* Appeal Judgement, Disposition, para. 398.

diligence on the part of the moving party; and (iv) that the new fact, if proved, could have been a decisive factor in reaching the original decision.⁸ These criteria are cumulative.⁹

10. However, in “wholly exceptional circumstances”, a Chamber may consider reviewing its decision, despite failure to meet criteria (ii) and (iii), “if ignoring the new fact would result in a miscarriage of justice.”¹⁰

11. The Appeals Chamber has defined a “new fact” as “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.¹¹ The requirement that the new fact was not at issue means that it must not have been among the factors that a Chamber could have taken into account in reaching its verdict.¹² Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.¹³

12. With regard to the re-assignment of counsel, it is settled by the jurisprudence of this Tribunal that “it is only in exceptional circumstances that a convicted person will be granted legal assistance at the expense of the Tribunal after a final judgement has been rendered against him.”¹⁴

⁸ *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006 (“*Niyitegeka* First Review Decision”), para. 6, and footnotes 3 - 8; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007 (“*Niyitegeka* Second Review Decision”), paras. 4, 5 and footnotes 11-14 with supporting jurisprudence; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008 (“*Niyitegeka* Third Review Decision”), paras. 13, 14 and footnotes 43 - 48 with supporting jurisprudence; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, 22 April 2009 (“*Niyitegeka* Fourth Review Decision”), para. 21 and footnote 38 with supporting jurisprudence.

⁹ *Niyitegeka* First Review Decision, para. 7.

¹⁰ *Niyitegeka* First Review Decision, para. 7; *Niyitegeka* Fourth Review Decision, para. 21 and footnote 39 with supporting jurisprudence.

¹¹ *Niyitegeka* First Review Decision, para. 6 and footnote 3 with supporting jurisprudence.

¹² *Niyitegeka* Fourth Review Decision, para. 22 and footnote 41 with supporting jurisprudence.

¹³ *Naletilic v. The Prosecutor*, Case No. IT-98-34-R, Decision on Mladen Naletilic’s Request for Review, 19 March 2009 (“*Naletilic* Review Decision”), para. 11 and footnote 22; *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. 9.

¹⁴ *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on request for assignment of counsel, 12 November 2009.

C.—SUBMISSIONS

(i) *The Applicant fails to proffer any fact that could qualify as “new fact” for the purposes of review of the final Judgement in his case*

13. It should be recalled that review of a final judgement is an exceptional procedure, which does not provide an opportunity to re-litigate arguments that failed at trial or on appeal.¹⁵ In this regard, the Applicant does not develop his argument relating to his alleged alibi¹⁶ and the lack of record of the site visit.¹⁷

14. As recalled above, the term “new fact” refers to new evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings.¹⁸ No such new fact is proffered in this Request for Review.

Ntarama

15. First, the Applicant fails to show that the Prosecutor possessed and failed to disclose under Rule 68 of the Rules various materials and judgements containing new facts about the events at Nyamirambo, Nyamata, and Rushashi.¹⁹

16. Second, concerning the Ntarama events, the Applicant’s argument in the present Request for Review is limited to the production of an affidavit purportedly from a lawyer who claims that the Applicant’s name, presence and involvement in crimes committed at Ntarama were not mentioned during the trial he was involved in before the Tribunal de Première Instance de Nyamata.²⁰

17. The Applicant’s unsupported contention should be dismissed. Clearly, whether his name or involvement in crimes committed at Ntarama was mentioned during the specific trial referred to in the affidavit is not “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.²¹ The Appeals

¹⁵ *Niyitegeka* Fourth Review Decision, para. 21; *Niyitegeka* Fifth Review Decision, para. 10

¹⁶ Request for Review, para. 24; Appeal Judgement, paras. 326-357.

¹⁷ Request for Review, para. 26, Appeal Judgement, paras. 48-50.

¹⁸ *Niyitegeka* Fourth Review Decision, para. 22.

¹⁹ Request for Review, paras. 23, 25, 29.

²⁰ Request for Review, para. 29.

²¹ *Rutaganda* Review Decision, para. 9; *Niyitegeka* First Review Decision, para. 6 and footnote 3.

Chamber has held that witnesses' failures to discuss an accused's activities in a separate trial involving a different accused not to constitute new facts for the purposes of review.²² Moreover of the fact of the Applicant's presence at Ntarama and the other crime sites was litigated at trial and on appeal. The Applicant denied at trial that he was present at Ntarama during the events. On appeal, he specifically challenged the Trial Chamber's assessment of the evidence, including that of Prosecution Witnesses BMI, BMJ, BMK, and BML. He unsuccessfully challenged the findings regarding his presence and involvement in the killings of Tutsi refugees at Ntarama.²³

18. The affidavit in support of this request for Review does not contain any new fact which could have been a decisive factor in reaching the Appeal Judgement. It simply repeats the Appellant's denial of his presence and participation in the meeting at the Ntarama sector office on 14 April 1994 and in an attack at the Ntarama Church on 15 April 1994.²⁴ As such, it cannot have any impact on the final Judgement.

Prefect *de facto*

19. The Applicant relies in this Request for Review on a Trial Chamber III's decision of 22 February 2010, in *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, that a specific document signed by the Applicant as *sub-prefect*, for the *prefect*, does not show that he acted as prefect *ad interim*. He appears to claim that this holding constitutes a new fact warranting review of the trial Chamber's finding in his case, upheld on appeal, that he did act as prefect *de facto* before he was officially appointed on 17 April 1994.

20. The Applicant's authority and function as prefect *de facto* was at issue during the trial and on appeal. Having assessed the entire evidence before it, the Trial Chamber in the Applicant's case found that before his formal appointment as prefect of Kigali prefecture on 17 April 1994, the Applicant "exercised at least *some of the authority* which would normally have fallen under the 'prefect'".²⁵ The Trial Chamber considered the totality of the evidence on the issue of the Applicant's authority and whether he acted

²² *Rutaganda* Review Decision, para. 13.

²³ Applicant's Ground of appeal 6. See *Karera* Appeal Judgement, paras. 215-258.

²⁴ *Karera* Appeal Judgement, para. 258. See Trial Judgement, paras. 246-254; 292-315; 541-544; 554, 560.

²⁵ Trial Judgement, para. 77.

as prefect *de facto* during the events; and the parties' submissions regarding, *inter alia*, the letters of 22 September, 21 October and 25 October 1993, signed by the Applicant, the scope of Article 12 of Legislative Decree No. 10/75 of 11 March 1975, and Prefect Bizimungu's letter dated 24 August 1993 in which he informed the Applicant of his appointment as prefect *ad interim* of Kigali prefecture.²⁶

21. It is not clear how Trial Chamber III's holding that the Applicant performed at least some of the functions of the prefect before he was officially appointed on 17 April 1994 can constitute a new fact for the purpose of review of the final conclusion, supported by the evidence adduced at trial.²⁷ The Applicant unsuccessfully challenged this finding on appeal. As the Appeals Chamber noted, "[b]y signing 'for the prefect' letters relating to matters falling outside his normal duties as sub-prefect in charge of economic and technical affairs, at a time when no prefect was on duty, the Appellant effectively exercised some of the powers of the prefect."²⁸

22. In sum, the Applicant's argument should be dismissed.

Nyamirambo: Killings of Murekezi

23. Similarly, the Applicant does not show any new fact for the purposes of review in relation to the killing of Murekezi. Relying on the corroborative testimonies of Prosecution Witnesses BMU and BMG²⁹, the Trial Chamber found that between 8 and 10 April 1994, policeman Kalimba forced a man to kill Murekezi, a Tutsi, at the roadblock near the Applicant's house and later boasted that he had carried out the killing following the Appellant's order.³⁰ The Applicant challenged this finding on appeal.³¹

24. First, the Applicant relies on the book *La mort ne veut pas de moi*, which was authored by Yolande Mukagasana and published in 1997 (Paris, Fixot).³² This was well

²⁶ *Karera Appeal Judgement*, para. 74; Exhibit P15, p. 10.

²⁷ *Karera Appeal Judgement*, paras. 52, 63.

²⁸ *Karera Appeal Judgement*, para. 68, referring to exhibit P15.

²⁹ Trial Judgement, paras. 186-190; *Karera Appeal Judgement*, para. 193.

³⁰ Trial Judgement, paras. 189, 192.

³¹ *Karera Appeal Judgement*, paras. 188-199.

³² See *N'aie pas peur de savoir - Rwanda: une rescapée tutsi raconte*. Paris: J'ai lu, 1999 (350p). Yolande Mukagasana is a well-known figure who also wrote other books about the genocide in Rwanda. See *Les*

before the Applicant's arrest and trial. The Applicant was therefore in the position to obtain and make use of any facts contained in the book. Any failure in this regard is due to lack of due diligence which renders the Applicant's request impermissible. No explanation is given in this regard. The Applicant's arguments at paragraph 30 of this Request for Review should be dismissed on this basis alone.

25. Second, the Applicant simply relies on self-serving extracts of the book. He seems to contend, without any explanation, that the book contains a different version of the circumstances of the killing of Murekezi. The Trial Chamber however relied on "the detailed and consistent first-hand testimony"³³ of Prosecution Witness BMG, who lived in the same neighbourhood as Murekezi.³⁴ BMG was present and witnessed policeman Kalimba force a young man to kill Murekezi at the roadblock in front of the Appellant's house between 8 and 15 April 1994.³⁵ For his part, Prosecution Witness BMU was informed by a subordinate about the killing of Murekezi.³⁶

26. Third, the Appeals Chamber dismissed the Applicant's challenges to the credibility of BMG and BMU in this regard.³⁷ It "*proprio motu*, reverse[d] the Appellant's convictions for ordering genocide and extermination as a crime against humanity, based on the killing of Murekezi."³⁸ It however affirmed the Appellant's conviction for ordering murder as a crime against humanity based on the killing of Murekezi. The excerpts from the book do not show that the Applicant did not give such an order. Once again, the Applicant attempts to challenge the credibility of these witnesses, issue which was litigated at length at trial and on appeal. Consequently the excerpts from the book cannot amount to new fact pursuant to Rule 120 of the Rules.

Blessures du silence. Témoignages du génocide au Rwanda. [with Alain Kazimierakis] Arles: Actes Sud et Médecins sans frontières, 2001 (160p.).

³³ Trial Judgement, para. 188.

³⁴ Transcript, 9 January 2006, p. 21, lines 9-21.

³⁵ Trial Judgement, para. 186; Appeal Judgement, para. 195.

³⁶ Trial Judgement, para. 187.

³⁷ *Karera* Appeal Judgement, paras. 193-199.

³⁸ *Karera* Appeal Judgement, Disposition, para. 398.

27. It is therefore unclear how the excerpts from the book could have been a decisive factor in the Appeal Judgement and that ignoring it would result in a miscarriage of justice. The Applicant's argument should be dismissed.

Rushashi

28. With regard to Rushashi, the Applicant does not make any arguments pertinent for the purpose of review. First, Tharcisse Renzaho's statement that Conseiller Gakuru assisted people from Kimisange sector while they were refugees in Nyamirambo sector until they fled the country on 3 or 4 July 1994 does not constitute a new fact for the purpose of review. Clearly, such evidence was available to the Appellant during and after his trial, since it comes from another detainee who has been in the same prison all along. The Applicant did not act with the requisite diligence to present the alleged new fact during his trial (or appellate) proceedings. No explanation is given in this regard. His request should be dismissed on this basis alone.

29. In addition, the Appeals Chamber already examined the Appellant's contentions regarding the circumstances of the killing of Gakuru. It allowed, *in part*, his Seventh Ground of Appeal and reversed his conviction for instigating murder as a crime against humanity, based on the murder of Gakuru.³⁹ It however affirmed his conviction for aiding and abetting murder as a crime against humanity based on the killing of Gakuru.⁴⁰

30. In such circumstances, the alleged new fact is, at the most, additional evidence of issues which were litigated at trial and on appeal. Moreover, the Applicant does not demonstrate how the statement from Tharcisse Renzaho could have been a decisive factor in reaching the appeal judgement.

(ii) *There is no exceptional circumstances justifying the re-assignment of counsel*

31. As shown above, the Applicant's discontent with the Trial Chamber's factual and legal conclusions, which he already challenged on appeal, his unsubstantiated claim regarding the violations of the Prosecutor's disclosure obligations or unsupported claim

³⁹ *Karera* Appeal Judgement, Disposition, para. 398.

⁴⁰ *Karera* Appeal Judgement, Disposition, para. 398.

that there are other alleged new facts, do not amount to exceptional circumstances which would warrant the assignment of counsel.⁴¹

32. Consequently, the Applicant fails to demonstrate that the re-assignment of counsel is necessary to ensure the fairness of the proceedings.

(iii) Conclusion

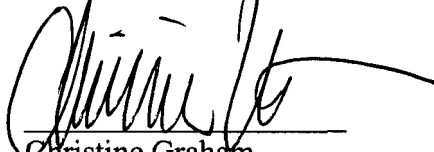
33. In sum, the Applicant has failed to demonstrate the existence of any “new facts” warranting review. His case has reach finality and his Request for Review should be dismissed in its entirety.

D.—RELIEF SOUGHT


34. For all of the foregoing reasons, the Prosecutor respectfully requests that the Appeals Chamber dismisses the Applicant’s Request for Review in its entirety.

DATED 31 August 2010, at Arusha, Tanzania.

Word count: 3344

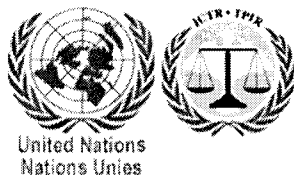


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⁴¹ *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on request for assignment of counsel, 12 November 2009.



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