UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No: MICT-13-36

Date: 20 November 2017

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IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mparany Mamy Richard Rajohnson
Judge Aydin Sefa Akay
Judge Solomy Balungi Bossa
Judge Seymour Panton

Registrar: **Mr. Olufemi Elias**

The Prosecutor

v.

Laurent Semanza

PROSECUTION RESPONSE TO REQUEST FOR REVIEW

Office of the Prosecutor
Veronic Wright
Thembile Segoete
Sunkarie Ballah-Conteh

Laurent Semanza
Mr. Luciano Terreri Mendonca Junior

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A. Overview of the Application

1. On 8 October 2017, Laurent Semanza (the "Applicant") filed his "Request for Review"[1] (the "Request"), seeking review of his final judgment pursuant to Article 24 of the MICT Statute (the "Statute") and Rule 146 of the Mechanism Rules of Procedure and Evidence (the "Rules").

2. In the Request, the Applicant alleges that he has received new information, which was not available at the time of his trial and appeal. The allegedly "new" information consists of the following materials:

- Statements by witnesses Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali, submitted by Mr. Nzirorera in the *Karemera et al case* in response to the Prosecutor's motion for judicial notice of certain adjudicated facts, concerning the massacre at Musha church on 13 April 1994.[2]
- The Gacaca testimony of Manish regarding the massacre at Musha church on 13 April 1994.
- Statements by Witnesses Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire relating to events at Bicumbi commune on 8 April 1994.
- The guilty plea agreement between the Prosecutor and Juvenal Rugambarara.
- The indictment against Paul Bisengimana.

3. First, the Applicant seeks to impugn the credibility of Prosecution witnesses VA, VV, VM and VD, in relation to their testimony on the massacres at Musha church, on the basis of purported contradictions between their testimony in the *Semanza* case and alleged new facts contained in the statements of witnesses Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali, and the Gacaca testimony of a certain Manisha.[3]

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[1] *The Prosecutor v. Laurent Semanza*, Case No. MICT-13-36, Request for Review, 8 October 2017 ("The Request").
[2] *The Prosecutor v. Karemera et al.* Case No. ICTR-98-44-PT, Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts, 30 June 2005; The Request Annex, 100, statement of Evariste Micoyabagabo dated 15 October 2007; Annex 97, statement of Francois Rwabukumba dated 15 October 2007; Annex 105, statement od Amandin Mbonyintwali dated 2008.
[3] The Request, paras. 3-15.

4. Second, the Applicant seeks to impugn the credibility of Prosecution witnesses VAM, VA and VM in relation to their testimony on the murders in Bicumbi commune on 8 April 1994, on the basis of alleged contradictions between their testimony in the *Semanza* case, and the facts contained in the statements of Witnesses Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire.[4]

5. Third, the Applicant argues that there are contradictions between the charges on which he was convicted and those contained in the indictment and eventual guilty plea agreement between the Prosecutor and Juvenal Rugambarara and in the plea agreement between the Prosecutor and Paul Bisengimana.[5] He submits that these contradictions cast doubt on the testimonies of Witnesses VP, VA, VM and VAM in relation to his involvement in the attacks and massacres at Musha church from 9-13 April 1994, including the murder of a certain Rusangwa and in the massacres at Mwulire hill.[6]

6. In addition to his request for review, the Applicant requests access to the transcripts of Witness KF's testimony in the *Ndindiliyimana et al.* (Military II) trial. He argues that the testimony could contain information that would confirm that Semanza did not participate in the attacks at Musha church and that this would amount to a new fact that would support his application for a review of his judgment.[7]

7. The Applicant's request for review should be dismissed in its entirety on the following grounds:

- The witness statements, Gacaca testimony, plea agreement and indictment referred to as "new facts" by the Applicant do not constitute 'new facts' for review purposes, but additional evidence of facts known at trial. They relate to the Applicant's alibi and the credibility of Prosecution Witnesses in relation to the Applicant's presence during the attacks at Musha church and Bicumbi commune, a matter which was already raised and considered during the original proceedings.
- Even accepting, arguendo, that the witness statements, Gacaca testimony, plea agreement and indictment could qualify as 'new facts', which, the Prosecutor submits, would be an erroneous qualification in the

[4] *The Prosecutor v. Laurent Semanza*, Case No. MICT-13-36, Request for Review, 8 October 2017, paras.16-25.
[5] *The Prosecutor v. Laurent Semanza*, Case No. MICT-13-36, Request for Review, 8 October 2017, paras.26-41.
[6] *The Prosecutor v. Laurent Semanza*, Case No. MICT-13-36, Request for Review, 8 October 2017, paras.26-41.
[7] *The Prosecutor v. Laurent Semanza*, Case No. MICT-13-36, Request for Review, 8 October 2017, paras.42-50.

circumstances, the Request for Review cannot succeed. The alleged new facts could not have been a decisive factor in the decision, either of the Trial Chamber, or, more importantly, of the Appeals Chamber.

B. Procedural Background

8. The Applicant, a former *bourgmestre* of Bicumbi commune was convicted by Trial Chamber III on 15 May 2003, for complicity in genocide and rape, murder, torture and extermination as crimes against humanity for his involvement in massacres that occurred at Musha church between 9-13 April 1994, massacres that occurred at Mwulire hill between 16-18 April 1994 and massacres that occurred at Mbare mosque on 12 April 1994. He was sentenced to twenty five years' imprisonment.

9. On 20 May 2005, the Appeals Chamber:

- Affirmed Semanza's conviction for complicity in genocide with respect to the events at Mwulire hill;
- Reversed the conviction for complicity in genocide with respect to the events at Musha church;
- Reversed the acquittal for and entered a conviction for genocide with respect to the events at Musha church;
- Affirmed the conviction for aiding and abetting extermination as a crime against humanity with respect to the events at Mwulire hill;
- Reversed the conviction for aiding and abetting and entered a conviction for ordering extermination as a crime against humanity with respect to the events at Musha church ;
- Reversed the acquittals for serious violations of Common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto under Counts 7 and 13 and instead entered convictions for serious violations of Common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto under Count 7 (for ordering the murders at Musha church and aiding and abetting the murders at Mwulire hill) and Count 13 (for instigating the rape and torture of Victim A and the murder of Victim B, and for committing torture and intentional murder of Rusanganwa).

- Affirmed the convictions for rape, murder and torture as crimes against humanity, and increased Semanza's sentence from twenty five to thirty five years' imprisonment.

C. Standard of Review

10. Review Proceedings are governed by Article 24 of the Mechanism Statute and Rules 146 and 147 of the Mechanism Rules. The Appeals Chamber of the ICTR/ICTY has repeatedly emphasised that review of a final judgement is an exceptional procedure and is not meant to provide parties with an opportunity to remedy its failings at trial or on appeal.[8] To succeed on review, the moving party is required to satisfy the following cumulative criteria: (1) that there is a new fact; (2) 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; (3) that the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and (4) that the new fact, if proved, could have been a decisive factor in reaching the original decision.[9]

11. In "wholly exceptional circumstances", a Chamber may consider reviewing its decision, despite failure to meet criteria (2) and (3) above, "if ignoring the new fact would result in a miscarriage of justice."[10]

12. For purposes of review the Appeals Chamber has constantly 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] Where the fact was already at issue, the new information offered merely constitutes additional evidence of that fact and the review procedure is not available.

13. In determining a "new fact", the Appeals Chamber has held that the focus should be on "looking to the previously litigated facts that are most relevant

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[8] *Eliézer Niyitegeka v The Prosecutor,Case No. ICTR-96-14-R,* Decision on Request for Review, 30 June 2006, para 5-7, (First Review Decision); *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010, para.10 (Fifth Review Decision).
[9]First Review Decision, para. 6; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007, paras.4, 5 (Second Review Decision); *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Fourth Request for Review of the Judgment rendered by the Appeals Chamber on 9 July 2004, and for Legal Assistance (Articles 20 and 25 of the Statute; Rules 45, 107 and 120 of the Rules), 25 November 2008, para. 21 (Fourth Review Decision).
[10]Fourth Review Decision, para. 21 and footnote 39 with supporting jurisprudence.
[11]First Review Decision, para. 6 and footnote 3 with supporting jurisprudence.
[12]Fourth Review Decision, para. 22 and footnote 41 with supporting jurisprudence.

vis-à-vis the alleged 'new fact', whether broad or narrow, to determine whether they preclude the availability of a review."[13]

D. Prosecution's Submissions

(i) Statements regarding the Applicant's whereabouts during attacks for which he was convicted are not "new facts" within the meaning of Rule 146 of the Rules

14. Both the Trial chamber and the Appeals Chamber extensively considered the evidence suggesting that the Applicant was not present during the attacks for which he stands convicted. The issue of his whereabouts is not a new fact and his Request to offer statements seeking to confirm his alibi must fail.

a) Statements of Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali and the Gacaca testimony of Manisha are not "new facts" in relation to the attack at Musha church on 13 April 1994.

15. The statements of Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali,[14] submitted by the defence in the *Karemera et al* case in response to the Prosecutor's motion to admit adjudicated facts, and Manisha's Gacaca testimony, are not "new facts" within the meaning of Article 24 and Rules 146. The credibility of witnesses VA, VV, VM and VD, and the implications it may have for the Applicant's alibi, are not new facts, having already been specifically considered during the proceedings.[15]

16. Evariste Micoyabagabo states that he never told Witness VD that he saw the Applicant recruiting people to attack Musha Church, and that he has no knowledge of Semanza's involvement in the attack.[16] Francois Rwabukumba and Amandin Mbonyintwali on the other hand, state that they did not see the Applicant at Musha church on 13 April 1994 and that had he been there, they would have known about his presence.[17]

17. In his Gacaca testimony, Manisha states that he did not see any authority at the church and cannot say whether there was anyone commanding the

[13] First Review Decision para.6
[14] The Request, Annex, 100, statement of Evariste Micoyabagabo dated 15 October 2007; Annex 97, statement of Francois Rwabukumba dated 15 October 2007; Annex 105, statement of Amandin Mbonyintwali dated 2008.
[15] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras. 194-208.
[16] The Request, Annex, 100.
[17] The Request, Annex, 100, statement of Evariste Micoyabagabo dated 15 October 2007; Annex 97, statement of Francois Rwabukumba dated 15 October 2007; Annex 105, statement od Amandin Mbonyintwali dated 2008.

attackers at the time.[18] Even if they may contradict the evidence of Prosecution Witness VA, VV, VM and VD as relied upon by the ICTR Trial and Appeals Chamber to convict Semanza for the 13 April 1994 Musha Church attacks,[19] the statements relate to Semanza's presence at Musha Church on 13 April 1994, a matter which was in issue both at trial and on appeal.

18. The purported contradictions between the statements and the evidence of Witnesses VA, VD, VM and VV do not raise a new fact. In considering the Applicant's charges on the Musha Church attacks, both the ICTR Trial and Appeals Chamber evaluated the evidence of Prosecution Witnesses VA, VD, VM and VV regarding Semanza's presence at Musha Church during the 13 April 1994 attack,[20] as well as, Defense Witnesses MBZ,[21] MTP,[22] BP and TDB who all testified at trial that they did not see the Applicant during the attacks at the church.[23] Bringing an additional four witnesses to state the same things that have been testified to at trial by other Defence witnesses does not amount to a new fact.

19. Further, the Appeals Chamber considered the Applicant's contention that the Trial Chamber unreasonably ignored or minimized contradictions or insufficiencies in the evidence placing him at Musha Church at the time of the massacre. The Appeals Chamber extensively evaluated the evidence of Witnesses VA, VD, VM and VV, and found that the Applicant had failed to demonstrate that the Trial Chamber was unreasonable in considering that the four witnesses were able to identify the Applicant in April 1994.[24]

20. The statements being offered by the Applicant are not new facts within the meaning of Rule 146 of the Rules. They merely constitute additional evidence of facts already litigated at trial and on appeal.

21. "While the Appeals Chamber has consistently held that newly discovered information relating to witness credibility may amount to a new fact,[25] it has

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[18] *Ibid* Annex 105.
[19] The Request, paras. 4 – 11.
[20] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras. 194-208; *The Prosecutor v Laurent Semanza*, Case No. ICTR- 7-20-A, Appeals Judgment, 20 May 2005, pras. 202 – 218.
[21] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, T. 3 October 2001, pp.14-15.
[22] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, T. 24 October 2001, pp.23-24.
[23] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Witness BP, T. 3 October 2001, p.111, Witness TDB, T.4 October 2001, pp.64-66.
[24] *The Prosecutor v Laurent Semanza*, Case No. ICTR- 7-20-A, Appeals Judgment, 20 May 2005, paras. 202 – 218
[25] *Kamuhanda v. the Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011, para. 26 (citing *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, para. 8);

additionally held that where the credibility issue was extensively litigated and the allegedly new information merely repeats the same core contentions already advanced at trial or on appeal, the material is not a new fact.[26]

22. The Applicant's attempt to re-introduce evidence of his alibi and whereabouts during the events at Musha church as new facts through the statements of Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali and Manisha's Gacaca testimony, should therefore be denied.

b) The statements of Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire are not "new facts" in relation to events at Bicumbi commune

23. The statements of Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire are not "new facts" within the meaning of Article 24 and Rules 146 and 147.[27] Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire each state that they did not see the Applicant during the attacks that took place in Bicumbi commune on 8th April 1994,[28] thereby purportedly contradicting the testimony of Witness VAM.

24. As stated above, the credibility of the witnesses, and the implications it may have for the Applicant's alibi, are not new facts having been specifically considered during the proceedings.[29] In this regard, the Prosecution refers to its submissions in paragraphs 14-23 above and incorporates them by reference herein.

25. The Prosecution emphasizes however, that the statements on which the Applicant seeks to rely, do not raise a new issue. The Applicant's alibi and evidence of his whereabouts on 8th April 1994 was presented during his trial and was fully assessed by the Trial and the Appeals Chamber.[30]

Niyitegeka v. the Prosecutor, Case No. ICTR-01-71-R, Decision on Request for Review, 2 February 2012, para. 14; Muvunyi v. the Prosecutor, Case No. ICTR-00-55A-R, Decision on Request for Variation of Protective Measures and Request for Review, 28 September 2012, para. 22.

[26] *Kamuhanda v. the Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011, para. 27

[27] The Request, paras. 16-25, 25-60.

[28] *Ibid.* Annexes 9, 10 and 11.

[29] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras.263-272.

[30] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras.263-272; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Appeals Judgment, 20 May 2005, paras. 291-298.

26. At trial the Applicant claimed to be at his home on 8 April 1994 when the attacks in Bicumbi commune, including the incident at VAM's son's home took place.[31] This alibi was supported by Defence Witnesses KNU and PFM, who each testified that everyone in the Applicant's home, including the Applicant stayed at home throughout the day of the 8th April 1994.[32]

27. The purported "new" information offered by the Applicant merely constitutes additional evidence of facts already known to the Chamber. The review procedure should therefore be denied.

(ii) The statements of Evariste Micoyabagabo, Francois Rwabukumba, Amandin Mbonyintwali, Antoine Rutikanga, Callixte Bitegwamaso, Jean Nsanzumuhire and Manisha's Gacaca testimony could not have been a decisive factor in reaching the original decision

28. In the event the Appeals Chamber considers that the statements amount to a "new fact", the Prosecution submits that they could not have been a decisive factor in reaching the original decision.

29. The Applicant seeks to rely on the statements of Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali, in which they state that they never saw the Applicant during the attack on Musha church on 13 April 1994, and those of Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire where they claim that they did not see the Applicant during attacks at VAM's house or its vicinity on or about 8 April 1994, to impugn the credibility of prosecution witnesses.

30. It is settled jurisprudence however, that in the context of large scale assaults, such as that on Musha church, and those in Bicumbi commune including at VAM's residence and its vicinity, involving numerous assailants and refugees, the fact that Evariste Micoyabagabo, Francois Rwabukumba and Amandin Mbonyintwali claim that they did not see Semanza at Musha Church, and Antoine Rutikanga, Callixte Bitegwamaso and Jean Nsanzumuhire state that they did not see the Applicant in Bicumbi commune, in the vicinity of VAM's residence has limited probative value.[33]

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[31] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, 18 February 2002, pp.49-55, 125.
[32] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Witness KNU, T. 12 November 2001, pp.25-26, 65-73; Witness PFM, T. 14 November 2001, p.54.
[33] *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgment 21 May 2007, paras. 113, 211; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-00-55A-A, Decision on Request to Admit Additional Evidence, 27 August 2007, para. 14.

31. In these circumstances, the additional evidence cannot cast sufficient doubt on the evidence of the prosecution witnesses that would disturb the factual findings entered by the *Semanza* Trial Chamber and confirmed by the Appeals Chamber in relation to the massacre on 13 April 1994 at Musha church and the attacks and murders in Bicumbi commune.

32. The Applicant's request for review should therefore be denied.

(iii) The plea agreement in Juvenal Rugambarara's case and the indictment against Paul Bisengimana are not "new facts".

33. Both Juvenal Rugambarara's plea agreement with the Prosecution and Paul Bisengimana's indictment do not constitute "new facts" warranting a review of Semanza's judgment. The Appeals Chamber has consistently 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".[34]

34. Neither Rugambarara's plea agreement nor Paul Bisengimana's indictment fall within the category of "information of an evidentiary nature". An indictment is an accusatory instrument that lays out the charges against the accused and the material facts underpinning those charges. Likewise, a plea agreement is simply an agreement between the parties whereby the accused agreed to plead guilty to certain charges. Neither qualify as evidence and cannot establish or disprove the allegations in the Applicant's own case or have any bearing on the credibility of Prosecution witnesses. On this basis, the Applicant's request must fail.

(iii) The alleged "new facts" could not have been a decisive factor in reaching the original decision

35. Notwithstanding the foregoing, should the Chamber consider that Rugamabarara's plea agreement and Paul Bisengimana's indictment and plea agreement are new facts, they could not have been a decisive factor in reaching the original decision.

36. The Prosecutor has discretion on who to indict, what crimes to indict for and what modes of liability to impute to each accused as well as which witnesses

[34]First Review Decision, para. 6 and footnote 3 with supporting jurisprudence.

to call to give evidence.[35] The mere fact that Rugambarara was eventually charged and convicted as a superior for his failure to punish the crimes of his subordinates and Bisengimana of aiding and abetting crimes committed during the genocide period, is alone insufficient to cast doubt on the credibility of Witnesses VA, VM, VP and VAM.

37. Furthermore, the Applicant's assertion that the mere fact that witnesses VA, VM, VP and VAM were not called by the Prosecution to testify against Rugambarara and Bisengimana renders them incredible has no legal basis. Rugambarara and Bisengimana pleaded guilty to the charges against them. There was therefore no trial which required the witnesses to be called to testify.[36]

38. Moreover, as stated by the *Semanza* Appeals Chamber, regardless of the alleged discrepancies between the Rugambarara plea agreement, Paul Bisengimana's indictment and the charges and convictions of the Applicant, the Trial Chamber was "required to concern itself with the indictment and the evidence in the case before it".[37] Therefore the information could not have had an impact on either the Trial or Appeals Chamber judgment had it been available at the time the decision was made, as it has no probative value.

E. Prosecution Submissions in Response to the Request for Access to KF's Testimony in *Ndindiliyimana et al.* (Military II).

(iv) The Applicant has failed to meet the requirements for access to confidential material from the *Military II* case.

39. The Applicant's request for access to Witness KF's testimony in the *Military II* case should be denied. He has failed to establish a legitimate forensic purpose for access to the confidential material requested, or that the material is likely to materially advance his case.

40. 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 for the access must be demonstrated.[38] In

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[35] *Ndindabahizi* Appeal Judgement, para. 98; *Akayesu* Appeal Judgement, para. 94 (quoting *Čelebići* Appeal Judgement, para. 602).
[36] The Request, para. 39.
[37] *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, para.45.
[38] *Prosecutor v. Nyiramasuhuko et. al*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 17; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Ndindiliyimana v. Prosecutor*, Case No.

determining whether this standard has been met a chamber must consider the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the applicant's case and the case from which the material is sought.[39] Such a factual nexus may be established if the cases stem from events alleged to have occurred in the same geographic area, at the same time, although this may not always be sufficient. A case specific analysis is required each time.[40] The applicant must further establish that the material sought is likely to assist the case materially or at least that there is a good chance that it would."[41]

41. The Applicant has failed to establish that such a factual nexus, either geographical or temporal exists between his own case and the *Ndindiliyimana* case. His case centred on events at Mwulire hill, Mabare mosque and Musha church in the Kigali Rural prefecture. The *Ndindiliyimana* case did not involve any of these crimes sites. There is no factual overlap between the two cases. KF's closed session testimony from the *Ndindiliyimana* case is therefore likely to be largely irrelevant to the Applicant's criminal responsibility for the crimes for which he was convicted. As such, it stands to reason that the material is unlikely to assist his case in any way.

42. Notwithstanding the foregoing, the Prosecutor would oppose the disclosure of the confidential material without the consent of the witness concerned. The Appeals Chamber has repeatedly underscored the importance of the protected witness's consent to the disclosure of confidential material.[42] Even where it is determined that confidential material from another case may materially assist the applicant, it is within the Chamber's discretionary power to strike a balance between the rights of the requesting party to have access to material to prepare its case, and guaranteeing the protection and integrity of confidential information.[43] In this regard, the Applicant has failed to identify any exigent circumstances that would warrant disclosure of the requested

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ICTR-00-56-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

[39] *Ibid*

[40] *Rutaganda v The Prosecutor*, Case No. ICTR 96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the Karemera et al. Case, 10 July 2009, para.13.

[41] *Ibid*

[42] *The Prosecutor v Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 18; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

[43] *Rutaganda v. the Prosecutor*, Case No. ICTR96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the Karemera et al. Case, 10 July 2009, para. 14.

material without the witnesses' consent, or indeed that a miscarriage of justice would occur otherwise.

43. Having failed to establish a legitimate forensic purpose for access to the material requested, the Applicant is only entitled to material which may suggest his innocence or mitigate his guilt, or which affects the credibility of the Prosecution evidence adduced during his trial.[44] In this regard, the Prosecutor notes that potentially exculpatory material was disclosed to the Applicant on 20 February 2010 and again on 21 February 2014. These disclosures included both open and closed session transcripts and witness statements. Had KF's closed session testimony from the *Ndindiliyimana* case included any potentially exculpatory information, it would have been disclosed to the Applicant as part of the disclosures already made.

RELIEF SOUGHT

44. For all of the foregoing reasons, the Prosecutor respectfully requests that the Applicant's Request for Review and for access to the transcripts of KF's testimony in the *Military II* case be dismissed in its entirety.

Dated at Arusha this 20th day of November 2017

Veronic Wright
Senior Legal Officer

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[44] MICT Rule 73.

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/ *FICHE DE TRANSMISSION POUR LE DÉPÔT DE DOCUMENTS DEVANT LE MÉCANISME POUR LES TRIBUNAUX PÉNAUX INTERNATIONAUX*

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Classification Level/ *Catégories de classification* :	☒ Unclassified/ *Non classifié*	☐ Ex Parte Defence excluded/ *Défense exclue*
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	☐ Strictly Confidential/ *Strictement confidentiel*	☐ Ex Parte R86(H) applicant excluded/ *Art. 86 H) requérant exclu*
		☐ Ex Parte Amicus Curiae excluded/ *Amicus curiae exclu*
		☐ Ex Parte other exclusion/ *autre(s) partie(s) exclue(s)* (specify/*préciser*) :

Document type/ *Type de document* :	☒ Motion/ *Requête*	☐ Submission from parties/ *Écritures déposées par des parties*	☐ Indictment/ *Acte d'accusation*
	☐ Decision/ *Décision*	☐ Submission from non-parties/ *Écritures déposées par des tiers*	☐ Warrant/ *Mandat*
	☐ Order/ *Ordonnance*	☐ Book of Authorities/ *Recueil de sources*	☐ Notice of Appeal/ *Acte d'appel*
	☐ Judgement/ *Jugement/Arrêt*	☐ Affidavit/ *Déclaration sous serment*	

II - TRANSLATION STATUS ON THE FILING DATE/ *ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT*

☐ Translation not required/ *La traduction n'est pas requise*

☒ Filing Party hereby submits only the original, and requests the Registry to translate/
La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :
(Word version of the document is attached/ *La version Word est jointe*)

☐ English/ *Anglais* ☒ French/ *Français* ☐ Kinyarwanda ☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party hereby submits both the original and the translated version for filing, as follows/
La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :

Original/ *Original en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
Translation/ *Traduction en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party will be submitting the translated version(s) in due course in the following language(s)/
La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :

☐ English/ *Anglais* ☐ French/ *Français* ☐ Kinyarwanda ☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

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