UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No: MICT-13-37

Date: 13 July 2015

Original: English

THE OFFICE OF THE PRESIDENT

Before: **Judge Theodor Meron, President**

Registrar: **Mr. John Hocking**

FERDINAND NAHIMANA

v.

THE PROSECUTOR

PROSECUTION RESPONSE TO REQUÊTE EN RÉVISION

Office of the Prosecutor
Hassan Bubacar Jallow
Richard Karegyesa
Cheickh Bangoura

The Applicant:
Jean Marie Biju-Duval
Diana Ellis QC
Joanna Evans

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A.—PROSECUTOR'S RESPONSE TO THE REQUEST FOR REVIEW

(i) Overview of the Request

1. On 3 June 2015 Ferdinand Nahimana (the Applicant) filed his "*Requête en revision*"[1] pursuant to Articles 19 and 24 of the MICT Statute and Rule 146 of the MICT Rules of Procedure and Evidence by which he seeks a review of the ICTR Appeal Judgement of 28 November 2007[2] that found him guilty of direct and public incitement to commit genocide and persecution as a crime against humanity.[3]

2. The Applicant seeks the review on the basis of what he alleges are "new facts", which he claims undermine his convictions and sentence. The alleged new facts comprise new documents – a copy of diplomatic Telegrams not available at trial - which, the Applicant contends, provide evidence that he did not intervene with the RTLM journalists to stop the broadcasts of Radio RTLM subsequent to his meetings with French diplomats on July 2 1994. [4] He further asserts that because of the date on which he met the French diplomats (July 2 1994), no causal link can be reasonably established between their conversations and the cessation of the broadcasts of the RTLM. [5] Finally, the applicant submits that Prosecution Expert Witness Alison Des Forges significantly misrepresented the content of the diplomatic telegrams and therefore the resulting convictions based on her testimony are unsafe.[6]

3. In response, the Prosecutor submits that the Request should be dismissed in its entirety, on the following grounds:

a. First, the Request is, in essence, an impermissible attempt to remedy the Applicant's failings at trial and/or on appeal for the purpose of obtaining a review of the Appeal Judgement of 28 November 2007.

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[1] *The Prosecutor v. Ferdinand Nahimana,* Case No. MICT-13-37, Requête en révision, 3 June 2015(Request) .
[2] *The Prosecutor v. Ferdinand Nahimana,*Case No. ICTR-99-52-A, 28 November 2017 (Appeal Judgement).
[3] *Ibid.* page 345.
[4] Request, para 14-17 and annexes 1-5
[5] *Ibid.* para. 15.
[6] *Ibid.*paras.43-50.

b. Second, the diplomatic telegrams released by the French authorities do not constitute new facts warranting a review of judgement but constitute additional evidence of facts that were in issue and litigated at trial and on appeal.

c. Third, even assuming, *arguendo,* that the diplomatic telegrams relied upon by the Applicant amount to a "new fact", it could not have been a decisive factor in reaching the original decision.

(ii) Procedural Background

4. The Applicant, a former Director of ORINFOR (Rwandan Office of Information), Co-founder of the Radio télévision libre des mille collines ("RTLM") and Member of the Mouvement révolutionnaire national pour le développement (MRND), was convicted by Trial Chamber I, on 3 December 2013, for conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and persecution and extermination as crimes against humanity. [7] He was sentenced to imprisonment for the remainder of his life.[8]

5. The Appeals Chamber partially reversed the Applicant's convictions and affirmed his convictions, pursuant to Article 6(3), for the crimes of direct and public incitement to commit genocide and, persecution as a crime against humanity only in respect of RTLM broadcasts after 6 April 1994. His sentence of life imprisonment was replaced by a sentence of 30 years.[9]

B.—STANDARD OF REVIEW

6. 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.[10] To succeed on

[7]*The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* Case No. ICTR-99-52-T, 3 December 2003 (Trial Judgement).
[8]*Ibid.*p. 356.
[9] Appeal Judgment, p.345.
[10]*EliézerNiyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006 (First Review Decision), paras. 5-7; *EliézerNiyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fifth Request for Review, 27 January 2010 (Fifth Review Decision), para. 10.

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.[11]

7. 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."[12]

8. 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".[13] 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.[14]

9. For the reasons set out below, the Prosecutor submits that the Applicant fails to meet the threshold for review.

C. —THE PROSECUTOR'S SUBMISSIONS

(i) The Request is an impermissible attempt to remedy the Applicant's failings at trial and on appeal.

[11] *EliézerNiyitegeka v.The Prosecutor*, First Review Decision, para.6; *EliézerNiyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007 (Second Review Decision), paras.4-5; *EliézerNiyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Fourth Request for Review of the Judgement 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 (Fourth Review Decision), para. 21.
[12] *EliézerNiyitegeka v.The Prosecutor*, Fourth Review Decision, para.21 and footnote 39 with supporting jurisprudence.
[13] *EliézerNiyitegeka v.The Prosecutor*, First Review Decision, para.6 and footnote 3 with supporting jurisprudence.
[14] *EliézerNiyitegeka v.The Prosecutor*, Fourth Review Decision, para.22 and footnote 41 with supporting jurisprudence.

10. The Applicant impugns the Trial Chambers factual finding – on the basis of Des Forges' testimony- that he intervened with RTLM journalists to put an end to RTLM broadcasts attacking General Dallaire and UNAMIR.[15]

11. *First*, the applicant never objected to or otherwise challenged this aspect of Des Forges' testimony at trial while he had the opportunity to do so. Indeed, the Appeals Chamber in its judgement noted that by failing to challenge this aspect of Des Forges' evidence at trial, the Applicant had waived his right to raise it on appeal.[16] The Appeals Chamber however considered the Applicant's arguments on appeal in this regard and found that he had failed to establish any error by the Trial Chamber in finding that he had intervened to halt attacks by RTLM journalists on General Dallaire and UNAMIR.[17] It is instructive to note that the only evidence before the Trial Chamber that the Applicant did not intervene to halt the RTLM attacks – which was rejected – was his own testimony and that of Bemeriki.[18]

12. Second, having failed, at trial and on appeal, in establishing that he did not intervene to halt the RTLM attacks on Dallaire and UNAMIR, the Applicant now seeks to relitigate the matter by distorting the uncontroverted testimony of Des Forges and proffering evidence not on the record.

13. In paragraph 49 of the Request the Applicant erroneously contends that Des Forges "*significantly misrepresented the content of these diplomatic telegrams...*" which however is not borne out by the record. Des Forges in her testimony does not attribute the halting of RTLM attacks on Dallaire and UNAMIR to the *"diplomatic telegrams"* but to her discussions on the matter with *"diplomatic sources"*.[19] Indeed, her evidence about the diplomatic telegrams read to her own phone is confirmed by the actual contents of the telegrams at Annex 5 of the Request, namely that the Applicant twice made promises/commitments to halt the RTLM attacks against Dallaire and UNAMIR, including in the presence of the President.[20]

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[15] *Nahimana et al* Trial Judgement paras 565, 568 and 972.
[16] *Nahimana et al* Appeal Judgement para 830 and fn 1906 and 1907
[17] *Ibid* paras 831-834
[18] *Ibid* para 832 and fn 1912 and 1913
[19] T. 23 May 2002 p.212 and 213
[20] See Annex 5 pages 12/476bis, 11/467bis and 7/476bis

14. Additionally, the Applicant takes out of context the summation of Ambassador Gerard in his telegram of 25 July 1994 at page 4/476bis of Annex 5 to erroneously conclude that the Applicant never followed through on his promise to halt RTLM attacks on Dallaire and UNAMIR subsequent to the meeting of 2 July 1994. Read in context, the telegrams reveal that the various meeting with government representatives and the French diplomats were about securing cooperation for the effective functioning of "Operation Turquoise" and the humanitarian safe zone, which was predicated amongst others things on cessation of military activities against civilians by the FAR and militias, and halting RTLM attacks on Dallaire and UNAMIR. It is not explicit as suggested by the Applicant that the comment by Ambassador Gerard that *"Commitments were made by my interlocutors but they were not credible and they did not respect them"*, refers to the Applicant's non-intervention to halt the RTLM attacks on Dallaire and UNAMIR.

15. Finally, the Applicant suggests at paragraph 35 of the Request that the reason why RTLM halted its attacks against Dallaire and UNAMIR subsequent to his meeting with Ambassador Gerard of 2 July 1994 was because it ceased broadcasting on 3 July 1994 with the RPF capture of Kigali, rather than his alleged intervention. It is instructive to note that this argument was neither advanced at trial or on appeal by the Applicant and is not supported by any evidence on record. Indeed, the Trial Chamber found that RTLM had continued broadcasting through July 1994.[21] It is clear from the Applicants arguments that he is undecided on two critical issues: whether the RTLM ceased broadcasts altogether on 3 July 1994 or, whether RTLM's continuation of broadcasts after 3 July 1994 was evidence that he did not intervene to stop the attacks against Dallaire and UNAMIR as promised.

16. In sum, the Request is a dismal attempt to use the avenue of review to litigate *de novo* matters sufficiently canvassed at trial and on appeal and should not succeed.

(ii) The diplomatic telegrams do not constitute new facts warranting a review of judgement but additional evidence of facts in issue at trial.

[21] Trial Judgement para 1017; see also para 534 -537 in which the TC discusses the discredited defence evidence of Bemeriki who testified that RTLM broadcasts temporarily stopped on 3 July and resumed on 8 July up to 14 July 1994.

17. The Applicant proffers as a "new fact" a copy of four telegrams released to him by the French authorities on June 10, 2014.

18. *First,* the telegrams released by the French authorities do not constitute new facts warranting a review of judgement. 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".[22] 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.[23]

19. In the instant case, the content of the telegrams was an issue at trial that was not challenged or objected to by the Applicant.[24] The testimony of Des Forges that she learnt from *"diplomatic sources"* that RTLM attacks against Dallaire and UNAMIR had ceased shortly after the Applicant's meeting with Ambassador Gerard[25] was also an issue not challenged or objected to at trial, although the Applicant in his defence testified that he never intervened to stop those broadcasts.[26] To this extent the diplomatic telegrams – known to exist at trial- are not new facts but additional evidence of facts in issue at trial. Additionally, the content of the telegrams confirms the evidence of Des Forge that the Applicant twice met French diplomats in early July 1994 and promised to intervene with RTLM to halt attacks against Dallaire and UNAMIR. The telegrams do not, as suggested by the Applicant, prove that he never intervened with RTLM to stop the attacks as promised. On review of the evidence available to the Trial Chamber, the Appeals Chamber was satisfied that it was reasonable to conclude that it was the Applicant's intervention that halted the RTLM attacks against Dallaire and UNAMIR.[27]

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[22]*See, e.g., ElièzerNiyitegeka v.The Prosecutor*, First Review Decision, para.6 and footnote 3 with supporting jurisprudence; *Kajelijeli v. the Prosecutor*, Case No.ICTR-98-44A-R, Decision on Kajelijeli's Request for Review, 29 May 2013, paras. 16,49,57,63,68,73,70 (Kajelijeli Review Decision); *Kamuhanda v. the Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011, para. 26.
[23]*ElièzerNiyitegeka v.The Prosecutor*, Fourth Review Decision, para.22 and footnote 41 with supporting jurisprudence.
[24] Appeals Judgement para 830
[25] T. 23 May 2002 pages 212-213
[26] Appeals Judgement para 832
[27] Ibid para 833

20. In view of the foregoing the Prosecutor submits that the telegrams proffered by the Applicant do not constitute new facts for purposes of review under the Statute but are additional evidence of facts unsuccessfully litigated at trial and on appeal.

(ii) The alleged new fact could not have been a decisive factor in reaching the original decision

21. While the Prosecutor concedes that the telegrams relied upon by the Applicant in the Request were made available only in June 2014, it is submitted that even if the material had been submitted to the Trial Chamber or the Appeals Chamber, it could not have been decisive in reaching the final verdicts. The findings by the Trial and Appeals Chambers that the Applicant continued to exercise effective control over the employees of RTLM after 6 April 1994 were not based on the impugned testimony of Des Forges alone but upon the totality of evidence.[28] This evidence included the testimony of the following witnesses: GO, X, FW, FY, FS, BI, AGX, Nsanzuwera, Philippe Dahinden, Thomas Kamilindi and Collette Braeckman, which established the effective control the Applicant exercised from creation of RTLM in 1993 through July 1994.[29] His arguments on appeal that he exercised no control over RTLM after 6 April 1994 were roundly rejected by the Appeals Chamber[30], which also rejected his claim that it was the army that exercised control over RTLM after 6 April 1994 as being without foundation.[31]

22. Indeed the telegrams, even if admitted on review, substantially corroborate the entire testimony of Des Forges that the Applicant continued in July 1994 to hold out and be regarded as a "Director" of RTLM who twice made promises to foreign diplomats – including in the presence of the President – that he would intervene to stop the RTLM attacks on Dallaire and UNAMIR.[32] The telegrams do not contain any shred of evidence that the Applicant's control over RTLM ended on 6 April 1994.

23. The Prosecutor submits, in view of the foregoing, that the alleged new facts were not a decisive factor and, even if admitted on review, would not undermine the ultimate findings of the

[28] See Trial Judgement analysis at paras 620-696 generally and conclusion at para 970 – 972; See also Appeals Judgement analysis at paras 789- 822 and 826 – 834 generally.
[29] Ibid
[30] Appeal Judgement para 834
[31] Ibid para 825
[32] Supra fn 20 and Des Forges testimony, T. 23 May 2002 pages 203-213

Applicant's Article 6(3) responsibility for direct and public incitement to commit genocide and persecution as a crime against humanity.

D.—RELIEF SOUGHT

24. For all of the foregoing reasons, the Prosecutor respectfully requests that the Applicant's Request for Review be dismissed in its entirety.

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DATED at Arusha this 13th day of July 2015

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