

**DECLARATION OF JUDGE RAFAEL NIETO-NAVIA,
SEPARATE OPINION OF JUDGE SHAHABUDDEEN,
DECLARATION OF JUDGE LAL CHAND VOHRAH**



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:

Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA

v

THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza

Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor

Ms Carla Del Ponte

Mr Bernard Muna
Mr Mohamed Othman
Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcusse

I. INTRODUCTION

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 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the "Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 December 1999 ("the Motion for Review").
2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.
3. The Decision was stayed by Order of the Appeals Chamber in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities. The Prosecutor responded to the application, asking to be heard on the same point, and in response to this the Appellant withdrew his request.
5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as *amicus curiae* before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon. This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention"), informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention.
7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day. On 8 December 1999 the Appeals Chamber issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit. The Appellant objected to this application.
8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.
9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the Prosecutor's Motion for Review. The Prosecutor filed her response to these motions on 3 February 2000.
10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.
11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000. The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review. The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The

- Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.
12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision. The Prosecutor states that the

- new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.
14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.
 15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals Chamber. The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."
 16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber, and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review. The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.
 17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor. New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.
 18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly. She asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to

- conclude that a different order would be appropriate. In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration. The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.
19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.
 20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.
 21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40*bis* through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies.
 22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits. She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole.
 23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.
 24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".

25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.
26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor.

The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person".
28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law.
29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.
30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence.
31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Decision was correct in its findings and is fully supported by the Record.
32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.
33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national

reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999." Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as 'amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.
35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.
36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

REVIEW

General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.
38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence. Similarly Article 4 of Protocol No. 7 to the European Convention for the

- Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts". Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "
39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a court will undertake a review can differ from that provided in the legislation for this Tribunal.
 40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.
 41. Returning to the procedure in hand, it is clear from the Statute and the Rules that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; 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 it must be shown that the new fact could have been a decisive factor in reaching the original decision.
 42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact . In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision".

Further, the Appeals Chamber stated that-

a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed in *Prosecutor v. Dražen Erdemovic*, the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the

International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadic* in consideration of the matter before it now.

44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.

As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was common ground that the Prosecutor could appeal against a decision of acquittal, which would not be the case if the interpretation submitted by the Appellant was accepted.
47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals demonstrate that a right of appeal is also available in

- inter alia* the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction. Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.
48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the "convicted person" in the wording of the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.
 49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.
 50. The Appeals Chamber therefore has jurisdiction to review its Decision pursuant to Article 25 of the Statute and to Rule 120.

3. Merits

51. With respect to this Motion for Review, the Appeals Chamber begins by confirming its Decision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision. Pursuant to Article 25 of the Statute, in such an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant case before the Chamber.
52. The Appeals Chamber confirms that in considering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new facts which were not known at the time of the proceedings before the Chamber, and which could have been a

decisive factor in the decision, pursuant to Article 25 of the Statute. It then considers the condition introduced by Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.

53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996. It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent ». The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

l'Appellant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui.

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 – 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

1. The report by Judge Mballe of the Supreme Court of Cameroon. In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.
 2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States. Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997 the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.
57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant", as there was no proof to the contrary. The above information however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 *bis* had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.
58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000, the Appeals Chamber decides to accept this additional information.
60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.
61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial delay and that the Appellant's rights have still been violated. However, the Appeals Chamber

finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

(d) Were the new facts known to the Prosecutor?

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known **to the moving party** at the time of the proceedings before a Chamber, **and could not have been discovered through the exercise of due diligence**" (emphasis added).
64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."
65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.
66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse".
67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin*. In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information

which is now given to me ...would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of *McMartin v The Queen*, the court held, *per* Ritchie J, that:

In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.
70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements:

... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that consequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejects the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

- 1) **ALLOWS** the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;
- 2) **REJECTS** the application by the Appellant to be released;
- 3) **DECIDES** that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:
 - a) If the Appellant is found not guilty, he shall receive financial compensation;

b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.

Judge Vohrah and Judge Nieto-Navia append Declarations to this Decision.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Done in both English and French, the French text being authoritative.

_____ s/.	_____ s/.	_____ s/.
—	—	—
Claude Jorda, Presiding	Lal Chand Vohrah	Mohamed Shahabuddeen

_____ s/.	_____ s/.
Rafael Nieto-Navia	Fausto Pocar

Dated this thirty-first day of March 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]