UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Adama Dieng**

Decision of: **6 March 2007**

Eliézer NIYITEGEKA

v.

THE PROSECUTOR

Case No. ICTR-96-14-R

Decision on Request for Review

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Inneke Onsea

The Applicant:

Mr. Eliézer Niyitegeka, *pro se*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized with a request for review, filed on 8 December 2006, by Mr. Eliézer Niyitegeka ("Applicant").[1] The Prosecution responded on 16 January 2007,[2] and the Applicant filed his reply on 1 February 2007.[3]

I. BACKGROUND

2. On 16 May 2003, Trial Chamber I convicted the Applicant, the former Minister of Information in the Rwandan Interim Government in 1994, of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder, extermination, and other inhumane acts as crimes against humanity, and sentenced him to imprisonment for the remainder of his life.[4] In its Judgement of 9 July 2004, the Appeals Chamber dismissed the Applicant's appeal against his convictions and affirmed his sentence.[5] On 27 October 2004, the Applicant filed his First Request for Review*,* which was supplemented with additional briefing, including written submissions from assigned counsel.[6] In a decision of 30 June 2006, the Appeals Chamber dismissed the Applicant's First Request for Review.[7]

3. In the Second Request for Review, the Applicant submits several alleged "new facts" principally concerning his alibi. He claims that these "new facts" arise from the

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[1] *Requête en révision de l'Arrêt rendu par la Chambre d'appel le 9 juillet 2004 et, subséquemment, de la décision de la Chambre d'appel du 30 juin 2006*, 8 December 2006 ("Second Request for Review").
[2] Prosecutor's Response to Niyitegeka's "*Requête en révision de l'Arrêt rendu par la Chambre d'appel le 9 juillet 2004 et, subséquemment, de la décision de la Chambre d'appel du 30 juin 2006*", 16 January 2007.
[3] *Réplique de l'Appelant Niyitegeka à la "Prosecutor's Response to 'Requête en révision de l'arrêt rendu par la Chambre d'appel le 09 juillet 2004 et, subséquemment de la décision de la Chambre d'appel du 30 juin 2006'"*, 1 February 2007.
[4] *The Prosecutor v. Eliézer Niyitegeka*, Case No ICTR-96-14-T, Judgement and Sentence, 16 May 2003, paras. 420, 429, 437, 447, 454, 467, 480, 502 ("Trial Judgement").
[5] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 270 ("Appeal Judgement").
[6] In particular, additional briefing was filed on 7 February 2005, 17 August 2005, and 10 October 2005. The Appeals Chamber will refer to these submissions collectively as "First Request for Review". *See Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 1, Annex A ("*Niyitegeka* First Review Decision").
[7] *See Niyitegeka* First Review Decision, para. 76. On 27 September 2006, the Appeals Chamber denied the Applicant's request for reconsideration of this decision. *See The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006 ("*Niyitegeka* Reconsideration Decision").

Rwamakuba Trial Judgement and an affidavit and agenda provided by Mr. Jean Kambanda, the former Prime Minister of the Rwandan Interim Government in 1994.[8] In addition, the Applicant complains that the Prosecution failed to disclose the agenda of Mr. Kambanda to him as exculpatory material in breach of its obligation to do so under Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules").[9] Finally, he seeks the assignment of Tribunal appointed counsel to assist him with his Second Request for Review.[10]

II. DISCUSSION

4. Review proceedings are governed by Article 25 of the Statute of the Tribunal and Rules 120 and 121 of the Rules. Review of a final judgement may be granted only when the moving party satisfies the following cumulative criteria: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of the original proceedings; (3) the lack of discovery of that new fact was not the result of lack of due diligence by the moving party; and (4) the new fact *could* have been a decisive factor in reaching the original decision.[11] In wholly exceptional circumstances, where the second or third criteria are not satisfied, the Appeals Chamber may nevertheless grant review if ignoring the new fact *would* result in a miscarriage of justice.[12]

5. The Appeals Chamber recalls that a "new fact" for the purposes of review refers to new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.[13] The Appeals Chamber has held that the phrase "not in issue"

[8] Second Request for Review, paras. 30, 33, 45. In addition, the Applicant again raises issues related to the integrity of one of the Prosecution counsel involved in the conduct of the trial. *See* Second Request for Review, paras. 161-167. The Appeals Chamber declines to address this issue as it was exhaustively considered in the Appeal Judgement. *See* Appeal Judgement, paras. 12-23.
[9] *See* Second Request for Review, para. 99.
[10] *See* Second Request for Review, paras. 23, 168(ii).
[11] *Georges 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 ("*Rutaganda* Review Decision"). *See also The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys Simba's Request for Suspension of Appeals Proceedings and Review, 9 January 2007, para. 8 ("*Simba* Review Decision"); *Niyitegeka* First Review Decision, paras. 5-7. *See also The Prosecutor v. Tihomir Blaški}*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, para. 7 ("*Blaški}* Review Decision").
[12] *Simba* Review Decision, para. 8; *Rutaganda* Review Decision, para. 8; *Niyitegeka* First Review Decision, para. 7; *Blaški}* Review Decision, para. 8; *The Prosecutor v. Duško Tadi}*, Case No. IT-94-1-R, Decision on Request for Review, 30 July 2002, paras. 26, 27 ("*Tadi}* Review Decision").
[13] *Rutaganda* Review Decision, para. 9; *Niyitegeka* First Review Decision, para. 6. *See also Blaški}* Review Decision, paras. 14, 15; *Tadi}* Review Decision, para. 25.

means that "it must not have been among the factors that the deciding body could have taken into account in reaching its verdict."[14]

A. Alleged New Facts Arising from the *Rwamakuba* Case

6. The Applicant submits that, in the *Rwamakuba* Trial Judgement, Trial Chamber III assessed and accepted an alibi similar to the one advanced and rejected in his case related to attendance at a Cabinet Meeting in Kigali on 10 April 1994 and the consequent difficulty of traveling to points outside Kigali at that time.[15] He requests the Appeals Chamber to apply the same reasoning as in the *Rwamakuba* Trial Judgement to his case, not only to events occurring on 10 April 1994, but also to all other instances where he claims that he attended official meetings.[16]

7. The Appeals Chamber is not satisfied that the *reasoning* applied in the *Rwamakuba* Trial Judgement constitutes new information of an *evidentiary nature* of a fact that was not in issue during the trial or appeal proceedings in the Applicant's case. The Applicant concedes that at trial he presented similar arguments to the Trial Chamber concerning attendance at official meetings and the general difficulty of travel at the time.[17] Accordingly, this argument was clearly among the factors that the deciding body took into account in reaching its verdict. Moreover, the fact that the Trial Chamber in the *Rwamakuba* case reached a different conclusion when assessing the weight of alibi evidence with respect to a different accused in a separate trial involving a different factual matrix does not provide a basis for reviewing the assessment of the alibi evidence presented in the Applicant's case.[18]

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[14] *Rutaganda* Review Decision, para. 9; *Niyitegeka* First Review Decision, para. 6. *See also Blaški}* Review Decision, paras. 14, 15; *Tadi}* Review Decision, para. 25.
[15] Second Request for Review, paras. 28-33, citing *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Judgement, 20 September 2006, paras. 91, 98, 117, 156, 214, 215 ("*Rwamakuba* Trial Judgement"). Mr. Rwamakuba, like the Applicant, was also a minister in the Rwandan Interim Government in 1994. *See Rwamakuba* Trial Judgement, para. 3.
[16] Second Request for Review, paras. 28, 30, 33.
[17] Second Request for Review, para. 30 (noting that he made the same arguments as those advanced in *Rwamakuba* in his case). The Trial Chamber considered these aspects of the Applicant's alibi at, *inter alia*, paras. 67, 79-82, 177, 222, 223, 228, 232, 294-300, 359-362 of the Trial Judgement.
[18] *Rutaganda* Review Decision, para. 20. *See also The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001, para. 143 ("two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence"). In particular, the Appeals Chamber further observes that the Trial Chamber in the *Rwamakuba* case considered the Prosecution evidence "generally unreliable", a conclusion which the alibi only strengthened. *See Rwamakuba* Trial Judgement, paras. 91, 94-97.

B. Alleged New Facts Arising From Mr. Kambanda's Affidavit and Agenda

8. The Applicant next submits an agenda and affidavit supplied by former Prime Minister Kambanda.[19] He argues that these documents confirm the dates of several official meetings and his attendance at those meetings, thereby calling into question his participation in crimes occurring on the same day.[20] In the affidavit relied upon by the Applicant, Mr. Kambanda attests to the Applicant's presence at several Cabinet Meetings on 10 April 1994 in Kigali; on 16 April 1994 and 13 May 1994 in Gitarama; and on 10, 17, and 22 June 1994 in Gisenyi.[21] In his affidavit, Mr. Kambanda also refers to his agenda, which was seized from him at the time of his arrest, to confirm his recollection of the dates and of the approximate duration of each meeting, which he states lasted from 9 a.m. until the afternoon.[22] The Applicant attaches three excerpts from Mr. Kambanda's agenda to his Second Request for Review corresponding to 13 May 1994 and 10 and 17 June 1994.[23]

9. In the following discussion, the Appeals Chamber considers whether the information, arising from Mr. Kambanda's affidavit and his agenda constitutes a new fact in connection with the Applicant's convictions based on the events of 10 and 16 April 1994, 13 May 1994, and 10, 17, and 22 June 1994.[24]

1. 10 April 1994

10. The Trial Chamber found that, on 10 April 1994, the Applicant transported guns in Gisovu commune along with three soldiers.[25] This event, along with a number of others, formed part of the Applicant's conviction for genocide.[26] During the cross-examination of Prosecution Witness GGH, the Applicant, through his counsel, referred to his presence at a Cabinet Meeting in Kigali at the time of this event.[27] However, in considering this

[19] The agenda and affidavit are attached as exhibits to the Second Request for Review.
[20] Second Request for Review, paras. 34-106, 122-160, Exhibits 1-3.
[21] Second Request for Review, Exhibit 1, paras. 4-6.
[22] Second Request for Review, Exhibit 1, para. 4.
[23] Second Request for Review, Exhibits 2, 3.
[24] The Appellant also submits argument concerning his alibi for an event on 20 May 1994. *See* Second Request for Review, paras. 107-121. In his First Request for Review, the Appellant submitted an additional affidavit in support of his alibi for this date, but the Appeals Chamber was not satisfied that it met the threshold for granting review. *Niyitegeka* First Review Decision, paras. 24-28. In his Second Request for Review, the Appellant seeks to relitigate this decision, without submitting any additional new information of an evidentiary nature. The Appeals Chamber, however, will not reconsider its previous decision on this issue and need not address these submissions in detail. *See Niyitegeka* Reconsideration Decision.
[25] Trial Judgement, para. 68. The Applicant submits that Gisovu commune is approximately 185 Kilometres from Kigali. Second Request for Review, para. 65.
[26] Trial Judgement, para. 411.
[27] Trial Judgement, para. 67.

exchange, the Trial Chamber noted that the Applicant did not "adduce any evidence of this meeting" and therefore considered that no alibi had in fact been raised in respect of the event.[28] In his First Request for Review, the Applicant presented evidence of this meeting in the form of a radio broadcast he gave that same day, concerning what occurred at the meeting.[29]

11. In assessing whether the transcripts of the radio broadcast constituted a "new fact" or would have been a decisive factor in reaching the original decision, the Appeals Chamber reasoned as follows in the First Review Decision:

> The Applicant seeks to introduce the transcripts of cassettes in order to prove a fact that he already asserted, albeit without evidence, at trial: that he was in Kigali on 10 April 1994, attending a Cabinet Meeting. [F…ğ] The transcripts of the cassettes are information of an evidentiary nature concerning the Applicant's participation in the Cabinet Meeting of 10 April 1994. However, the transcripts relate to the alibi of the Applicant's participation in the Cabinet Meeting of 10 April 1994 in relationship with the credibility of Prosecution Witness GGH, both being matters that were already considered at trial. Accordingly, the transcripts cannot amount to a "new fact" for the purposes of a review application, and the Appeals Chamber is not obliged to examine them further. [F…ğ] Furthermore, the particular factual finding of the Applicant transporting arms on 10 April 1994 was not critical to his conviction for any crime. [F…ğ] The other evidence relating to the genocide count is overwhelming, such that the conviction on that count would stand even if the transcripts were credited and the factual finding on transport of arms on 10 April 1994 were quashed.[30]

12. In his Second Request for Review, the Applicant relies on the evidence of the radio broadcasts as well as Mr. Kambanda's affidavit attesting to his presence at the Cabinet Meeting.[31] However, for the same reasons quoted above, the Applicant's attempt to bolster his alibi considered at trial does not constitute a new fact for the purposes of review.

2. 16 April 1994

13. The Trial Chamber found that, "approximately ten days after 6 April 1994", the Applicant procured gendarmes for an attack on Mubuga Church in Kibuye Prefecture.[32] The evidence relied on by the Trial Chamber suggests that this incident occurred "sometime before noon that day".[33] The Trial Chamber, however, declined to rely on

[28] Trial Judgement, para. 67.
[29] *Niyitegeka* First Review Decision, para. 11.
[30] *Niyitegeka* First Review Decision, paras. 12, 13 (internal citations omitted).
[31] Second Request for Review, para. 43, 48-71; Exhibit 1, para. 4.
[32] Trial Judgement, para. 83.
[33] Trial Judgement, para. 70.

evidence of the actual attack on Mubuga Church as it was uncorroborated hearsay.[34] At trial, the Applicant presented an alibi that, from 14 April until 20 or 30 May 1994, he was in Murambi Centre in Gitarama Town, more than 100 kilometers away with the Interim Government. To establish his alibi, the Applicant relied on the testimony of two witnesses who claimed they saw him there.[35] However, the Trial Chamber rejected the evidence of the two witnesses finding that their testimony was not credible and could not raise a reasonable doubt about the Applicant's role in procuring gendarmes for the attack on Mubuga Church.[36]

14. In his First Request for Review, the Applicant adduced evidence of his attendance at a Cabinet Meeting in Gitarama on 16 April 1994 in the form of a transcript of his radio broadcast, given that same day, concerning what occurred at the meeting.[37] In assessing whether the transcripts of the radio broadcast constituted a "new fact" or would have been decisive in reaching the original decision, the Appeals Chamber reasoned as follows in the First Review Decision:

> The Appeals Chamber is of the opinion that the transcripts of cassette AV/917 constitute information of an evidentiary nature, relating to the Applicant's alibi of participation in the Cabinet Meeting of 16 April 1994 and the credibility of Prosecution Witness KJ. Nonetheless, the alibi and the implications it may have for the credibility of Prosecution Witness KJ, are not new facts, having already been pleaded during the proceedings. Accordingly, the transcripts of cassette AV/917 relating to the said meeting do not amount to a "new fact" for the purposes of a review application and the Appeals Chamber is not obliged to examine them further. Nonetheless, the Appeals Chamber will consider whether, assuming the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could be characterized as a "new fact", they could have been a decisive factor in reaching the original decision. […] The Applicant's contends that, before the meeting in the morning of 16 April 1994, he gave an interview which, according to him, was transcribed into a 10-page document. However, he indicates neither the starting nor finishing time or the duration of the interview, making it impossible to determine when he was at the Cabinet Meeting. In the Appeals Chamber's view, the Applicant has failed to demonstrate that the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could have been a decisive factor in reaching the original decision.[38]

15. In his Second Request for Review, the Applicant refers to the Appeals Chamber's language that "he indicates neither the starting nor finishing time or the duration of the interview, making it impossible to determine when he was at the Cabinet Meeting."[39] Addressing this reasoning, the Applicant points to Mr. Kambanda's affidavit as

[34] Trial Judgement, para. 83.
[35] Trial Judgement, paras. 79-82.
[36] Trial Judgement, paras. 81, 82.
[37] *Niyitegeka* First Review Decision, para. 15.
[38] *Niyitegeka* First Review Decision, paras. 16, 18, 19 (internal citations omitted).
[39] Second Request for Review, para. 74, citing *Niyitegeka* First Review Decision, para. 18.

confirmation of his presence at this meeting held in Gitarama, from around 9 a.m. until sometime in the afternoon.[40]

16. From the above-quoted text, it clearly follows that the Applicant's alibi for 16 April 1994 is not a new fact and, therefore, his further attempt to bolster this alibi with Mr. Kambanda's affidavit likewise does not present a new fact for purposes of review. While the Applicant may have interpreted this passage from the First Review Decision as suggesting that additional evidence of his attendance at this meeting might have assisted in establishing his alibi, this is not the case. In finding that the Applicant participated in this crime, the Trial Chamber relied on an eye-witness account, which it considered credible. In particular, the Appeals Chamber notes that the Trial Chamber did not fix the date on which the Applicant procured gendarmes for the attack on Mubuga Church as 16 April 1994. Rather, it referred to this timeframe based on the underlying witness's testimony in a more open manner as "approximately ten days after 6 April 1994". Therefore, even accepting as true that the Applicant attended a Cabinet Meeting on 16 April 1994 and that this could constitute a new fact, the Appeals Chamber is still not satisfied that it could have been a decisive factor in reaching the original decision.

3. 13 May 1994

17. The Trial Chamber found that, on the morning of 13 May 1994, the Applicant, among others, led a large-scale attack on Tutsi refugees at Muyira Hill in Kibuye prefecture, resulting in the death of thousands.[41] This event formed part of his conviction for genocide, direct and public incitement to commit genocide, and extermination as a crime against humanity.[42] At trial, as in the case of the events of 16 April 1994, the Applicant advanced an alibi that he was in Gitarama town, which the Trial Chamber rejected for the same reasons mentioned in the preceding sub-section.[43]

18. In his First Request for Review, the Applicant presented video footage from the BBC to confirm that he was at the Cabinet Meeting and at a subsequent press conference in Gitarama.[44] In assessing whether this footage constituted a new fact or would have

[40] Second Request for Review, paras. 43, 72-88.
[41] Trial Judgement, para. 178.
[42] Trial Judgement, paras. 413, 433, 451.
[43] Trial Judgement, paras. 79-82, 109-114, 177.
[44] *Niyitegeka* First Review Decision, para. 20.

been a decisive factor in reaching the original decision, the Appeals Chamber reasoned as follows in the First Review Decision:

> ŦTğhe Applicant's attendance at the Cabinet Meeting/Press Conference of 13 May 1994, which the Applicant aims to prove with the video footage, cannot be considered a "new fact" as the issue was discussed at trial Ŧ…ğ. Even if the Cabinet Meeting/Press Conference were held on 13 May 1994, as testified to by Defence Witness TEN-10, it does not imply that the Applicant could not have participated in the attack in Muyira and the meeting in Kucyapa on that day. Indeed the attack is supposed to have taken place on 13 May 1994 between 7:00 and 10:00 a.m., whereas according to Defence Witness TEN-10 the Cabinet Meetings were held usually from 8:00 a.m. to 2:00 p.m. or beyond. The Applicant has failed to show that he participated in the said Cabinet Meeting/Press Conference from the beginning and that he could not have participated in the attack in Muyira and in the meeting in Kucyapa, and join the Cabinet Meeting/Press Conference at a later stage.[45]

19. In his Second Request for Review, the Applicant refers to the Appeals Chamber's language that "the Applicant has failed to show that he participated in the said Cabinet Meeting/Press Conference from the beginning".[46] In response, the Applicant points to Mr. Kambanda's affidavit and his agenda as confirmation of his presence at this meeting, held in Gitarama, from around 9 a.m. until sometime in the afternoon.[47]

20. The Appeals Chamber's First Review Decision establishes that the Applicant's alibi for 13 May 1994 is not a new fact and, therefore, his further attempt to bolster this alibi with Mr. Kambanda's affidavit likewise does not present a new fact for purposes of review.

4. 10 and 17 June 1994

21. The Trial Chamber found that the Applicant participated with local leaders in two meetings in Kibuye prefecture, respectively, on the mornings of 10 and 17 June 1994 to plan and distribute weapons for an attack on Tutsis in Bisesero.[48] Based on these events, the Trial Chamber convicted the Applicant of conspiracy to commit genocide and direct and public incitement to commit genocide.[49] At trial, the Applicant advanced an alibi, based on the testimony of Defence Witness TEN-10, that he was attending Cabinet Meetings on these dates in Gisenyi prefecture some 200 kilometres away.[50] The Trial Chamber rejected this alibi because it did not find Witness TEN-10 credible, in particular

[45] *Niyitegeka* First Review Decision, paras. 21-22 (internal citations omitted).
[46] Second Request for Review, para. 97, citing *Niyitegeka* First Review Decision, para. 22.
[47] Second Request for Review, paras. 43, 89-106; Exhibit 1, para. 4; Exhibit 2.
[48] Trial Judgement, para. 225.
[49] Trial Judgement, paras. 424, 429, 434, 437.

noting his lack of firsthand or detailed knowledge about who attended and what transpired at the meetings.[51]

22. In his First Request for Review, the Applicant presented transcripts of radio broadcasts of his accounts of these meetings given on 11 and 18 June 1994, respectively.[52] In assessing whether this footage constituted a new fact or would have been a decisive factor, the Appeals Chamber reasoned as follows in the First Review Decision:

> ₣Hğaving been raised as such during the proceedings, the Applicant's alibi based on his attendance at the Cabinet Meetings of 10 and 17 June 1994, in support of which the transcripts are introduced, is not a "new fact" within the meaning of Rule 120. ₣…ğ ₣Eğven assuming that Cabinet Meetings were held on 10 and 17 June 1994 in Muramba, and that the Applicant gave an account thereof on the radio, the transcripts do not prove that the Applicant physically participated in the cabinet meetings or that if he was a participant, that he was present throughout the day. ₣…ğ The Appeals Chamber finds that the Applicant has failed to establish that the contents of the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings held on 10 and 17 June 1994 could have been a decisive factor in reaching the original decision.[53]

23. In his Second Request for Review, the Applicant refers to the Appeals Chamber's language that "the transcripts do not prove that the Applicant physically participated in the cabinet meetings or that if he was a participant, that he was present throughout the day."[54] In response, the Applicant points to Mr. Kambanda's affidavit and agenda as confirmation of his presence at these meetings, held in Gisenyi prefecture, as well as their duration from around 9 a.m. until sometime in the afternoon.[55]

24. The Appeals Chamber's First Review Decision establishes that the Applicant's alibi for 10 and 17 June 1994 is not a new fact, and, therefore, his further attempt to bolster this

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[50] Trial Judgement, paras. 214, 224.
[51] Trial Judgement, paras. 214, 224.
[52] *Niyitegeka* First Review Decision, para. 29.
[53] *Niyitegeka* First Review Decision, paras. 30-32 (internal citations omitted).
[54] Second Request for Review, para. 126, citing *Niyitegeka* First Review Decision, para. 31.
[55] Second Request for Review, paras. 43, 122-142; Exhibit 1, para. 4; Exhibit 3. The Trial Chamber also found that "around 18 June [1994]", the Applicant participated in an attack in Kiziba as well as a subsequent meeting that evening in the Kibuye Prefectural office. *See* Trial Judgement, paras. 215, 229. These findings are based on the same witness, namely Prosecution Witness GGV, whose evidence underlies the Applicant's convictions for the meetings on 10 and 17 June 1994. The Applicant does not make specific arguments about the events of 18 June 1994 in the present submissions. However, the Appeals Chamber understands his submissions to suggest that, if his alibi were accepted for 10 and 17 June 1994, then it would have implications for the credibility of Witness GGV, thereby undermining his convictions based on the events of 18 June 1994 as well.

alibi with Mr. Kambanda's affidavit likewise does not present a new fact for purposes of review.[56]

5. 22 June 1994

25. The Trial Chamber found that, around 3 p.m. on 22 June 1994, the Applicant was present and rejoiced in the brutal killing and dismemberment of Assiel Kabanda.[57] The Trial Chamber relied on this event, along with other extensive evidence, to infer the Applicant's genocidal intent.[58] As with the events of 10 and 17 June 1994 discussed in the preceding subsection, the Applicant presented evidence through Defence Witness TEN-10 that he attended a Cabinet Meeting in Gisenyi prefecture, which the Trial Chamber rejected for the same reasons.[59]

26. In his First Request for Review, the Applicant presented evidence that a Cabinet Meeting occurred on 22 June 1994 in order to support his alibi.[60] In assessing whether this agenda constituted a new fact or would have been a decisive factor, the Appeals Chamber reasoned as follows in the First Review Decision:

> ŦTğhe Applicant's attendance at the Cabinet Meeting of 22 June 1994, which the agenda seeks to establish, is not a "new fact", since it had been raised during the original proceedings. Ŧ…ğ Regarding the Applicant's attendance at the Cabinet Meeting of 22 June 1994, the entry "MININFOR" at point 4 of the agenda of the said meeting, which according to the Applicant, refers to the "Minister of Information" is not unequivocal. The said entry in the agenda does not rule out the possibility that the Minister of Information may have sent a representative, or that the schedule of the meeting may have been subsequently amended to enable him to address the meeting earlier so that he could leave or that he did not attend the meeting at all. Even if considered to be of impeccable provenance, the agenda is not proof of anything other than the fact that a meeting was scheduled, but not that it actually took place with all anticipated participants present at all or throughout the meeting.[61]

27. In his Second Request for Review, the Applicant refers to the Appeals Chamber's language that "The [entry "MININFOR" at point 4 of the agenda] does not rule out the possibility that the Minister of Information may have sent a representative, or that the schedule of the meeting may have been subsequently amended to enable him to address the meeting earlier so that he could leave or that he did not attend the meeting at all."[62] In response, the Applicant points to Mr. Kambanda's affidavit and agenda as confirming his

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[56] *Niyitegeka* First Review Decision, para. 30.
[57] Trial Judgement, para. 312.
[58] Trial Judgement, paras. 417, 419.
[59] Trial Judgement, paras. 214, 224, 311.
[60] *Niyitegeka* First Review Decision, para. 33.
[61] *Niyitegeka* First Review Decision, paras. 34, 37 (internal citations omitted).

presence at this meeting, held in Gisenyi prefecture, as well as the duration from around 9 a.m. until sometime in the afternoon.[63]

28. The Appeals Chamber's First Review Decision indicates that the Applicant's alibi for 22 June 1994 is not a new fact and, therefore, his further attempt to bolster this alibi with Mr. Kambanda's affidavit likewise does not present a new fact for purposes of review.

C. Alleged Disclosure Violation

29. The Applicant also complains in his Second Request for Review that the Prosecution breached its obligation to disclose Mr. Kambanda's agenda to him as exculpatory material pursuant to Rule 68 of the Rules.[64] The Appeals Chamber notes that Mr. Kambanda's agenda does not mention the Applicant by name and simply refers to dates of meetings. However, the agenda's reference to dates of meeting is potential proof that meetings occurred on those dates, and this is consistent with the alibi advanced at trial by the Applicant. As such, the Prosecution did have an obligation to disclose this material to the Applicant pursuant to Rule 68 of the Rules. The Appeals Chamber notes that the failure of the Prosecution to immediately disclose this material may be explained by the fact that, as the Trial Judgement reflects, the Applicant did not give clear advance notice of his intent to rely on an alibi.[65] Nonetheless, a review of the Trial Judgement reveals that having evidence of the existence and exact dates of these meetings was a consideration for the Trial Chamber in evaluating the strength of the alibi that was ultimately advanced.[66] As such, when the importance of these meetings became apparent during the proceedings, the Prosecution had a clear obligation to disclose Mr. Kambanda's agenda, and its failure to do so constitutes a breach of that obligation. However, for the reasons mentioned above, the Appeals Chamber does not consider that this violation prejudiced the Applicant and thus declines to accord any remedy.

D. Assignment of Counsel

30. Though counsel may be assigned in connection with a request for review at the preliminary examination stage for a limited duration if it is necessary to ensure the fairness

[62] Second Request for Review, para. 146, citing *Niyitegeka* First Review Decision, para. 37.
[63] Second Request for Review, paras. 43, 143-160; Exhibit 1, para. 4; Exhibit 3.
[64] *See* Second Request for Review, para. 99.
[65] *See, e.g.,* Trial Judgement, paras. 81, 82.
[66] *See, e.g.,* Trial Judgement, paras. 67, 214.

of the proceedings,[67] the Appeals Chamber is not satisfied that additional briefing would be of assistance in the present inquiry. In such circumstances, the Applicant's Second Request for Review does not warrant the assignment of counsel under the auspices of the Tribunal's legal aid system.

III. DISPOSITION

31. For the foregoing reasons, the Applicant's Second Request for Review is **DENIED** in all respects.

Judge Shahabuddeen appends a separate declaration.

Judge Meron appends a separate opinion.

Done in English and French, the English version being authoritative.

Done this 6th day of March 2007,
At The Hague,
The Netherlands.

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Judge Fausto Pocar,
Presiding

[Seal of the Tribunal]

[67] *Rutaganda* Review Decision, para. 41.

DECLARATION OF JUDGE SHAHABUDDEEN

1. I am not satisfied on the evidence in this case that the Appeals Chamber's refusal to consider it will lead to a miscarriage of justice. However, I would like to keep the door open to the Appeals Chamber being able to reconsider a case on that exceptional basis should it arise. I understand the existing decisions of the Appeals Chamber to exclude that possibility.[1] I continue to see merit in the idea that the Appeals Chamber should, in a possible case, have the option to consider new evidence proffered by an appellant that does not amount to a new fact, if its exclusion would lead to a miscarriage of justice.[2] In establishing the Tribunal as a judicial body, the Security Council should be seen as having entrusted it with basic judicial functions to administer justice, and consequently with the competence to correct extreme cases of injustice even absent express authority in the Statute to do so.[3] In this respect, I am in agreement with the opinion expressed by Judge Meron.

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

Done this 6th day of March 2007,
At The Hague, The Netherlands.

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Mohammed Shahabuddeen
Judge

[Seal of the Tribunal]

[1] *See Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005," 26 June 2006 (*Žigić* Reconsideration Decision"); *The Prosecutor v. Eliézier Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006 ("*Niyitegeka* First Review Decision").
[2] *See Niyitegeka* First Review Decision, Declaration of Judge Shahabuddeen.
[3] *See Žigić* Reconsideration Decision, Declaration of Judge Shahabuddeen, para. 2.

SEPARATE OPINION OF JUDGE MERON

1. In our decision on Niyitegeka's earlier motions for review, Judge Shahabuddeen wrote separately to express his view that the Tribunal has the inherent jurisdiction to reconsider final judgements even where the requirements of Article 25 are not met.[1] This is an issue on which the Appeals Chamber has issued varying decisions,[2] and on which I have twice reserved my position.[3]

2. In the decision at hand, the Appeals Chamber rejects Niyitegeka's motion for review on the grounds that his new evidence does not constitute a "new fact" – as our jurisprudence has interpreted this term – for purposes of Article 25 and Rules 120-121. Unlike in the earlier decision, the Appeals Chamber here mainly declines to address whether in any event this new evidence could have affected the verdict. In light of this choice, I deem it useful to say a few words here about my views on our inherent power to reconsider final judgements.

3. A situation might someday arise in which new evidence that does not amount to a "new fact" under our jurisprudence would nonetheless demonstrate the presence of a serious miscarriage of justice. To pose a hypothetical, suppose that an accused is convicted of murdering a victim. Suppose further that a fact at issue at trial was whether the victim was in fact dead – the Prosecution presented several eye-witnesses who testified to seeing the victim's dead body, whereas the Defence responded with an eye-witness who claimed to have later seen the victim alive. If the victim should turn up alive after the issuance of all final judgements in the case, a clear miscarriage of justice would result from letting the murder conviction stand. This would be true even though under the distinction created by our precedent, this new evidence of the victim's state of being would likely be "additional evidence" that bolsters the Defence's claim at trial that the victim was alive and not a "new fact".

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[1] *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Review, Declaration of Judge Shahabuddeen, 30 June 2006.
[2] *Compare Prosecutor v. Zdravko Mucić, Hazim Delić, and Esad Landžo*, Case No. IT-96-21-A*bis*, Judgement on Sentencing Appeal, 8 April 2003 ("*Čelebi}i* Decision"), paras 49-53, *with Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006 ("*Žigić* Decision"), para. 9.
[3] *See Čelebi}i* Decision, Separate Opinion of Judges Meron and Pocar; *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review ("*Niyitegeka* Reconsideration Decision"), Separate Opinion of Judge Meron, 27 September 2006.

4. Such situations are unlikely. Like Judge Shahabuddeen, however, I do not think the door should be closed on the exceptional case in which proof of innocence is convincingly demonstrated even though the technical requirements of Article 25 are not satisfied.[4] Should a situation arise where we are presented with convincing evidence of innocence that does not amount to a "new fact" under our jurisprudence, I would likely deem it in the interests of justice to depart from our holding in *Žigić* – a holding that in turn departed from our holding in *Čelebi}i* – and find that we have inherent jurisdiction to reconsider final judgements when necessary to avoid a clear miscarriage of justice. I have become increasingly concerned that, in departing from *Čelebi}i, Žigić* removed an important safety net for ensuring that justice is done – a departure that is especially problematic in light of our increasingly strict interpretation of the term "new facts". In that respect, I note that allowing for review only of "new facts" as we interpret the term means that we take a stricter approach than that of prominent civil and common law jurisdictions.[5] This Tribunal aims to be a model of due process protections. By refusing to allow convicted persons with an avenue for pursuing claims that do not meet the strict requirements of Article 25 and yet which may be meritorious, we disserve this aim and indeed risk substantive unfairness.

5. I recognize that the holding in *Žigić* has been followed in subsequent cases.[6] I will continue to abide by it unless and until the circumstances of a particular case demonstrate that a clear miscarriage of justice will result from doing so. In the case at hand, I do not think that the agenda and affidavit of a convicted war criminal constitutes the sort of convincing and credible evidence needed to show such a miscarriage of justice. Accordingly, I agree with today's outcome.

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

Done on the 6th day of March 2007

[4] *See Žigić* Decision, Declaration of Judge Shahabuddeen, para. 8.
[5] *See, e.g.,* Code De Procedure Penal, Art. 622 ("Après une condamnation, vient à se produire ou à se révéler un fait nouveau *ou un élément* inconnu de la jurisdiction au jour due procès, de nature à faire naître un doute sur la culpabilité du condamné") (emphasis added) (France); 28 U.S.C. § 2255 (providing for a review process and further providing for a second review process given "newly discovered *evidence* that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense") (emphasis added) (United States).
[6] *Niyitegeka* Reconsideration Decision, pp. 1-2; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 6.

At The Hague, The Netherlands.

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Theodor Meron
Judge

[Seal of the International Tribunal]