



**Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda**

488/H

*EW*

ICTR-99-54A-R

25<sup>th</sup> August 2011

{488/H – 468/H}

**IN THE APPEALS CHAMBER**

**Before:**

**Judge Patrick Robinson, Presiding**

**Judge Liu Daqun**

**Judge Andréia Vaz**

**Judge Theodor Meron**

**Judge Carmel Agius**

**ICTR Appeals Chamber**

**Date:** 25<sup>th</sup> August 2011

**Action:** R. Fama

**Copied To:** Concerned Judges,

**Registrar:**

**Mr. Adama Dieng**

**Decision of:**

**25 August 2011**

*Parties, JPU, LDs, LSS*  
*[Signature]*

**Jean de Dieu KAMUHANDA**

**v.**

**THE PROSECUTOR**

*Case No. ICTR-99-54A-R*

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**DECISION ON REQUEST FOR REVIEW**

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**International Criminal Tribunal for Rwanda  
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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 seised of a request for review filed by Jean de Dieu Kamuhanda (“Kamuhanda”) on 21 May 2010.<sup>1</sup> The Prosecutor responded on 30 June 2010.<sup>2</sup> Kamuhanda indicated on 6 July 2010 that he did not intend to file a substantive reply.<sup>3</sup>

## I. BACKGROUND

### A. Kamuhanda Trial Judgement

2. On 22 January 2004, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Kamuhanda, a former Minister of Higher Education and Scientific Research,<sup>4</sup> for genocide and extermination as a crime against humanity by instigating, ordering, and aiding and abetting the killing and extermination of members of the Tutsi ethnic group on 12 April 1994 at the Gikomero Parish Compound in Gikomero Commune, Kigali-Rural Prefecture.<sup>5</sup> For these crimes, the Trial Chamber imposed two concurrent sentences of life imprisonment.<sup>6</sup>

3. On the basis of the first-hand evidence of Prosecution Witness GEK, the Trial Chamber found that, between 6 and 10 April 1994, Kamuhanda distributed grenades, machetes, and guns to a number of individuals at the home of his cousin in Gikomero Commune, and promised to return with more.<sup>7</sup> The Trial Chamber further found that Kamuhanda participated in the killings in Gikomero Parish Compound on 12 April 1994 by:

[...] ordering *Interahamwe*, soldiers, and policemen to kill members of the Tutsi ethnic group, instigating other assailants to kill members of the Tutsi ethnic group and by aiding and abetting in

<sup>1</sup> *Mémoire en demande en révision*, 21 May 2010 (“Request”). See also *Annexe au mémoire en demande en révision - Documents confidentiels*, 21 May 2010 (strictly confidential); *Seconde annexe au mémoire de demande en révision (copie du cahier Gacaca)*, 24 May 2010 (confidential); *Troisième annexe au mémoire en demande en révision and attachement*, 24 and 27 May 2010 (strictly confidential and confidential).

<sup>2</sup> Prosecutor’s Response to “*Mémoire en demande en révision*”, 30 June 2010 (“Response”).

<sup>3</sup> *Mémoire en réplique à la demande en révision*, 6 July 2010, p. 2.

<sup>4</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgment and Sentence, signed on 22 January 2004, filed on 23 January 2004 (“*Kamuhanda Trial Judgement*”), paras. 6, 244.

<sup>5</sup> *Kamuhanda Trial Judgement*, paras. 651, 652, 700, 702, 750. Judge Maqutu issued a separate opinion in which he disagreed with several credibility assessments of particular witnesses and certain factual findings. See *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judge Maqutu’s Separate and Concurring Opinion on the Verdict, 22 January 2004 (“*Judge Maqutu Separate Opinion*”).

<sup>6</sup> *Kamuhanda Trial Judgement*, paras. 770, 771. Judge Maqutu dissented on the sentence and would have imposed a single term of 25 years of imprisonment. See *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judge Maqutu’s Dissent on the Sentence, 22 January 2004, para. 14.

<sup>7</sup> *Kamuhanda Trial Judgement*, paras. 266-273, 637.

the commission of the crime through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound.<sup>8</sup>

4. Kamuhanda's convictions for the crimes in Gikomero Parish Compound were premised on the Trial Chamber's finding that, on 12 April 1994, Prosecution Witnesses GEK and GEB observed Kamuhanda travelling in the direction of the Gikomero Parish Compound accompanied by armed assailants.<sup>9</sup> The Trial Chamber accepted that an additional 11 Prosecution witnesses then saw Kamuhanda arrive at the Gikomero Parish Compound in the early afternoon in a vehicle carrying armed assailants.<sup>10</sup> The Trial Chamber noted that three of these witnesses (Witnesses GAF, GAA, and GES) had sufficient prior knowledge of Kamuhanda to identify him based on previous sightings.<sup>11</sup> The Trial Chamber considered that the other eight witnesses (Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH) were credible with respect to the identification of Kamuhanda based on information acquired from others who knew him, including the general exclamation in the crowd that Kamuhanda had arrived.<sup>12</sup> In accepting this identification evidence, the Trial Chamber also considered the accounts of those witnesses (Witnesses GEK, GEB, GAF, GAA, and GES) who had prior knowledge of Kamuhanda and saw him either en route or at the compound.<sup>13</sup>

5. Based on the totality of the evidence before it,<sup>14</sup> the Trial Chamber found that, on 12 April 1994, Kamuhanda was present at the Gikomero Parish Compound where he spoke with Pastor Nkuranga and witnessed the killing of Augustin Bucundura, a Tutsi, by an armed person who had arrived together with Kamuhanda, and left shortly thereafter.<sup>15</sup> The Trial Chamber further found that, by his gestures and by his words, Kamuhanda intimated to the attackers to start the killings at the compound shortly before leaving the scene.<sup>16</sup>

### **B. Appeal Proceedings in the *Kamuhanda* Case**

6. During the appeal proceedings, the Appeals Chamber admitted new statements and heard the testimonies of Witness GAA, who had appeared before the Trial Chamber, and Witness GEX,

<sup>8</sup> *Kamuhanda* Trial Judgement, para. 648.

<sup>9</sup> *Kamuhanda* Trial Judgement, paras. 437-444, 500.

<sup>10</sup> *Kamuhanda* Trial Judgement, paras. 451, 453-456, 458, 460-462, 466, 501.

<sup>11</sup> *Kamuhanda* Trial Judgement, paras. 446-449, 466.

<sup>12</sup> *Kamuhanda* Trial Judgement, paras. 451, 453-456, 458, 460-462, 465.

<sup>13</sup> *Kamuhanda* Trial Judgement, para. 466. The Appeals Chamber notes that the Trial Chamber erroneously indicated that Witnesses GEK and GEB had seen Kamuhanda at the compound, when they in fact testified to having seen him en route to the compound. See *Kamuhanda* Trial Judgement, paras. 437, 443, 444.

<sup>14</sup> *Kamuhanda* Trial Judgement, paras. 476, 505.

<sup>15</sup> *Kamuhanda* Trial Judgement, para. 491.

<sup>16</sup> *Kamuhanda* Trial Judgement, para. 491. The Appeals Chamber notes that Judge Maqutu dissented in this regard. See Judge Maqutu Separate Opinion.

who had provided a statement to the Prosecution, but had not been called to testify at trial.<sup>17</sup> The statements had been procured by Mr. Léonidas Nshogoza (“Nshogoza”), a Defence investigator, following the trial and were submitted on appeal in an attempt to demonstrate that the evidence against Kamuhanda had been fabricated.<sup>18</sup> Both witnesses recanted their prior statements and/or testimony incriminating Kamuhanda and alluded to possible collusion among the remaining Prosecution witnesses.<sup>19</sup>

7. At the close of the evidentiary hearing held on 19 May 2005, the Appeals Chamber directed the Prosecution to investigate allegations of false testimony, after noting “significant discrepancies in testimony given by the witnesses, which may amount to false testimony.”<sup>20</sup> The Prosecution subsequently appointed a Special Counsel to conduct the investigation (“Special Investigation”).<sup>21</sup>

8. On 19 September 2005, the Appeals Chamber affirmed Kamuhanda’s convictions for ordering genocide and extermination as a crime against humanity, as well as the sentences imposed by the Trial Chamber.<sup>22</sup> Having reviewed the additional evidence admitted on appeal, the Appeals Chamber concluded that it was not credible.<sup>23</sup>

### **C. Proceedings Related to the Special Investigation**

9. As a result of the Special Investigation, Witness GAA was charged on 11 June 2007 with false testimony, contempt, and attempt to commit acts punishable as contempt.<sup>24</sup> On 3 December 2007, he pleaded guilty to two counts of giving false testimony and contempt.<sup>25</sup> He

<sup>17</sup> *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, 19 September 2005 (“Kamuhanda Appeal Judgement”), paras. 211, 212, 222, 442. See also *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Decision on Appellant’s Motion for the Admission of Additional Evidence on Appeal, 12 April 2005 (“Decision on Additional Evidence”), paras. 50, 53, 74; AT. 18 May 2005 pp. 3-73.

<sup>18</sup> *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, *Requête aux fins d’admission de moyens de preuve supplémentaires en application de l’article 115 du règlement de Procédure et de Preuve*, 20 September 2004 (confidential). See also *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009 (“Nshogoza Trial Judgement”), paras. 73, 74.

<sup>19</sup> *Kamuhanda Appeal Judgement*, paras. 212, 213, 222, 223.

<sup>20</sup> See *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005 (“Oral Decision”).

<sup>21</sup> Appointment of Special Counsel by the Prosecutor, ICTR/INFO-9-2-442.EN, 12 July 2005. See also *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Prosecutor’s Reply by Way of Clarification in Relation to Jean de Dieu Kamuhanda’s Response to the “Prosecutor’s Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*”, 20 March 2006, para. 10.

<sup>22</sup> *Kamuhanda Appeal Judgement*, para. 365. The Appeals Chamber, however, vacated the convictions based on instigating and aiding and abetting genocide and extermination as a crime against humanity. See *Kamuhanda Appeal Judgement*, paras. 66, 72, 77, 365.

<sup>23</sup> *Kamuhanda Appeal Judgement*, paras. 221, 226.

<sup>24</sup> *The Prosecutor v. GAA*, Case No. ICTR-07-90-R77-I, Judgement and Sentence, signed on 4 December 2007, filed on 5 December 2007 (“GAA Trial Judgement”), para. 1.

<sup>25</sup> *GAA Trial Judgement*, paras. 4, 5.

was sentenced to nine months of imprisonment.<sup>26</sup> In sentencing Witness GAA, Trial Chamber III of the Tribunal expressed disapproval that no indictment had yet been issued against Nshogoza for his alleged role in inducing the witness to provide false testimony.<sup>27</sup>

10. On 7 January 2008, Nshogoza was indicted for contempt of the Tribunal based on his alleged role in soliciting false testimony in the *Kamuhanda* case before the Appeals Chamber.<sup>28</sup> On 2 July 2009, Nshogoza was convicted of one count of contempt of the Tribunal and sentenced to 10 months of imprisonment based on his violation of a witness protection order for Prosecution witnesses in the *Kamuhanda* case<sup>29</sup> by meeting with Witnesses GAA and GEX and disclosing their identifying information to third parties.<sup>30</sup> Nshogoza was acquitted of other allegations that included manipulating, inciting, instigating, inducing, or bribing witnesses into giving false evidence before the Appeals Chamber.<sup>31</sup> On 15 March 2010, the Appeals Chamber affirmed Nshogoza's conviction for contempt and, Judges Robinson and Güney dissenting, his sentence.<sup>32</sup>

#### **D. Post-Appeal Proceedings in the *Kamuhanda* Case**

11. On 3 March 2006, the Prosecution disclosed to Kamuhanda, pursuant to Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a transcript of testimony given by Defence Witness 7/14 in the *Rwamakuba* case.<sup>33</sup> Like the *Kamuhanda* case, the *Rwamakuba* case involved allegations of crimes committed in Gikomero Commune.<sup>34</sup> According to the Prosecution, the evidence of Witness 7/14 suggested that Prosecution Witnesses GET and GEK in the *Kamuhanda* trial had organised false testimony against Kamuhanda.<sup>35</sup>

12. On 31 March 2006, the Prosecution also disclosed, at Kamuhanda's request, the transcripts of several other witnesses from the *Rwamakuba* case, including Witnesses 1/5, 3/1, 3/11, 3/22, 7/3,

<sup>26</sup> GAA Trial Judgement, p. 6.

<sup>27</sup> GAA Trial Judgement, para. 11.

<sup>28</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, Indictment, 7 January 2008.

<sup>29</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-5[4]-I, *Décision relative à la requête du Procureur en prescription de mesures de protection en faveur des témoins*, 10 July 2000.

<sup>30</sup> See *Nshogoza* Trial Judgement, paras. 188, 189, 233. See also *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-T, T. 2 July 2009 pp. 9, 10.

<sup>31</sup> *Nshogoza* Trial Judgement, paras. 190-211.

<sup>32</sup> *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010, para. 112.

<sup>33</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Prosecutor's Disclosure Pursuant to Rule 75(F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*, 3 March 2006 (confidential) ("Disclosure of 3 March 2006"). See also *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Corrigendum to the Submissions Accompanying the Prosecutor's Disclosure Pursuant to Rule 75(F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*, 31 March 2006 (confidential).

<sup>34</sup> See *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Judgement, 20 September 2006 ("*Rwamakuba* Trial Judgement").

<sup>35</sup> Disclosure of 3 March 2006, para. 3.

and 9/31, who stated that Kamuhanda was not seen in Gikomero Commune at the time of the massacres.<sup>36</sup>

13. On 28 May 2009, the Prosecution disclosed to Kamuhanda witness statements and trial transcripts from the *Nshogoza* case, including Witness GAA's statements made before the Special Counsel who had been appointed by the Prosecutor.<sup>37</sup> On 21 July 2009, the Appeals Chamber granted Kamuhanda's motion requesting the assignment of a legal assistant at the Tribunal's expense to assist him in preparing a potential request for review of the *Kamuhanda* Appeal Judgement.<sup>38</sup>

14. On 14 January 2010, the Prosecution agreed to disclose various items requested by Kamuhanda.<sup>39</sup> On 4 March 2010, the Appeals Chamber reminded the Prosecution to immediately disclose certain items<sup>40</sup> and found that the Prosecution's failure to disclose some material in a timely manner amounted to a violation of Rule 68 of the Rules.<sup>41</sup>

## II. DISCUSSION

### A. Request for Review

15. Kamuhanda seeks review of his case based on several alleged new facts which he claims undermine his convictions based on his role in the attack at Gikomero Parish Compound on 12 April 1994.<sup>42</sup> Specifically, he highlights newly discovered evidence disclosed by the Prosecution following his appeal demonstrating that: (i) Witnesses GAA and GEX sincerely recanted their prior testimony or statements;<sup>43</sup> (ii) Witnesses GAA and GAF were not at the compound during the

<sup>36</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Prosecutor's Disclosure Pursuant to Rule 75(F) of the Rules, of the Transcript of the Testimony of Defence Witnesses 1/5, 3/1, 3/11, 3/22, 7/3, and 9/31 in *Prosecutor v. Rwamakuba*, 31 March 2006 (confidential).

<sup>37</sup> See *supra*, para. 8; Memorandum from Abdoulaye Seye, Appeals Counsel for the Office of the Prosecutor, entitled "Disclosure to Mr. Jean de Dieu Kamuhanda of Witness Statements and Trial Transcripts from the Case *The Prosecutor v. Léonidas Nshogoza*", 28 May 2009 (strictly confidential).

<sup>38</sup> Decision on Motion for Legal Assistance, 21 July 2009 ("Decision on Motion for Legal Assistance"). See also Motion for Legal Assistance for Preliminary Proceedings Relating to the Review of the Judgement Delivered by the Appeals Chamber on 19 September 2005, originally filed in French on 15 May 2009, English translation filed on 22 June 2009 ("Motion for Legal Assistance").

<sup>39</sup> See Prosecutor's Further Response to Kamuhanda's "*Requête aux fins de communication de pièces à décharge et autres éléments pertinents – Article 68 du Règlement de procédure et de preuve*", 14 January 2010.

<sup>40</sup> Kamuhanda Exhibits D9, D10, D22 through D24, D53, and D54 from the *Nshogoza* case, as well as the audio cassettes numbered KT00-1679 through KT00-1682, the statement identified as K0110003 in the Electronic Disclosure Suite and the identity of its author. See *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010 ("Decision on Disclosure"), para. 47.

<sup>41</sup> Decision on Disclosure, para. 45. See also *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, *Requête aux fins de communication de pièces à décharge et autres éléments pertinents – Article 68 du Règlement de procédure et de preuve*, 22 December 2009 ("Motion for Disclosure");.

<sup>42</sup> Request, paras. 19-228, p. 56.

<sup>43</sup> Request, paras. 20-53, 154-156, 175, 176, 191-198.

attack;<sup>44</sup> (iii) Kamuhanda was not present at the compound during the attack;<sup>45</sup> (iv) Witness GEK's testimony concerning Kamuhanda's involvement was not credible;<sup>46</sup> and (v) the evidence against him was fabricated.<sup>47</sup>

16. The Prosecution responds that the Request fails to meet the cumulative criteria for review and that it should be dismissed in its entirety.<sup>48</sup>

### 1. Standard of Review

17. Review proceedings are governed by Article 25 of the Statute of the Tribunal ("Statute") and Rules 120 and 121 of the Rules. Review is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.<sup>49</sup> Review may be granted only when the moving party satisfies the following cumulative criteria: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the original proceeding; (iii) the lack of discovery of that new fact was not the result of lack of due diligence by the moving party; and (iv) the new fact *could* have been a decisive factor in reaching the original decision.<sup>50</sup> In wholly exceptional circumstances, the Appeals Chamber may grant review, even where the second or third criteria are not satisfied, if ignoring the new fact *would* result in a miscarriage of justice.<sup>51</sup>

18. A "new fact" refers to new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceeding.<sup>52</sup> By "not in issue" the Appeals Chamber has held that "it must not have been among the factors that the deciding body could have taken into account in

<sup>44</sup> Request, paras. 54-77, 157-159, 175, 176, 199, 204-209.

<sup>45</sup> Request, paras. 78-120, 160, 210-213.

<sup>46</sup> Request, paras. 137-147, 167-169, 221-228.

<sup>47</sup> Request, paras. 121-136, 161-166, 214-220.

<sup>48</sup> Response, paras. 4, 35, 68.

<sup>49</sup> *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("Rutaganda Review Decision"), para. 8. See also *François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Review and Assignment of Counsel, 28 February 2011 ("Karera Review Decision"), para. 9; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, 21 April 2009 (public redacted version) ("Niyitegeka Review Decision"), para. 21; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza's Motion for Review and/or Reconsideration of the Appeal Judgement of 28 November 2007, 22 June 2009 ("Barayagwiza Review Decision"), para. 22.

<sup>50</sup> *Rutaganda Review Decision*, para. 8. See also *Karera Review Decision*, para. 9; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Decision with Respect to Veselin Šljivančanin's Application for Review, 14 July 2010 ("Šljivančanin Review Decision"), p. 2; *Niyitegeka Review Decision*, para. 21; *Barayagwiza Review Decision*, para. 22.

<sup>51</sup> *Rutaganda Review Decision*, para. 8. See also *Karera Review Decision*, para. 10; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Review Judgement, 8 December 2010, paras. 7, 23; *Barayagwiza Review Decision*, para. 22.

<sup>52</sup> *Rutaganda Review Decision*, para. 9. See also *Karera Review Decision*, para. 11; *Šljivančanin Review Decision*, p. 2; *Niyitegeka Review Decision*, para. 22; *Barayagwiza Review Decision*, para. 23.



reaching its verdict.”<sup>53</sup> In other words, what is relevant is whether the deciding body knew about the fact or not in arriving at the decision.<sup>54</sup>

## 2. Witnesses GAA’s and GEX’s Recantations

19. The Trial Chamber relied on Prosecution Witness GAA, together with 12 other Prosecution witnesses, in finding that Kamuhanda participated in the massacre at the Gikomero Parish Compound on 12 April 1994.<sup>55</sup> Although Witness GEX did not testify as a Prosecution witness, she had provided the Prosecution with a witness statement indicating that Kamuhanda ordered the assailants to “work” during the attack at the compound.<sup>56</sup> On appeal, Kamuhanda presented additional evidence from Witnesses GAA and GEX recanting their prior statements or testimony.<sup>57</sup>

20. It followed from Witness GAA’s additional evidence that, contrary to his evidence at trial, he was never at the Gikomero Parish Compound on 12 April 1994 and that he falsely implicated Kamuhanda after losing family members during the attack at the compound and being told by Witness GEK that Kamuhanda led it.<sup>58</sup> In addition, contrary to what she told the Prosecution, Witness GEX stated that she had not in fact seen Kamuhanda at the Gikomero Parish Compound and that several witnesses had colluded to incriminate him.<sup>59</sup>

21. After considering the additional evidence, the Appeals Chamber found Witness GAA’s recantation and his evidence of collusion to be not credible.<sup>60</sup> The Appeals Chamber also concluded that Witness GEX’s testimony was unreliable and found no evidence supporting a collusion of the Prosecution witnesses to testify falsely against Kamuhanda.<sup>61</sup>

22. Kamuhanda seeks review of the Appeals Chamber’s findings that the additional evidence of Witnesses GAA and GEX on appeal was not credible.<sup>62</sup> He submits that the Appeals Chamber’s findings were based on the inconsistencies between their testimony and the written statements given

<sup>53</sup> *Rutaganda* Review Decision, para. 9. *See also Karera* Review Decision, para. 11; *Niyitegeka* Review Decision, para. 22; *Barayagwiza* Review Decision, para. 23.

<sup>54</sup> *Rutaganda* Review Decision, para. 9. *See also Barayagwiza* Review Decision, para. 23.

<sup>55</sup> *Kamuhanda* Trial Judgement, paras. 437-444, 451, 453-456, 458, 460-462, 466.

<sup>56</sup> *Kamuhanda* Appeal Judgement, para. 222.

<sup>57</sup> *Kamuhanda* Appeal Judgement, paras. 211-213, 222, 223.

<sup>58</sup> *Kamuhanda* Appeal Judgement, paras. 212, 213.

<sup>59</sup> *Kamuhanda* Appeal Judgement, paras. 222, 223.

<sup>60</sup> *Kamuhanda* Appeal Judgement, paras. 219-221.

<sup>61</sup> *Kamuhanda* Appeal Judgement, para. 226. *See also Kamuhanda* Appeal Judgement, para. 225.

<sup>62</sup> Request, paras. 20-53, 154-156, 175, 176, 191-198.

to Nshogoza in 2004 and on the fact that Witness GAA had consistently implicated Kamuhanda in several written statements for many years prior to his recantation.<sup>63</sup>

23. Kamuhanda avers that, following their testimony before the Appeals Chamber, Witnesses GAA and GEX continued to maintain the veracity of their recantations.<sup>64</sup> In particular, Witness GAA did so in statements given during the Special Investigation, before Rwandan authorities, in later statements given to the Prosecution, and during his initial appearance in his case for false testimony.<sup>65</sup> Witness GEX also reaffirmed her testimony before the Appeals Chamber in statements to Rwandan authorities and during her testimony in the *Nshogoza* trial.<sup>66</sup> Kamuhanda also points to the statements of witnesses who were interviewed during the Special Investigation or appeared in the *Nshogoza* trial, who did not recall seeing Witness GAA at Gikomero Parish Compound or claimed that Witness GAA informed them that he was not there or that he falsely testified before the Trial Chamber.<sup>67</sup>

24. Kamuhanda submits that this newly discovered information, which was not before the Appeals Chamber, constitutes a new fact demonstrating the sincerity of Witnesses GAA's and GEX's recantations before the Appeals Chamber.<sup>68</sup> He contends that the Appeals Chamber's findings on Witnesses GAA's and GEX's credibility would have been different if it had been aware that they had consistently maintained their recantations.<sup>69</sup>

25. The Prosecution responds that the material related to Witnesses GAA and GEX does not constitute a "new fact" but rather additional evidence of previously known facts already at issue during the proceedings.<sup>70</sup> It argues that the credibility of the witnesses was considered and litigated extensively throughout the proceedings.<sup>71</sup>

26. The Appeals Chamber observes that Kamuhanda's arguments pertain to the credibility and reliability of Witnesses GAA's and GEX's additional evidence, which was considered extensively during the appeal proceedings.<sup>72</sup> The Appeals Chamber has previously recognised that newly discovered information related to witness credibility may amount to a new fact.<sup>73</sup> Specifically, in the *Rutaganda* Review Decision, the Appeals Chamber held that the existence of statements given

<sup>63</sup> Request, paras. 20, 193, 194.

<sup>64</sup> Request, paras. 21, 195.

<sup>65</sup> Request, paras. 23-34.

<sup>66</sup> Request, paras. 35-40.

<sup>67</sup> Request, paras. 22, 43-52.

<sup>68</sup> Request, paras. 155, 156, 175, 176, 194-198.

<sup>69</sup> Request, paras. 155, 156, 175, 176, 194-198.

<sup>70</sup> Response, paras. 4, 25-27.

<sup>71</sup> Response, para. 27.

<sup>72</sup> *Kamuhanda* Appeal Judgement, paras. 211-226, 229.

to judicial authorities by witnesses who appeared in the *Rutaganda* case in relation to a separate case in Rwanda and which may have materially differed from their testimony before the Tribunal amounted to new facts.<sup>74</sup>

27. The situation in the present case, however, is different. The various statements given by Witnesses GAA and GEX following their testimony on appeal in this case simply reiterate the core of that evidence. As such, the purported new facts are merely additional facts to those that were already at issue during the appeal proceedings. Furthermore, the statements of various witnesses who claimed that Witness GAA informed them that he either testified falsely or was not at the Gikomero Parish Compound also go to issues litigated during the appeal proceeding.<sup>75</sup> Thus, the material submitted in support of the Request is not a new fact for the purpose of review under Rule 120 of the Rules, since the core issues raised therein were at issue in the original proceedings.

28. Even if this material could be considered a new fact, it would not warrant review. First, to suggest that testimony found to be not credible can be rehabilitated by the simple act of subsequent repetition is not a valid argument and cannot substantiate a claim that a Chamber would have assessed the witness's credibility differently at the time the evidence was heard.

29. Second, even if the purported new facts established that Witnesses GAA and GEX had sincerely recanted their earlier statements or testimony, which would mean that their testimony before the Appeals Chamber was truthful, it could not have had an impact on the verdict. In relation to Witness GEX, she did not testify at trial and her evidence was therefore not a part of the case against Kamuhanda. Moreover, the Appeals Chamber determined that her evidence on appeal did not support "a collusion of the Prosecution witnesses with the goal to testify falsely against [Kamuhanda]."<sup>76</sup> Nothing in the materials submitted in support of the Request alters this conclusion.

30. With regard to Witness GAA, Kamuhanda has not identified any finding of the Trial Chamber where reliance on Witness GAA was decisive to his conviction. The Appeals Chamber recalls that Witness GAA was one of 13 witnesses who identified Kamuhanda either at or en route to the Gikomero Parish Compound.<sup>77</sup> While his testimony was given greater weight due to his familiarity with Kamuhanda, the Trial Chamber considered that four other witnesses had prior

<sup>73</sup> *Rutaganda* Review Decision, para. 17.

<sup>74</sup> *Rutaganda* Review Decision, paras. 14-17.

<sup>75</sup> *Kamuhanda* Appeal Judgement, para. 213.

<sup>76</sup> *Kamuhanda* Appeal Judgement, para. 226. The Appeals Chamber recalls that Witness GEX's additional evidence was admitted to assist in the assessment of the credibility and reliability of Witness GAA's additional evidence. See *Kamuhanda* Appeal Judgement, para. 225, referring to Decision on Additional Evidence, para. 53.

knowledge of Kamuhanda as well.<sup>78</sup> Notably, the Appeals Chamber held in its Judgement that, even if Witness GAA's trial testimony were disregarded, the remaining evidence reasonably supported a finding that Kamuhanda ordered the massacre.<sup>79</sup> Therefore, the finding of Kamuhanda's participation in the attack at the compound has a firm evidentiary foundation even without Witness GAA's account. Finally, the submitted material does not substantiate Witness GAA's allegation in his additional evidence that the Prosecution witnesses had colluded, which the Appeals Chamber rejected on appeal.<sup>80</sup>

31. Accordingly, the Appeals Chamber dismisses Kamuhanda's request for review based on the alleged new facts related to the sincerity of Witnesses GAA's and GEX's respective recantations.

### 3. Presence of Witnesses GAA and GAF

32. The Trial Chamber concluded that Witnesses GAA and GAF were among three witnesses at Gikomero Parish Compound who had sufficient prior knowledge of Kamuhanda to identify him during the attack.<sup>81</sup> The Trial Chamber relied on them along with 11 other witnesses in varying degrees to find that Kamuhanda participated in the attack.<sup>82</sup>

33. On appeal, Kamuhanda presented additional evidence from Witness GAA, indicating that the witness was not at the compound.<sup>83</sup> In addition, in challenging the Trial Chamber's reliance on Witness GAF, Kamuhanda highlighted Judge Maqutu's Separate Opinion expressing reservations as to whether Witness GAF was at the compound at the time of the attack.<sup>84</sup> The Appeals Chamber did not find Witness GAA's additional evidence credible.<sup>85</sup> It also rejected Kamuhanda's challenge to Witness GAF's credibility.<sup>86</sup>

34. Kamuhanda seeks review on the basis of newly discovered evidence which demonstrates that Witnesses GAA and GAF were not at the Gikomero Parish Compound at the time of the attack.<sup>87</sup> In this respect, he highlights statements made by Witness GAA during the Special Investigation in which Witness GAA reiterated his absence from the compound. Kamuhanda further

<sup>77</sup> *Kamuhanda* Trial Judgement, paras. 437-444, 451, 453-456, 458, 460-462, 466.

<sup>78</sup> *Kamuhanda* Trial Judgement, paras. 437, 438, 441, 445-449, 466.

<sup>79</sup> *Kamuhanda* Appeal Judgement, para. 296.

<sup>80</sup> *Kamuhanda* Appeal Judgement, para. 219.

<sup>81</sup> *Kamuhanda* Trial Judgement, paras. 451, 466.

<sup>82</sup> *Kamuhanda* Trial Judgement, paras. 443-456, 458, 460-462, 465, 466, 478-493, 498-506.

<sup>83</sup> *Kamuhanda* Appeal Judgement, paras. 211-213.

<sup>84</sup> See Judge Maqutu Separate Opinion, para. 47 ("All indications make it suspect that Witness GAF was at Gikomero Parish on 12 April 1994 at the time of the killings"). See also Judge Maqutu Separate Opinion, paras. 44-46.

<sup>85</sup> *Kamuhanda* Appeal Judgement, paras. 219-221.

<sup>86</sup> *Kamuhanda* Appeal Judgement, paras. 245-252.

<sup>87</sup> Request, paras. 54-77, 157-159, 175, 176, 179-189, 199-209.

refers to numerous statements of other persons taken during the Special Investigation or given during the *Nshogoza* case, which corroborate the absence of Witness GAA.<sup>88</sup> In addition, Kamuhanda points to the statements, tendered during the *Nshogoza* case, of three witnesses who did not see Witness GAF during the attack.<sup>89</sup> Kamuhanda argues that neither the Trial Chamber nor the Appeals Chamber was aware of these facts during the proceedings.<sup>90</sup>

35. The Prosecution responds that the material submitted in support of the Request pertains to the credibility of Witnesses GAA and GAF.<sup>91</sup> As the credibility of these witnesses was already at issue during the original proceedings, the Prosecution submits that the material does not amount to a new fact.<sup>92</sup>

36. The Appeals Chamber does not consider that the newly discovered information relating to the presence of Witnesses GAA and GAF at the Gikomero Parish Compound amounts to a new fact warranting review under Rule 120 of the Rules. Kamuhanda placed Witness GAA's presence at the compound squarely at issue before the Appeals Chamber with the witness's additional evidence on appeal.<sup>93</sup> The material highlighted by Kamuhanda in his Request is simply additional evidence of that and not a new fact. In any case, the Appeals Chamber has already determined above that, even if Witness GAA's evidence were disregarded, ample other evidence underpins Kamuhanda's convictions.<sup>94</sup>

37. In addition, although the specific evidence relating to Witness GAF's presence at the compound was not before the Trial Chamber or the Appeals Chamber, the witness's presence was at issue during the proceedings. Indeed, in his Separate Opinion, Judge Maqutu expressly questioned whether Witness GAF was at the compound, which Kamuhanda relied on in challenging the witness's credibility on appeal.<sup>95</sup> Therefore, the newly discovered information does not constitute a new fact. Even if it did, Kamuhanda has not demonstrated that the fact that three witnesses did not see Witness GAF at the compound, during a chaotic attack against thousands of refugees,<sup>96</sup> either could or would impact the Trial Chamber's acceptance of his extensively corroborated first-hand testimony.

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<sup>88</sup> Request, paras. 54-71.

<sup>89</sup> Request, paras. 72-75.

<sup>90</sup> Request, paras. 157-159.

<sup>91</sup> Response, para. 27.

<sup>92</sup> Response, para. 29.

<sup>93</sup> *Kamuhanda Appeal Judgement*, paras. 211-221.

<sup>94</sup> *See supra*, para. 31.

<sup>95</sup> Judge Maqutu Separate Opinion, para. 47.

<sup>96</sup> *Kamuhanda Trial Judgement*, paras. 467, 506, 642, 644.

38. Therefore, the Appeals Chamber finds that the submitted information relating to the presence of Witnesses GAA and GAF at the Gikomero Parish Compound does not amount to a new fact for the purposes of review under Rule 120 of the Rules.

#### 4. Absence of Kamuhanda

39. The Trial Chamber considered extensive evidence from Defence witnesses supporting the contention that Kamuhanda did not participate in the attack.<sup>97</sup> It follows from the Trial Judgement that these witnesses were either at the compound or in the vicinity around the time of the attack, or conducted an investigation related to the massacre.<sup>98</sup> Of those at the compound, the Trial Chamber observed that “the Defence Witnesses may have arrived on the scene of the events after the man identified as Kamuhanda had already left.”<sup>99</sup> It therefore concluded that “[i]n such a case, even if the Chamber were to believe these Witnesses, it would not demonstrate that the Accused was not there.”<sup>100</sup> In addition, the Trial Chamber highlighted other credibility issues impacting some of the Defence witnesses, including Pastor Nkuranga (Witness GER) whose statements describing the incident, which do not mention Kamuhanda, were admitted pursuant to Rule 92*bis* of the Rules.<sup>101</sup> After considering the Prosecution and Defence evidence together, the Trial Chamber found that the Prosecution evidence established beyond reasonable doubt that Kamuhanda was present at the Gikomero Parish Compound on 12 April 1994.<sup>102</sup>

40. On appeal, Kamuhanda challenged the Trial Chamber’s assessment of the Defence evidence.<sup>103</sup> The Appeals Chamber rejected these challenges and concluded that the Trial Chamber’s “findings were supported by the evidence of a number of direct and corroborative witnesses, whereas none of the Defence witnesses [except Pastor Nkuranga (Witness GER) who did not testify before the Trial Chamber] was present during the initial phase of the attack.”<sup>104</sup>

41. Kamuhanda submits that newly discovered evidence from witnesses present during the attack, including its initial stages, as well as information concerning *Gacaca* proceedings related to the incident, demonstrate that he did not participate in it.<sup>105</sup> Kamuhanda contends that this material reveals that numerous witnesses present at the Gikomero Parish Compound did not see him during

<sup>97</sup> *Kamuhanda Trial Judgement*, paras. 468-476.

<sup>98</sup> *Kamuhanda Trial Judgement*, paras. 390-435, 469-475.

<sup>99</sup> *Kamuhanda Trial Judgement*, para. 470.

<sup>100</sup> *Kamuhanda Trial Judgement*, para. 470.

<sup>101</sup> *Kamuhanda Trial Judgement*, para. 475.

<sup>102</sup> *Kamuhanda Trial Judgement*, para. 476.

<sup>103</sup> *Kamuhanda Appeal Judgement*, paras. 322-340.

<sup>104</sup> *Kamuhanda Appeal Judgement*, para. 343. *See also Kamuhanda Appeal Judgement*, paras. 322-340.

<sup>105</sup> Request, paras. 78-120, 160, 179-189, 210-213.

the attack and that he was not implicated in the attack at *Gacaca* sessions.<sup>106</sup> Kamuhanda argues that neither the Trial Chamber nor the Appeals Chamber was aware that other witnesses confirmed that he was not at the compound at the time of the attack, or that his name was not mentioned during *Gacaca* proceedings.<sup>107</sup> Kamuhanda submits that, had the Trial Chamber been aware of this material, “it could not have suggested that the Defence witnesses may have arrived at the scene after the man identified as Kamuhanda had already left.”<sup>108</sup>

42. The Prosecution submits that the evidence of witnesses claiming that they did not see Kamuhanda at Gikomero during the massacre was considered at trial and on appeal; thus, arguments and materials supporting similar contentions should be dismissed.<sup>109</sup>

43. Although the additional witness statements and the *Gacaca* material were not before the Trial Chamber or the Appeals Chamber, Kamuhanda’s absence from the Gikomero Parish Compound was in issue at trial and on appeal.<sup>110</sup> The Appeals Chamber recalls that Kamuhanda presented a number of witnesses at trial who claimed that he was not at the compound on 12 April 1994.<sup>111</sup> The evidence included the testimony of Witness GPT, who conducted an investigation into who was responsible for the attack,<sup>112</sup> as well as the written statements of Pastor Nkuranga (Witness GER),<sup>113</sup> who according to the Trial Chamber interacted with Kamuhanda on his arrival.<sup>114</sup> Therefore, contrary to Kamuhanda’s assertion, Defence evidence concerning the initial phase of the attack was before the Trial Chamber. The newly discovered information is simply additional evidence of issues already considered during the proceedings and does not amount to a new fact. Moreover, the Appeals Chamber does not consider the different descriptions of the leader of the attack by *Gacaca* witnesses, or their alleged failure to discuss Kamuhanda’s activities in a separate trial involving different accused, to constitute new facts for the purposes of review under Rule 120 of the Rules.<sup>115</sup>

44. Accordingly, the Appeals Chamber dismisses Kamuhanda’s request for review based on the alleged new facts related to his presence at the compound.

<sup>106</sup> Request, paras. 80-120, 160.

<sup>107</sup> Request, paras. 211, 212.

<sup>108</sup> Request, para. 212.

<sup>109</sup> Response, para. 51.

<sup>110</sup> *Kamuhanda* Trial Judgement, paras. 469-476, 505; *Kamuhanda* Appeal Judgement, paras. 230-321, 343.

<sup>111</sup> *Kamuhanda* Trial Judgement, paras. 469-475.

<sup>112</sup> *Kamuhanda* Trial Judgement, paras. 390-396, 472.

<sup>113</sup> *Kamuhanda* Trial Judgement, para. 475.

<sup>114</sup> *Kamuhanda* Trial Judgement, para. 502.

<sup>115</sup> See *Rutaganda* Review Decision, para. 13.

## 5. Witness GEK's Credibility

45. The Trial Chamber accepted that Witness GEK was one of two witnesses who observed Kamuhanda travel towards the Gikomero Parish Compound on 12 April 1994 prior to the attack.<sup>116</sup> The Trial Chamber relied on this evidence to substantiate its finding that Kamuhanda arrived at the compound in a vehicle on the afternoon of 12 April 1994.<sup>117</sup> At trial and on appeal, Kamuhanda challenged the credibility of Witness GEK.<sup>118</sup> The Trial Chamber rejected these arguments and found her evidence to be credible.<sup>119</sup> The Appeals Chamber dismissed Kamuhanda's challenge to the Trial Chamber's reliance on Witness GEK's evidence.<sup>120</sup>

46. Kamuhanda seeks review of the finding that Witness GEK was credible on the basis of newly discovered evidence from the *Rwamakuba* case, the *Nshogoza* case, and the Special Investigation, which demonstrates that the witness was dishonest, fabricated evidence against Kamuhanda, and was not in Gikomero Commune during the relevant events.<sup>121</sup> Kamuhanda also notes that the witness appeared and was found not credible in the *Rwamakuba* case.<sup>122</sup> Kamuhanda argues that, if this material had been before the Trial Chamber or Appeals Chamber, the witness would have been found not credible, as was the case in the *Rwamakuba* Trial Judgement.<sup>123</sup>

47. The Prosecution responds that the Appeals Chamber already conducted a comprehensive assessment of Witness GEK's credibility and that the material referred to by Kamuhanda is simply additional evidence of facts already at issue in the proceedings.<sup>124</sup>

48. The Appeals Chamber is not convinced that the new material submitted by Kamuhanda related to the credibility of Witness GEK warrants review. The Trial Chamber expressly considered and rejected Defence evidence suggesting that Witness GEK was not in Gikomero Commune during the relevant events.<sup>125</sup> The Appeals Chamber also addressed this issue on appeal in addition to other questions raised by Kamuhanda concerning the witness's credibility, including her subsequent conviction for murder, her general trustworthiness, and allegations that she was

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<sup>116</sup> The Trial Chamber also relied on Witness GEK in finding that Kamuhanda participated in a meeting at a home in Gikomero Commune between 6 and 10 April 1994 where he incited those present to kill Tutsis and distributed weapons. The Appeals Chamber, however, considered that the Trial Chamber erred in basing its conviction for the killings at Gikomero Parish Compound on this meeting because there was an insufficient evidentiary link between the two incidents. See *Kamuhanda* Appeal Judgement, para. 77.

<sup>117</sup> *Kamuhanda* Trial Judgement, para. 466.

<sup>118</sup> *Kamuhanda* Trial Judgement, paras. 266-271; *Kamuhanda* Appeal Judgement, paras. 130-162.

<sup>119</sup> *Kamuhanda* Trial Judgement, para. 272.

<sup>120</sup> *Kamuhanda* Appeal Judgement, para. 162.

<sup>121</sup> Request, paras. 137-147, 167-169; 221-227.

<sup>122</sup> Request, para. 226.

<sup>123</sup> Request, paras. 226, 227.

<sup>124</sup> Response, paras. 34, 50.

<sup>125</sup> *Kamuhanda* Trial Judgement, paras. 266-272.



involved in the fabrication of testimony.<sup>126</sup> The newly discovered evidence is simply additional evidence of facts already at issue during the proceedings and not a new fact for the purposes of review under Rule 120 of the Rules. The fact that a separate Trial Chamber reached a different decision concerning her credibility in a different case does not affect this conclusion.<sup>127</sup>

49. Accordingly, the Appeals Chamber dismisses Kamuhanda's request for review based on the alleged new facts related to Witness GEK's credibility.

## 6. Fabrication of Evidence

50. At trial, Kamuhanda argued that the Prosecution witnesses gave false testimony and presented a witness who claimed that he had been asked to testify falsely.<sup>128</sup> The Trial Chamber rejected this general contention, noting that it was not substantiated by the evidence.<sup>129</sup> On appeal, Kamuhanda presented additional evidence from Witnesses GAA and GEX to support his contention that the Prosecution witnesses had colluded to offer false testimony against him.<sup>130</sup> The Appeals Chamber considered that the recantations of these witnesses of their prior testimony or statements were not credible.<sup>131</sup> The Appeals Chamber also found that no credible evidence supported Kamuhanda's contention that the Prosecution witnesses colluded to fabricate testimony.<sup>132</sup>

51. According to the Request, newly discovered evidence, principally from Defence Witness 7/14, who appeared in the *Rwamakuba* and *Nshogoza* cases and who provided statements during the Special Investigation, demonstrates that Witnesses GEK and GET conspired to falsely incriminate Kamuhanda.<sup>133</sup> Kamuhanda submits that this new material reveals that Witness 7/14 obtained information from Witnesses GEK and GET concerning the plot against Kamuhanda, and observed first-hand their efforts to recruit witnesses and to prepare them to offer fabricated testimony at various meetings.<sup>134</sup>

<sup>126</sup> *Kamuhanda Appeal Judgement*, paras. 130-162.

<sup>127</sup> *See The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 143 ("two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence").

<sup>128</sup> *Kamuhanda Trial Judgement*, paras. 68-70.

<sup>129</sup> *Kamuhanda Trial Judgement*, para. 71.

<sup>130</sup> *Kamuhanda Appeal Judgement*, paras. 211-213, 222, 223.

<sup>131</sup> *Kamuhanda Appeal Judgement*, paras. 221, 226.

<sup>132</sup> *Kamuhanda Appeal Judgement*, paras. 219, 226.

<sup>133</sup> Request, paras. 121-136, 161-166, 214-220.

<sup>134</sup> Request, paras. 121-136.

52. The Prosecution responds that allegations of fabrication of evidence against Kamuhanda by Witness GEK and others were at issue in the initial proceedings, including through the recantation statements of Witnesses GAA and GEX and the Rule 115 evidentiary hearing.<sup>135</sup>

53. The Appeals Chamber considers that the new information submitted by Kamuhanda concerning the alleged fabrication of evidence against him does not warrant review. The alleged fabrication of evidence was already considered by the Trial Chamber.<sup>136</sup> Significantly, the Appeals Chamber exhaustively addressed the issue in assessing Kamuhanda's additional evidence on appeal.<sup>137</sup> In particular, the written statement of Witness GAA and the testimony of Witness GEX referred to Witness GEK's alleged role in soliciting false testimony.<sup>138</sup> Notably, in rejecting Witness GAA's additional evidence, the Appeals Chamber noted the clear contradiction between his statement that the Prosecution witnesses had harmonised their testimony at trial and his testimony before the Appeals Chamber, in which he claimed that he had invented the particular details of his trial testimony on his own.<sup>139</sup> The Appeals Chamber concluded that this explanation undermined both his credibility and the allegation that the witnesses had harmonised their trial testimony.<sup>140</sup> The newly discovered material is therefore not a new fact, but simply additional evidence of facts already at issue in the proceedings.

54. Accordingly, the Appeals Chamber dismisses Kamuhanda's request for review based on the alleged new facts related to the fabrication of evidence against him.

## 7. Conclusion

55. For the foregoing reasons, the Appeals Chamber considers that Kamuhanda has not identified any new facts and, accordingly, dismisses his request for review.

### **B. Request for Reconsideration**

56. In the alternative, Kamuhanda requests reconsideration of his case.<sup>141</sup> The Prosecution responds that the request should be dismissed.<sup>142</sup> The Appeals Chamber recalls that the Statute only provides "for a right of appeal and a right of review but not for a second right of appeal by the

<sup>135</sup> Response, paras. 31, 33.

<sup>136</sup> *Kamuhanda* Trial Judgement, paras. 68-71.

<sup>137</sup> *Kamuhanda* Appeal Judgement, paras. 211-229.

<sup>138</sup> *Kamuhanda* Appeal Judgement, paras. 212, 223.

<sup>139</sup> *Kamuhanda* Appeal Judgement, para. 219.

<sup>140</sup> *Kamuhanda* Appeal Judgement, para. 219.

<sup>141</sup> See Request, paras. 229-234.

<sup>142</sup> See Response, paras. 60, 61.

avenue of reconsideration of a final judgement".<sup>143</sup> The Appeals Chamber therefore dismisses Kamuhanda's request for reconsideration.

### C. Disclosure Violations

57. Kamuhanda submits that the Prosecution violated Rule 68 of the Rules by failing to disclose exculpatory evidence as soon as practicable.<sup>144</sup> In particular, he notes that the exculpatory material relating to Witnesses 7/14, GAA, GEX, GAF, SP-002, SP-004, SP-015, SP-016, SP-017, SP-019, BUC, NYA, A13, A15, A17, A18, A23, A28, and A30 was disclosed only in May 2009 and January 2010.<sup>145</sup> He submits that the evidence is exculpatory since it suggests that he was not at the Gikomero Parish Compound on the day of the massacres and undermines the credibility of Prosecution evidence, demonstrating that the Trial Chamber wrongly convicted him.<sup>146</sup> He recalls the findings of the Decision on Disclosure that, *inter alia*, the Prosecution acknowledged the exculpatory character of the evidence by disclosing it.<sup>147</sup>

58. Kamuhanda further submits that the Prosecution's actions have caused him serious prejudice.<sup>148</sup> Kamuhanda argues that, had he been in possession of this material earlier, he could have requested a stay of the Appeals Chamber's deliberations in his case, sought reconsideration of his final Judgement before the case law changed, or filed a request for review five years earlier.<sup>149</sup> Kamuhanda submits that the only suitable remedy would be to order a retrial before a differently constituted Trial Chamber.<sup>150</sup>

59. The Prosecution responds that Kamuhanda did not suffer any material prejudice due to the late disclosure of some materials.<sup>151</sup> With respect to the request for retrial, the Prosecution submits that Kamuhanda's arguments should be summarily dismissed considering that he fails to provide any substantiation to justify such an exceptional remedy.<sup>152</sup>

<sup>143</sup> See, e.g., *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Ferdinand Nahimana's Motion for Reconsideration of the Appeal Judgement, 30 June 2010, para. 6.

<sup>144</sup> Request, para. 243.

<sup>145</sup> Request, paras. 249, 250, 253, 254, 256, 257, 259-266, 268, 269.

<sup>146</sup> Request, para. 271. Kamuhanda also explains how each piece of the requested evidence potentially exculpates him. See Request, paras. 251, 255, 258, 260, 261, 264, 267, 268, 270.

<sup>147</sup> Request, para. 272.

<sup>148</sup> Request, para. 294.

<sup>149</sup> Request, paras. 300, 303, 304.

<sup>150</sup> Request, paras. 314, 315.

<sup>151</sup> Response, paras. 4, 62.

<sup>152</sup> Response, para. 66.

60. The Appeals Chamber recalls that it has already found that the Prosecution violated its disclosure obligations by failing to disclose some material in a timely manner.<sup>153</sup> However, even when the Appeals Chamber is satisfied that the Prosecution has failed to comply with its Rule 68 obligations, it will examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.<sup>154</sup>

61. For the reasons mentioned above, none of the material at issue in this case amounts to a new fact. Consequently, the Appeals Chamber is of the view that the prejudice suffered by Kamuhanda is minimal, and that an appropriate remedy is an acknowledgement of the violation.<sup>155</sup>

#### **D. Other Violations**

62. Kamuhanda submits that the Prosecution violated Articles 2(e) and (h) of the “Prosecutor’s Regulations”<sup>156</sup> when it knowingly provided, in its Disclosure of 3 March 2006, an incorrect account of facts to the Appeals Chamber, considering the information it then had in its possession.<sup>157</sup> He argues that the Prosecution attempted to obstruct, or at least did not assist in, the discovery of the truth.<sup>158</sup> He also submits that the Prosecution committed contempt of court by failing to conclude the Special Investigation.<sup>159</sup> Kamuhanda notes that it took four years for the Prosecution to admit that the Special Investigation was never concluded and that no report was ever submitted.<sup>160</sup> He argues that the Prosecution was bound to conclude the Special Investigation since it emerged from the initial investigations that, on the day of the killings, Witness GAA was in Kibara and not at the Gikomero Parish Compound.<sup>161</sup>

63. The Prosecution responds that Kamuhanda’s arguments are unwarranted.<sup>162</sup>

64. With respect to Kamuhanda’s allegation of contempt, the Appeals Chamber first recalls that, on 21 July 2009, it granted Kamuhanda’s Motion for Legal Assistance and further ordered the Prosecution “to clarify whether it was provided with a report containing the conclusions of the

<sup>153</sup> Decision on Disclosure, para. 45.

<sup>154</sup> See, e.g., *Junéval Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 262; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 153.

<sup>155</sup> With respect to Kamuhanda’s argument that he could have requested a stay of the deliberations, the Appeals Chamber notes that Kamuhanda himself acknowledges that, apart from two statements from Witness GAA, which predated the *Kamuhanda* Appeal Judgement, all materials were subsequent to it. See Request, para. 179.

<sup>156</sup> Kamuhanda refers generally to “Prosecutor’s Regulations”. The Appeals Chamber infers that his reference is to Prosecutor’s Regulation No. 2 (1999).

<sup>157</sup> Request, paras. 282, 283, 286.

<sup>158</sup> Request, para. 284.

<sup>159</sup> Request, para. 288.

<sup>160</sup> Request, paras. 285, 292.

<sup>161</sup> Request, para. 280.

<sup>162</sup> Response, para. 64.

Special Counsel's investigation".<sup>163</sup> The Prosecution filed a clarification on 13 August 2009, wherein it reiterated its position stated before Trial Chamber III seized of the *Nshogoza* case that, in fact, the investigations by the Special Counsel were never concluded and therefore no such report existed.<sup>164</sup>

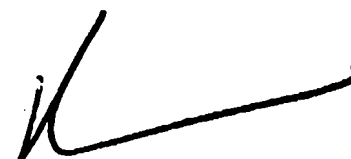
65. The Appeals Chamber recalls that, in its Oral Decision, it directed the Prosecution to investigate allegations and discrepancies under Rules 77(C)(i) and 91(B) of the Rules, leaving it to the Prosecution's discretion to take the eventual steps and measures deemed necessary and appropriate under the circumstances.<sup>165</sup> These provisions indicate that instructions to investigate possible contempt are made "with a view to the preparation and submission of an indictment". The Appeals Chamber considers that the filing of a concluding report is therefore not necessarily required and that it was within the Prosecution's discretion instead to file indictments against Witness GAA and Nshogoza. Accordingly, Kamuhanda's submission that the Prosecution committed contempt is without merit. The Appeals Chamber declines to consider any alleged violation of the Prosecutor's Regulation No. 2 because a violation of any of its provisions would be a matter for the Prosecutor to consider.<sup>166</sup>

### III. DISPOSITION

66. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Request in its entirety.

Done this 25th day of August 2011,  
At The Hague,  
The Netherlands.



  
Judge Patrick Robinson  
Presiding

[Seal of the Tribunal]

<sup>163</sup> Decision on Motion for Legal Assistance, para. 22.

<sup>164</sup> Prosecutor's Clarification on Kamuhanda's Request for Special Counsel's Report, 13 August 2009, para. 4.

<sup>165</sup> See Oral Decision.

<sup>166</sup> See Prosecutor's Regulation No. 2, Article 4.