



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

821/H

*[Handwritten initials]*

ICTR-98-44A-R

29<sup>th</sup> May 2013

IN THE APPEALS CHAMBER {821/H - 790/H}

**Before:** Judge Patrick Robinson, Presiding  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Andrézia Vaz  
Judge Carmel Agius

**Registrar:** Mr. Bongani Majola

**Decision of:** 29 May 2013

**JUVÉNAL KAJELIJELI**

v.

**THE PROSECUTOR**

*Case No. ICTR-98-44A-R*

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**DECISION ON REQUEST FOR REVIEW**

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Counsel for Juvénal Kajelijeli:

Mr. Lennox Hinds

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow  
Mr. James J. Arguin  
Mr. George W. Mugwanya  
Ms. Evelyn Kamau  
Ms. Aisha Kagabo  
Mr. Leo Nwoye

<p>ICTR Appeals Chamber 29 MAY 2013 Date: <i>R. Juvénal</i> Action: <i>Chambers, Defence</i> Copied To: <i>OTB, KAD, SPC</i></p>
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<p>International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda</p> <p>CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS</p> <p>NAME / NOM: <i>ROSETTE MUZIGU-MORRISON</i></p> <p>SIGNATURE: <i>[Signature]</i> DATE: <i>29/5/13</i></p>
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**CONTENTS**

<b>I. BACKGROUND.....</b>	<b>1</b>
<b>II. STANDARD OF REVIEW.....</b>	<b>2</b>
<b>III. DISCUSSION.....</b>	<b>3</b>
A. ALLEGED NEW FACTS RELATING TO FALSE TESTIMONY BY THE SEVEN PROSECUTION WITNESSES.....	4
1. Witnesses BTH's and 2's Testimonies in the <i>Karemera et al.</i> Trial .....	5
2. Witness GAP's Recantations and Statements.....	7
3. Witness GAO's Recantation .....	10
4. Witness GDQ's Statements.....	12
5. Witness GBH's Recantation .....	13
6. Witness GBE's Robbery Conviction .....	15
B. ALLEGED NEW FACTS RELATING TO KAJELIJELI'S PRESENCE AT NKULI CANTEEN ON 6 APRIL 1994.....	15
1. Witness GDD's Statements before Rwandan Authorities .....	16
2. Karorero's Testimony in the <i>Karemera et al.</i> Trial .....	17
C. ALLEGED NEW FACT RELATING TO KAJELIJELI'S PRESENCE DURING THE KILLING OF "KANOTI'S WIFE" .....	19
D. ALLEGED NEW FACT RELATING TO THE DISTRIBUTION OF TUTSI PROPERTIES IN MUKINGO COMMUNE.....	20
E. ALLEGED NEW FACT RELATING TO THE SEARCH FOR TUTSI SURVIVORS ON 8 APRIL 1994 .....	22
F. ALLEGED NEW FACT RELATING TO THE KILLINGS IN MUNYEMVANO'S COMPOUND .....	23
<b>IV. CONCLUSION.....</b>	<b>25</b>
<b>V. DISPOSITION.....</b>	<b>25</b>
<b>PARTIAL DISSENTING OPINION OF JUDGE PATRICK ROBINSON .....</b>	<b>1</b>

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 Juvénal Kajelijeli (“Kajelijeli”) on 15 June 2011.<sup>1</sup>

## I. BACKGROUND

2. Kajelijeli was born in 1951, in Rwinzovu Sector, Mukingo Commune, Ruhengeri Prefecture, Rwanda.<sup>2</sup> He served as *bourgmestre* of Mukingo Commune from 1988 to 1993 and from 26 June 1994 until mid-July 1994.<sup>3</sup>

3. On 1 December 2003, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Kajelijeli of genocide and extermination as a crime against humanity for instigating, ordering, and aiding and abetting pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) as well as for failing to prevent crimes pursuant to Article 6(3) of the Statute, in connection with crimes committed in April 1994 in the communes of Mukingo, Nkuli, and Kigombe, in particular at Byangabo Market, Busogo Hill, the Munyemvano compound, and the Ruhengeri Court of Appeal.<sup>4</sup> In addition, the Trial Chamber convicted him for direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute, based on the events at Byangabo Market, Mukingo Commune, on 7 April 1994.<sup>5</sup>

4. On 23 May 2005, the Appeals Chamber vacated Kajelijeli’s convictions for genocide and extermination as a crime against humanity based on Article 6(3) of the Statute.<sup>6</sup> The Appeals Chamber dismissed Kajelijeli’s other grounds of appeal, affirming the remainder of his convictions.<sup>7</sup> It found, *proprio motu*, that Kajelijeli’s fundamental rights were violated during the

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<sup>1</sup> Juvénal Kajelijeli’s Application for Review, 15 June 2011 (confidential) (“Request for Review”).

<sup>2</sup> *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (“Trial Judgement”), para. 5.

<sup>3</sup> Trial Judgement, paras. 6, 739.

<sup>4</sup> Trial Judgement, paras. 817-845, 896-907, 942.

<sup>5</sup> Trial Judgement, paras. 856-861, 942.

<sup>6</sup> *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“Appeal Judgement”), paras. 81, 325. The Appeals Chamber vacated Kajelijeli’s convictions under Article 6(3) of the Statute on the basis that he was convicted for both individual responsibility and superior responsibility based on the same facts, which constituted a legal error invalidating the Trial Judgement. However, the Appeals Chamber affirmed the Trial Chamber’s finding of Kajelijeli’s superior position for the purposes of sentencing. See Appeal Judgement, paras. 82-91, 316-319.

<sup>7</sup> Appeal Judgement, para. 325.

first period of his arrest and detention,<sup>8</sup> set aside his original sentence of two life sentences and 15 years' sentence to run concurrently, and converted it into a single sentence of 45 years.<sup>9</sup>

5. On 12 November 2009, the Appeals Chamber granted Kajelijeli's request for assignment of counsel to assist him in the preparation of a request for review and to file motions for investigation of alleged false testimony by Prosecution witnesses.<sup>10</sup> Kajelijeli filed the Request for Review on 15 June 2011. The Prosecution responded on 25 July 2011<sup>11</sup> and Kajelijeli replied on 9 August 2011.<sup>12</sup> On 15 February 2012, the Pre-Review Judge granted Kajelijeli's request to amend his reply and Kajelijeli filed an amended reply on 20 February 2012.<sup>13</sup>

6. On 21 February 2013, the Appeals Chamber instructed Kajelijeli and the Prosecution to file confidentially relevant documents in relation to one of the alleged new facts,<sup>14</sup> which they did on 4 March 2013.<sup>15</sup>

## II. STANDARD OF REVIEW

7. Review proceedings are governed by Article 25 of the Statute and Rules 120 and 121 of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>16</sup> Review of a final judgement is an

<sup>8</sup> Appeal Judgement, paras. 251-255, 320, 325.

<sup>9</sup> Appeal Judgement, paras. 320-325.

<sup>10</sup> Decision on Request for Assignment of Counsel, 12 November 2009 (confidential). Kajelijeli was assigned counsel on 4 January 2010. See Letter from Defence Counsel and Detention Management Section to Mr. Lennox Hinds, ICTR/JUD-11-5-2-10/010/dfm, 4 January 2010.

<sup>11</sup> Prosecutor's Response to Juvénal Kajelijeli's Application for Review, 25 July 2011 ("Response"). See also Corrigendum to Prosecutor's Response to Juvénal Kajelijeli's Application for Review, 30 September 2011.

<sup>12</sup> Applicant's Reply to Prosecutor's Response Brief, 9 August 2011 (confidential).

<sup>13</sup> Amended Reply Brief, 20 February 2012 ("Reply"); Decision on Motions for Leave to Amend Reply Brief and Exceed Word Limit of Reply Brief, 15 February 2012.

<sup>14</sup> Order in Relation to Juvénal Kajelijeli's Request for Review, 21 February 2013, p. 2.

<sup>15</sup> Applicant's Confidential Filing in Response to 21 February 2013 Order in Relation to Request for Review, 4 March 2013 (confidential); *Corrigendum et Addendum*, 4 March 2013 (confidential); Prosecution's Confidential Submissions in Compliance with the Appeals Chamber's Order of 21 February 2013, 4 March 2013 (confidential) ("Prosecution Submissions"). The Pre-Review Judge denied Kajelijeli's request for extension of time to comply with the Order. See Decision on Motion for Translation and Extension of Time, 28 February 2013. The Appeals Chamber notes that Kajelijeli filed a document in reaction to the Prosecution's submissions. See *Réplique de Juvénal Kajelijeli, pour réaction aux conclusions du Procureur contenues dans sa soumission du 4 mars 2013, à l'ordonnance du 21 février 2013, de la Chambre d'appel, relative à la requête du requérant, de demande de révision du jugement No. ICTR-98-44A-A, rendu le 23 mai 2005*, 7 March 2013 (confidential). The Appeals Chamber did not request this document and will not consider it. The Appeals Chamber will also not consider a submission from Kajelijeli filed after 4 March 2013. See *Renforcement et disposition de la réponse du 4 mars 2013 de Juvénal Kajelijeli, à l'ordonnance du 21 février 2013, de la Chambre d'Appel, relative à la requête du requérant, de demande de révision du jugement No. ICTR-98-44A-A, rendu le 23 mai 2005*, 25 April 2013 (confidential).

<sup>16</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 *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-R, Decision on Request for Variation of Protective Measures and Request for Review, 28 September 2012 ("Muvunyi Review Decision"), para. 11; *François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Reconsideration and Review, 26 March 2012 ("Karera Review Decision"), para. 9; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011 ("Kamuhanda Review Decision"), para. 17.

exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.<sup>17</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 proceedings; (iii) the lack of discovery of that new fact was not the result of a 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>18</sup> In wholly exceptional circumstances, the Appeals Chamber may nonetheless grant review, even when the second or third criterion is not satisfied, if ignoring the new fact *would* result in a miscarriage of justice.<sup>19</sup>

8. A “new fact” refers to new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.<sup>20</sup> The requirement that the fact was not in issue during the proceedings means that “it must not have been among the factors that the deciding body could have taken into account in reaching its verdict.”<sup>21</sup> Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.<sup>22</sup>

### III. DISCUSSION

9. Kajelijeli seeks review of his case based on alleged new facts, which he claims undermine his convictions.<sup>23</sup> He submits that the new facts demonstrate that: (i) Prosecution Witnesses GAP, GAO, GDD, GDQ, GBV, GBE, and GBH (“Seven Prosecution Witnesses”) testified falsely;<sup>24</sup> (ii) he was not present at Nkuli canteen on 6 April 1994;<sup>25</sup> (iii) he was not present during the killing of a woman said to be Kanoti’s wife;<sup>26</sup> (iv) he was not involved in the distribution of Tutsi properties in Mukingo Commune;<sup>27</sup> (v) he was not involved in the search for Tutsi survivors on 8 April 1994;<sup>28</sup> and (vi) he was not involved in the killings in Munyemvano’s compound.<sup>29</sup>

<sup>17</sup> Rutaganda Review Decision, para. 8. See also Muvunyi Review Decision, para. 11; Karera Review Decision, para. 9; Kamuhanda Review Decision, para. 17.

<sup>18</sup> Rutaganda Review Decision, para. 8. See also Muvunyi Review Decision, para. 11; Karera Review Decision, para. 9; Kamuhanda Review Decision, para. 17.

<sup>19</sup> Rutaganda Review Decision, para. 8. See also Muvunyi Review Decision, para. 12; Karera Review Decision, para. 10; Kamuhanda Review Decision, para. 17.

<sup>20</sup> Rutaganda Review Decision, para. 9. See also Muvunyi Review Decision, para. 13; Karera Review Decision, para. 11; Kamuhanda Review Decision, para. 18.

<sup>21</sup> Rutaganda Review Decision, para. 9. See also Muvunyi Review Decision, para. 13; Karera Review Decision, para. 11; Kamuhanda Review Decision, para. 18.

<sup>22</sup> Rutaganda Review Decision, para. 9. See also Muvunyi Review Decision, para. 13; Karera Review Decision, para. 11; Kamuhanda Review Decision, para. 18.

<sup>23</sup> Request for Review, paras. 2-7, 108, 109. See also Request for Review, paras. 12-19, 32-107.

<sup>24</sup> Request for Review, paras. 2-5, 7, 12-19, 32-57, 81-96, 108.

<sup>25</sup> Request for Review, paras. 6, 58-65.

<sup>26</sup> Request for Review, paras. 6, 66-72.

<sup>27</sup> Request for Review, paras. 6, 72, 78-80.

<sup>28</sup> Request for Review, paras. 6, 97-101.

<sup>29</sup> Request for Review, paras. 6, 103-107.

**A. Alleged New Facts Relating to False Testimony by the Seven Prosecution Witnesses**

10. The Trial Chamber found that Kajelijeli was involved in the distribution of Tutsi properties to the *Interahamwe* based on, *inter alia*, the testimonies of Witnesses GAP, GAO, and GDQ.<sup>30</sup> Based on the testimonies of Witnesses GBH, GDD, GAP, and GAO, the Trial Chamber found that Kajelijeli was actively involved in the training of the *Interahamwe*.<sup>31</sup> The Trial Chamber found that Kajelijeli held a *de facto* superior position over the *Interahamwe* based on the overall testimonies of Witnesses ACM, GAP, GAO, GDD, GDQ, GBV, GBE, GBH, and GBG.<sup>32</sup> Based on the testimony of Witness GDD, the Trial Chamber found that Kajelijeli was present at the canteen in Nkuli Commune on 6 April 1994,<sup>33</sup> and that following an order issued by Kajelijeli, Witness GDD killed Tutsis on 8 April 1994.<sup>34</sup> Based on the testimony of Witness GAP, the Trial Chamber found that Kajelijeli was present at the Mukingo Commune office on the morning of 7 April 1994.<sup>35</sup> The Trial Chamber found that Kajelijeli facilitated killings at the Ruhengeri Court of Appeal, Kigombe Commune, based mainly on the testimony of Witness GAO.<sup>36</sup> Based on the testimony of Witness GDQ, the Trial Chamber found that Kajelijeli was present at the roadblock where a woman said to be Kanoti's wife and her son were killed.<sup>37</sup> The Trial Chamber found that Kajelijeli was present at Byangabo market, Mukingo Commune, on the morning of 7 April 1994 based on the testimonies of Witnesses GAO, GBV, and GDQ.<sup>38</sup> The Trial Chamber also found that Kajelijeli participated in an attack against Tutsis at Busogo Hill in Rwankeri Cellule, Mukingo Commune, on 7 April 1994 based on the testimonies of Witnesses GAO, GBV, and GBE.<sup>39</sup>

11. These factual findings underlie, in part, Kajelijeli's convictions for genocide,<sup>40</sup> direct and public incitement to commit genocide,<sup>41</sup> and extermination as a crime against humanity.<sup>42</sup> The Appeals Chamber rejected Kajelijeli's appeal in relation to these findings.<sup>43</sup>

12. Kajelijeli relies on the following to demonstrate that the Seven Prosecution Witnesses testified falsely against him at trial: (i) testimonies of Witness BTH and Witness 2 in the *Karempera*

<sup>30</sup> Trial Judgement, paras. 313-315, 323.

<sup>31</sup> Trial Judgement, paras. 400, 452.

<sup>32</sup> Trial Judgement, paras. 403, 404, 608, 609, 620, 621, 625, 626, 739, 780.

<sup>33</sup> Trial Judgement, paras. 464, 465, 467-469, 819.

<sup>34</sup> Trial Judgement, paras. 606-608, 739.

<sup>35</sup> Trial Judgement, paras. 481-483, 739.

<sup>36</sup> Trial Judgement, paras. 611-613, 619-622, 625, 739, 834.

<sup>37</sup> Trial Judgement, paras. 710, 712-714, 739.

<sup>38</sup> Trial Judgement, paras. 490, 493, 501, 524-530, 549, 739.

<sup>39</sup> Trial Judgement, paras. 544-549, 739, 824, 829, 898.

<sup>40</sup> Trial Judgement, paras. 819-838, 842, 845.

<sup>41</sup> Trial Judgement, paras. 856-861.

<sup>42</sup> Trial Judgement, paras. 896-907.

<sup>43</sup> Appeal Judgement, paras. 65-67, 72-76, 89-91, 95-97, 100-104, 110-113, 115, 116, 118, 121, 124, 127, 128, 131-133, 145-152, 170, 173-178, 181-186.

*et al.* trial;<sup>44</sup> (ii) Witness GAP's recantations and statements;<sup>45</sup> (iii) Witness GAO's recantation;<sup>46</sup> (iv) Witness GDQ's statements before Rwandan authorities;<sup>47</sup> (v) Witness GBH's recantation;<sup>48</sup> and (vi) Witness GBE's robbery conviction.<sup>49</sup>

1. Witnesses BTH's and 2's Testimonies in the *Karemera et al.* Trial

13. Kajelijeli submits that the testimonies of Witnesses BTH and 2 given in the *Karemera et al.* trial from 10 to 17 April 2008 and on 19 and 20 October 2009, respectively, amount to new facts demonstrating that the Seven Prosecution Witnesses testified falsely at Kajelijeli's trial.<sup>50</sup> In their testimonies, Witnesses BTH and 2 stated that the Rwandan prison and prosecution officials were coaching detainees to give false testimony against accused persons before the Tribunal, including Kajelijeli.<sup>51</sup> Witness BTH named Witnesses GAP, GAO, and GDD,<sup>52</sup> and Witness 2 named Witnesses GAP, GAO, and GDQ<sup>53</sup> as detainees involved in the scheme. According to Kajelijeli, the testimonies of Witnesses BTH and 2 demonstrate the existence of a scheme by Rwandan judicial officials to fabricate evidence against accused persons before the Tribunal, including himself.<sup>54</sup> Kajelijeli contends that Witness BTH's testimony, corroborated by Witness 2's testimony, reveals the participation of Witnesses GAP, GAO, GDD, and GDQ<sup>55</sup> and implies the involvement of Witnesses GBV, GBE, and GBH<sup>56</sup> in the scheme to fabricate evidence against him.

14. Kajelijeli submits that the new information, which was not before the Trial Chamber or the Appeals Chamber, could not have been discovered through the exercise of due diligence,<sup>57</sup> and could have been a decisive factor with respect to a number of factual findings which underlie his convictions.<sup>58</sup>

<sup>44</sup> Request for Review, paras. 2-4, 7, 12, 32-48, 81-94, 108.

<sup>45</sup> Request for Review, paras. 2, 7, 16-18, 49-52, 108.

<sup>46</sup> Request for Review, paras. 2, 7, 16, 53-57, 108.

<sup>47</sup> Request for Review, paras. 73-77.

<sup>48</sup> Request for Review, paras. 4, 7, 95, 96, 108.

<sup>49</sup> Request for Review, para. 83.

<sup>50</sup> Request for Review, paras. 7, 32-35, 39-48, 81, 85, 89-94, referring to, *inter alia*, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Transcript ("*Karemera et al.* Transcript"), 20 October 2009 pp. 28, 29; 19 October 2009 pp. 33, 34 (closed session); 14 April 2008 pp. 3, 4, 8, 12-14, 19, 20, 25, 26, 35.

<sup>51</sup> See *Karemera et al.* Transcript, 20 October 2009 pp. 28, 29; 19 October 2009 pp. 33, 34 (closed session); 14 April 2008 pp. 3, 8, 19, 20, 25, 26, 35.

<sup>52</sup> *Karemera et al.* Transcript, 14 April 2008 pp. 2-4; Exhibit DNZ452 (under seal).

<sup>53</sup> *Karemera et al.* Transcript, 19 October 2009 pp. 33, 34 (closed session), 35; Exhibit DNZ651 (under seal).

<sup>54</sup> Request for Review, paras. 2, 12. See also Reply, paras. 10-30.

<sup>55</sup> Request for Review, paras. 2, 3, 12, 32-35, 46. See also Reply, paras. 46, 47.

<sup>56</sup> Request for Review, paras. 4, 81, 82, 84, 85. See also Reply, paras. 50-52. Kajelijeli argues that, although Witness BTH and Witness 2 did not explicitly mention the involvement of these witnesses, the testimonies of Witnesses GBV, GBE, and GBH may have been fabricated, since they met with Ruhengeri prosecution officials prior to providing statements to the investigators from the Tribunal in 1998. See Request for Review, paras. 4, 81, 82, 84, 85.

<sup>57</sup> Request for Review, paras. 32, 47, 85, 89. See also Reply, paras. 31-38, 48.

<sup>58</sup> Request for Review, paras. 7, 39-44, 90-94. See also Reply, paras. 39-45, 49.

15. The Prosecution responds that Kajelijeli's arguments should be dismissed in their entirety.<sup>59</sup> It argues that Witnesses BTH and 2 are not credible and that their allegations are unfounded.<sup>60</sup> It also argues that their testimonies are vague, speculative, and concerned an issue already considered in Kajelijeli's prior proceedings.<sup>61</sup> It further argues that the alleged new facts were discoverable through the exercise of due diligence during Kajelijeli's trial,<sup>62</sup> could not have been decisive in reaching the verdict,<sup>63</sup> and that ignoring them would not lead to a miscarriage of justice.<sup>64</sup>

16. The Appeals Chamber observes that Kajelijeli's arguments pertain to the credibility of the Seven Prosecution Witnesses, a matter which was considered at trial<sup>65</sup> and on appeal.<sup>66</sup> Although the testimonies of Witnesses BTH and 2 from the *Karemera et al.* trial were not before the Trial Chamber or the Appeals Chamber in this case, the issue regarding the Seven Prosecution Witnesses' bias and motivation to give false testimony was litigated at trial<sup>67</sup> and on appeal.<sup>68</sup> In particular, a review of the trial records reveals that the allegations that Rwandan authorities fabricated evidence by requesting some witnesses to testify falsely against Kajelijeli in exchange for lighter sentences were raised at trial<sup>69</sup> and challenged on appeal.<sup>70</sup> As such, the newly discovered

<sup>59</sup> Response, paras. 4, 15, 17, 20, 21, 24, 25, 50, 60, 64, 193, 195.

<sup>60</sup> Response, paras. 4, 15, 17, 20, 21, 24, 27, 51, 52, 54, 61, 62, 64, 193, 194. The Prosecution highlights that: (i) Witness BTH had previously committed perjury and provided false information in the *Karemera et al.* and *Bizimungu et al.* trials; (ii) the Trial Chamber in *Ndindiliyimana et al.* found Witness BTH to be unreliable; and (iii) Witness 2 fabricated evidence and perjured himself in the *Karemera et al.* trial. See *ibid.*, paras. 17-24.

<sup>61</sup> Response, paras. 5, 25, 27-33, 51-54, 61, 62, 64, 65, 68, 194.

<sup>62</sup> Response, paras. 6, 25, 34-37, 55, 56, 69, 194.

<sup>63</sup> Response, paras. 25, 38-50, 57-60, 70, 194.

<sup>64</sup> Response, paras. 50, 60, 70, 194.

<sup>65</sup> See Trial Judgement, paras. 116-118, 120, 146-152, 155-157, 467, 468, 519, 522, 619, 620, 624, 704, 713.

<sup>66</sup> See Appeal Judgement, paras. 15, 18, 22-26, 31-37, 94-97, 103, 104, 107, 110-112, 168, 170, 177, 184, 185, 191, 192, fn. 34. See also *ibid.*, paras. 66, 73, 89.

<sup>67</sup> See Trial Judgement, paras. 117, 147-152, 155, 467, 704.

<sup>68</sup> See Appeal Judgement, paras. 15, 18, 22-26, 31, 33-36, 103, 168, 170, 185, 191, 192, fn. 34.

<sup>69</sup> For Witness GAP, see *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Transcript ("Kajelijeli Transcript"), 3 December 2001 pp. 48-50 ("Q. Sir, isn't it a fact that the Rwandan authorities have told you that you have to testify against Juvénal Kajelijeli so that he would no longer hold you hostage? A. Yes, and if I took him to Rwanda today I would be set free immediately, sir. Q. Now you have just submitted that the Rwandan authorities have told you that in order for you to be set free, you have to, in fact, testify against Juvénal Kajelijeli, isn't that a fact? A. No, sir. I wasn't told that by the authorities. Q. But you have just told us that if you were to take Kajelijeli back to Rwanda today, you would be set free, is that correct? A. Yes, that's correct because even crimes that I may have committed, I committed them under his authority, sir. Q. Sir, isn't it a fact that you expect, based upon, if you do a good job here before the ICTR, that you will be set free if you went back to Rwanda; [...] Isn't it a fact that you expect to be released, based upon the testimony you have given to the Tribunal during Mr. Kajelijeli's trial? A. No, my case file will be pleaded and argued such as it was established here. I am here to testify against Kajelijeli here, sir. Q. Now, sir, were any promises made to you by the Rwandan authorities before you came here to testify? A. No. No promises because since my arrest, I stated that all that I am being charged with were committed by Kajelijeli, sir."); for Witness GDD, see *Kajelijeli* Transcript, 3 October 2001 p. 152 ("Q. So you did not tell the authorities in Rwanda when you confessed about Kajelijeli's ordering you to go out and kill Tutsi[s]; is that correct? A. So, in that document, when you look at Article 6(1), we are told when you plead guilty, mention the names of those who actively participated in the massacre, and that is why I did not mention the name of the minister who gave us orders. I didn't say all of that. Q. Did [there] come a time when somebody asked you to name Nzirodera and Kajelijeli? A. Who is this someone you talked about? Nobody asked me to name his name during the hearings at the Court in Rwanda."); for Witness GAO, see *Kajelijeli* Transcript, 23 July 2001 p. 80 ("Q. Now, you were told that in order for you not to receive the death penalty that you had to come here and, in fact, testify against Kajelijeli and to tell these lies that you have been telling against him; isn't that a fact? A. It is, say, third parties asked me to tell lies against Kajelijeli, then I would beg you to tell the Court who



information is merely additional evidence of issues already considered during the original proceedings. Thus, the testimonies of Witnesses BTH and 2 from the *Karemera et al.* trial do not amount to new facts for the purpose of review under Rule 120 of the Rules.

## 2. Witness GAP's Recantations and Statements

17. Kajelijeli points to Witness GAP's letter of 4 September 2006 addressed to the President of the Busogo *Gacaca* Court in Rwanda, in which, according to Kajelijeli, the witness recanted his testimony against him ("2006 Recantation Letter").<sup>71</sup> In the 2006 Recantation Letter, Witness GAP claimed that Kajelijeli was not involved in several events that occurred in Mukingo Commune in April 1994 and that the witness only testified against Kajelijeli to "protect [his] various interests".<sup>72</sup>

18. Kajelijeli further submits that Witness GAP was subsequently investigated for false testimony in the *Bizimungu et al.* trial following the contradiction between the 2006 Recantation Letter and his testimony in the *Setako* trial in 2008 ("2008 Recantation").<sup>73</sup> In the 2008 Recantation, Witness GAP maintained his testimony at Kajelijeli's trial and stated that the 2006 Recantation Letter contained "lies" which he told in order to be released by the Gataraga *Gacaca* Court as promised by someone who claimed to have contacts with the judges of that court.<sup>74</sup>

19. Kajelijeli further highlights that Witness GAP revealed in an interview with Defence counsel for Joseph Nzirorera in 2009 that he had participated in a scheme by Rwandan judicial officials to fabricate evidence against accused persons at the Tribunal ("2009 Statement"),<sup>75</sup> which he later denied in his testimony in the *Karemera et al.* trial.<sup>76</sup> In the 2009 Statement, Witness GAP stated that his testimony against Kajelijeli comprised "lies" he made up as part of the scheme to

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these people are, or tell the Court who the people who told these lies are. Q. Sir, when I ask you a question, I would like you to answer that question and only that question, do you understand me? A. Nobody asked me to say anything. I pleaded guilty even before Kajelijeli was caught and transferred to Arusha and I mentioned him in my case file in Rwanda. [...]").

<sup>70</sup> See Appeal Judgement, paras. 34, 103.

<sup>71</sup> Request for Review, paras. 16, 49, referring to, *inter alia*, *ibid.*, Annex 1, pp. 356/A, 355/A (Registry pagination).

<sup>72</sup> Witness GAP refers to the following events: "The meeting [...] whose purpose was to hunt down accomplices; Burial of the dead bodies of persons killed on 8 April 1994; Rewards to the *Interahamwe*; The role of the person in charge of the *Amahindure* group; Organisation of meetings at ISAE Busogo; Sale of land belonging to persons killed in 1994; [Kajelijeli's] arrival at the communal bureau on 7 April ... to seek assistance and support for the *Interahamwe* from the police." See Request for Review, Annex 1, p. 356/A (Registry pagination).

<sup>73</sup> Request for Review, paras. 17, 49, referring to *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion for the Recall of Prosecution Witness GAP, 5 March 2009 ("*Bizimungu* Decision"), para. 27.

<sup>74</sup> *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, T. 25 August 2008 pp. 48-50 (closed session).

<sup>75</sup> Request for Review, paras. 18, 51, referring to *ibid.*, Annex 4, pp. 322/A-304/A (Registry pagination).

<sup>76</sup> Request for Review, para. 18, referring to *Karemera et al.* Transcript, 26 January 2010 pp. 36, 37.

fabricate evidence by the Rwandan prosecution and prison authorities.<sup>77</sup> In his testimony before the Trial Chamber in the *Karemera et al.* case, Witness GAP denied the existence of such scheme.<sup>78</sup>

20. Kajelijeli further submits that Witness GAP's failure to mention Kajelijeli in a statement before the Busogo *Gacaca* Court in 2008, in which he confessed to committing crimes in Mukingo Commune in April 1994 ("2008 Confession Statement"), supports the conclusion that Witness GAP testified falsely at Kajelijeli's trial.<sup>79</sup>

21. Kajelijeli submits that Witness GAP's 2006 Recantation Letter, his investigation for false testimony before the Tribunal based on the 2008 Recantation, and the 2008 Confession Statement, as further supported by the 2009 Statement, amount to a new fact that could not have been discovered during the trial or appellate proceedings in his case.<sup>80</sup> Kajelijeli asserts that this alleged new fact corroborates Witness BTH's testimony in the *Karemera et al.* case that Witness GAP was involved in the fabrication of evidence against Kajelijeli and that this further undermines Witness GAP's credibility.<sup>81</sup> Kajelijeli argues that the alleged new fact could have been a decisive factor with respect to a number of factual findings, including those which the Trial Chamber relied on to establish his genocidal intent.<sup>82</sup>

22. The Prosecution responds that Kajelijeli's submissions regarding the statements of Witness GAP are unfounded, speculative, and do not impact the credibility of his testimony.<sup>83</sup> It argues that Witness GAP disavowed this alleged recantation during his testimony in the *Setako* trial, reiterated his testimony at Kajelijeli's trial, and provided an explanation that was accepted by the trial chamber in the *Setako* case.<sup>84</sup> It further submits that Witness GAP's statements do not amount to a new fact since the allegations at issue were addressed during Kajelijeli's proceedings<sup>85</sup> and could not have been decisive in reaching the verdict.<sup>86</sup>

23. The Appeals Chamber recalls that Witness GAP's credibility was considered at trial<sup>87</sup> and on appeal.<sup>88</sup> With respect to the 2008 Confession Statement, the Appeals Chamber notes that it cannot ascertain the contents of the document since it is in the Kinyarwanda language.<sup>89</sup> However,

<sup>77</sup> Request for Review, Annex 4, pp. 322/A-304/A (Registry pagination).

<sup>78</sup> *Karemera et al.* Transcript, 26 January 2010 pp. 36, 37, 39, 40, 43.

<sup>79</sup> Request for Review, para. 50, referring to *ibid.*, Annex 11, pp. 242/A-238/A (Registry pagination).

<sup>80</sup> Request for Review, paras. 7, 49-51, 108. See also Reply, paras. 57-60.

<sup>81</sup> Request for Review, paras. 49, 50, 72.

<sup>82</sup> Request for Review, paras. 40, 42, 44, 52. See also Reply, paras. 61, 62.

<sup>83</sup> Response, paras. 72, 76, 110, 111.

<sup>84</sup> Response, paras. 73, 74.

<sup>85</sup> Response, paras. 77-80, 112-114.

<sup>86</sup> Response, paras. 81-89, 115.

<sup>87</sup> Trial Judgement, paras. 155, 624.

<sup>88</sup> See Appeal Judgement, paras. 15, 18, 25, 26, 103, 104, fn. 34. See also *ibid.*, paras. 66, 73, 89.

<sup>89</sup> Request for Review, Annex 11, pp. 242/A-238/A (Registry pagination).

it does not find it necessary to obtain translation of the document. Based on the contents as summarised by Kajelijeli,<sup>90</sup> Witness GAP's failure to mention Kajelijeli's name in the Rwandan proceedings could not be considered to provide new information of an evidentiary nature of a fact that was not in issue during the original proceedings. The Appeals Chamber notes that the issue regarding Witness GAP's motivation to give false testimony was considered at trial<sup>91</sup> and on appeal.<sup>92</sup> The Appeals Chamber recalls that the alleged failure to discuss a convicted person's activities in a separate trial involving a different accused does not constitute a new fact for the purposes of review.<sup>93</sup> Based on the foregoing, the Appeals Chamber finds that the 2008 Confession Statement could not amount to a new fact for the purposes of review under Rule 120 of the Rules.

24. With respect to the remaining materials presented by Kajelijeli in support of the alleged new fact relating to Witness GAP, the Appeals Chamber has previously recognised that newly discovered information related to witness credibility may amount to a new fact.<sup>94</sup> The Appeals Chamber considers that the 2006 Recantation Letter, the 2008 Recantation, and the 2009 Statement contain new information of an evidentiary nature which relates to Witness GAP's credibility. While the issue regarding Witness GAP's motivation to give false testimony was considered at trial and on appeal, the new information contained in the aforementioned materials could not have been taken into account by the Trial Chamber or the Appeals Chamber in reaching a decision regarding Witness GAP's credibility. Despite the fact that Witness GAP confirmed his testimony against Kajelijeli before the Trial Chamber in the *Karemera et al.* case,<sup>95</sup> the witness's previous admissions to testifying falsely against Kajelijeli and changes in his account from 2001 to 2009 with respect to Kajelijeli's involvement in crimes raise new credibility issues. Thus, the Appeals Chamber finds that the materials presented in support of the alleged new fact affect the general credibility of Witness GAP. Therefore, the new information contained in these materials amounts to a new fact for the purposes of review under Rule 120 of the Rules.

25. The Appeals Chamber notes that the aforementioned materials were only available after Kajelijeli's trial and appeal proceedings. Therefore, the new fact was not known to Kajelijeli at the time of his proceedings and could not have been discovered through the exercise of due diligence.

26. The Appeals Chamber is not satisfied, however, that the new fact could have been a decisive factor in reaching the original decision. The Appeals Chamber recalls that the Trial Chamber did not exclusively rely on Witness GAP's testimony in finding that Kajelijeli: (i) played a role in the

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<sup>90</sup> Request for Review, para. 50.

<sup>91</sup> Trial Judgement, para. 155; *Kajelijeli* Transcript, 3 December 2001 pp. 48-50.

<sup>92</sup> Appeal Judgement, paras. 15, 18, 25, 26, 103, fn. 34.

<sup>93</sup> See *Rutaganda* Review Decision, para. 13.

<sup>94</sup> *Rutaganda* Review Decision, para. 17; *Kamuhanda* Review Decision, para. 26.

distribution of Tutsi properties to the *Interahamwe*;<sup>96</sup> (ii) was actively involved in the training of the *Interahamwe*;<sup>97</sup> (iii) held a *de facto* superior position over the *Interahamwe*;<sup>98</sup> or (iv) possessed genocidal intent.<sup>99</sup> Therefore, even if Witness GAP's testimony were disregarded, the Trial Chamber's findings had other evidentiary foundations.

27. Furthermore, the Trial Chamber's finding that Kajelijeli was responsible for the distribution of Tutsi properties did not underpin any of his convictions. While the Trial Chamber found that Kajelijeli's responsibility as a superior for the crimes committed by the *Interahamwe* was based on the findings that Kajelijeli was actively involved in the training of the *Interahamwe* and that he held a *de facto* superior position over them, the Appeals Chamber vacated his convictions under Article 6(3) of the Statute, and only considered his superior position for the purpose of sentencing.<sup>100</sup> Therefore, the new fact could not have been a decisive factor in reaching the original decision.

28. Accordingly, the Appeals Chamber dismisses Kajelijeli's request for review based on the alleged new fact relating to Witness GAP's purported recantations and statements.

### 3. Witness GAO's Recantation

29. Kajelijeli seeks review based on a letter from Witness GAO to the President of the Busogo *Gacaca* Court in Rwanda dated 16 October 2006, in which, Kajelijeli argues, Witness GAO recanted his entire testimony at Kajelijeli's trial and contradicted his testimony given on 23 and 24 July 2001 and from 26 through 28 November 2001 ("Letter of 16 October 2006").<sup>101</sup> In the letter, Witness GAO claimed that Kajelijeli did not attend a meeting on 7 April 1994 where a plan was made to kill Tutsis, did not order the killing of Tutsis in Mukingo Commune, and did not give orders to kill Tutsis who took refuge in the Ruhengeri Court of Appeal.<sup>102</sup>

30. Kajelijeli submits that Witness GAO's recantation amounts to a new fact demonstrating that Witness GAO testified falsely against him.<sup>103</sup> He submits that the new information, which was not

<sup>95</sup> *Karemera et al.* Transcript, 26 January 2010 pp. 36, 37, 39, 40.

<sup>96</sup> *See supra*, para. 10.

<sup>97</sup> *See supra*, para. 10.

<sup>98</sup> *See supra*, para. 10.

<sup>99</sup> *See Trial Judgement*, paras. 819-828.

<sup>100</sup> *See Appeal Judgement*, paras. 81, 82, 91, 325. *See also supra*, para. 4.

<sup>101</sup> Request for Review, para. 53. *See also ibid.*, para. 16.

<sup>102</sup> *See Request for Review*, Annex 2, p. 353/A (Registry pagination).

<sup>103</sup> Request for Review, para. 54. *See also Reply*, paras. 63, 64.

before the Trial Chamber or the Appeals Chamber, could not have been discovered through the exercise of due diligence<sup>104</sup> and could have been decisive in reaching the original decision.<sup>105</sup>

31. The Prosecution responds that the authenticity of Witness GAO's purported recantation is dubious.<sup>106</sup> It further argues that Kajelijeli misconstrues the content of Witness GAO's purported recantation in the Letter of 16 October 2006 and that the majority of Witness GAO's testimony against Kajelijeli remains un-recanted.<sup>107</sup> The Prosecution submits that Witness GAO's purported recantation does not amount to a new fact and contains information which was available during his proceedings or discoverable through the exercise of due diligence.<sup>108</sup>

32. As noted above, newly discovered information relating to witness credibility may amount to a new fact.<sup>109</sup> While Witness GAO's credibility and his motivation to give false testimony were issues considered at trial<sup>110</sup> and on appeal,<sup>111</sup> the Appeals Chamber considers that Witness GAO's purported recantation in the Letter of 16 October 2006 is new information of an evidentiary nature which relates to the witness's credibility. Witness GAO's purported recantation could not have been taken into account by the Trial Chamber or the Appeals Chamber in reaching a decision regarding Witness GAO's credibility because it was made in 2006, after the conclusion of Kajelijeli's trial and appeal proceedings. Therefore, Witness GAO's purported recantation in the Letter of 16 October 2006 amounts to a new fact for the purposes of review under Rule 120 of the Rules.

33. The Appeals Chamber notes that, since the statement was only made after the conclusion of Kajelijeli's trial and appeal proceedings, the new fact could not have been known to Kajelijeli or discovered through the exercise of due diligence during his proceedings before the Tribunal.

34. The Appeals Chamber, Judge Robinson dissenting, is not satisfied, however, that the new fact could have been a decisive factor in reaching the original decision. The Appeals Chamber observes that, on 22 December 2006, Witness GAO prepared another letter in which he explained that the purported recantation was made under false pretences.<sup>112</sup> The Appeals Chamber further notes that Witness GAO maintained his testimonies before the Tribunal.<sup>113</sup> Notably, in a statement given in March 2008, Witness GAO stated that he confirmed his previous testimonies before the

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<sup>104</sup> Request for Review, para. 54. *See also* Reply, para. 65.

<sup>105</sup> Request for Review, paras. 40-44, 55, 57. *See also* Reply, para. 66.

<sup>106</sup> Response, para. 91.

<sup>107</sup> Response, para. 92.

<sup>108</sup> Response, paras. 93-95.

<sup>109</sup> *See supra*, para. 24.

<sup>110</sup> *See* Trial Judgement, paras. 117, 150, 519, 522, 619, 620.

<sup>111</sup> *See* Appeal Judgement, paras. 15, 18, 25, 26, 33-35, 107, 110-112, 176, 177, 191, 192, fn. 34. *See also ibid.*, paras. 73, 89.

<sup>112</sup> *See* Prosecution Submissions, Annex 1, p. 799/H (Registry pagination).

trial chambers of the Tribunal, including in Kajelijeli's case.<sup>114</sup> Moreover, in May 2009, Witness GAO confirmed in court his previous testimonies given in the *Kajelijeli*, *Karemera et al.*, and *Ndindiliyimana et al.* trials, testifying to Kajelijeli's involvement in crimes.<sup>115</sup> The Appeals Chamber therefore finds, Judge Robinson dissenting, that Witness GAO's purported recantation in the Letter of 16 October 2006 is of limited probative value and could not have been a decisive factor in reaching the original decision.

35. Accordingly, the Appeals Chamber, Judge Robinson dissenting, dismisses Kajelijeli's request for review based on the alleged new fact relating to Witness GAO's purported recantation.

#### 4. Witness GDQ's Statements

36. Kajelijeli seeks review of his convictions based on statements made by Witness GDQ.<sup>116</sup> Kajelijeli submits that in a statement made to the Ruhengeri Prosecutor's Office on 24 November 1999, Witness GDQ did not list Kajelijeli as one of the assailants of the attacks at Busogo and Rwankeri Cellules ("1999 Statement"),<sup>117</sup> in contradiction to his testimony during Kajelijeli's trial on 5 and 6 December 2001 and the testimonies of Witnesses GAO and GBV.<sup>118</sup> Kajelijeli argues that the 1999 Statement undermines Witness GDQ's credibility.<sup>119</sup>

37. Kajelijeli further submits that Witness GDQ failed to mention Kajelijeli in relation to the attacks on Tutsis on 7 April 1994 in another statement before the *Gacaca* Court on 29 June 2006 ("2006 Statement"),<sup>120</sup> in contradiction to his own testimony during Kajelijeli's trial.<sup>121</sup> Kajelijeli argues that the 2006 Statement corroborates the testimonies of Witnesses BTH and 2 in the *Karemera et al.* trial that Witness GDQ provided false testimony.<sup>122</sup> He submits that these statements amount to a new fact, which was unavailable during his proceedings and could have affected the verdict.<sup>123</sup>

38. The Prosecution submits that the statements of Witness GDQ do not contradict the witness's testimony during Kajelijeli's trial and hence do not constitute new facts.<sup>124</sup> It contends that the 1999

<sup>113</sup> See Prosecution Submissions, Annex 2, Witness Statement of 28 and 29 March 2008 ("Statement of 29 March 2008"), pp. 766/H-762/H (Registry pagination); *Karemera et al.* Transcript, 5 May 2009 pp. 16-27.

<sup>114</sup> Statement of 29 March 2008, p. 764/H.

<sup>115</sup> See *Karemera et al.* Transcript, 5 May 2009 pp. 16-27, where Witness GAO was recalled for further cross-examination in the *Karemera et al.* trial.

<sup>116</sup> Request for Review, paras. 73-77.

<sup>117</sup> Request for Review, para. 73, referring to *ibid.*, Annex 16, pp. 161/A-159/A (Registry pagination).

<sup>118</sup> Request for Review, para. 73.

<sup>119</sup> Request for Review, para. 74.

<sup>120</sup> Request for Review, para. 76, referring to *ibid.*, Annex 17, pp. 157/A-127/A (Registry pagination).

<sup>121</sup> Request for Review, para. 76.

<sup>122</sup> Request for Review, para. 76.

<sup>123</sup> Request for Review, paras. 74, 76, 77. See also Reply, paras. 77, 78.

<sup>124</sup> Response, paras. 128, 135.

Statement focussed on the criminal conduct of other accused persons<sup>125</sup> and the 2006 Statement relates to charges against Witness GDQ himself rather than Kajelijeli.<sup>126</sup> The Prosecution submits that the information contained in these statements was discussed during Kajelijeli's trial and was available or discoverable through the exercise of due diligence.<sup>127</sup> Furthermore, it submits that the statements could not have been a decisive factor in the original proceedings.<sup>128</sup>

39. The Appeals Chamber notes that Witness GDQ's credibility, including his motivation to testify falsely, was considered at trial<sup>129</sup> and on appeal in this case.<sup>130</sup> As set forth above with regard to Witness GAP,<sup>131</sup> the Appeals Chamber does not find that the alleged failure to discuss Kajelijeli's activities in proceedings not before the Tribunal constitutes new information of an evidentiary nature of a fact that was not in issue during trial or appeal proceedings in this case.<sup>132</sup> The Appeals Chamber therefore finds that the 1999 Statement and the 2006 Statement are merely additional evidence of issues already considered during the original proceedings.

40. Accordingly, Witness GDQ's statements do not amount to a new fact for the purposes of review under Rule 120 of the Rules.

#### 5. Witness GBH's Recantation

41. Kajelijeli seeks review of his convictions based on Witness GBH's letter to the President of the Tribunal dated 20 May 2007, which, Kajelijeli argues, demonstrates that the witness provided false testimony against Kajelijeli during his trial on 17 and 18 July 2001.<sup>133</sup> In the letter, Witness GBH confessed to falsely testifying against Kajelijeli because he was "angry" at him for taking away his land and putting him in prison.<sup>134</sup> According to Kajelijeli, Witness GBH's recantation undermines his credibility, corroborates Witnesses BTH's and 2's allegations of false testimony, and contains new information which could not have been taken into account during Kajelijeli's trial.<sup>135</sup>

<sup>125</sup> Response, para. 128.

<sup>126</sup> Response, para. 135.

<sup>127</sup> Response, paras. 131, 132, 136, 138.

<sup>128</sup> Response, paras. 133, 134, 139-141.

<sup>129</sup> Trial Judgement, paras. 152, 519, 713.

<sup>130</sup> Appeal Judgement, paras. 15, 18, 31-34, 185, fn. 34.

<sup>131</sup> See *supra*, para. 23.

<sup>132</sup> See *Rutaganda* Review Decision, para. 13. See also Appeal Judgement, para. 176 ("[...] to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility.").

<sup>133</sup> Request for Review, paras. 95, 96, referring to *ibid.*, Annex 5, pp. 288/A, 287/A (Registry pagination). The Appeals Chamber notes that Kajelijeli refers to Annex 4 in footnote 134 of the Request for Review. However, this appears to be a typographical error.

<sup>134</sup> Request for Review, Annex 5, pp. 288/A, 287/A (Registry pagination).

<sup>135</sup> Request for Review, paras. 95, 96, heading III.B.(4). See also Reply, paras. 67-71.

42. The Prosecution submits that the authenticity of Witness GBH's purported recantation is "questionable" since it bears a different signature than the one on Witness GBH's previous statement of 21 August 1998.<sup>136</sup> It further submits that Witness GBH's purported recantation is not a new fact since it involves issues which were litigated at trial and on appeal, was available during Kajelijeli's trial or discoverable through the exercise of due diligence, and could not have been a decisive factor in reaching the verdict.<sup>137</sup>

43. As noted above with respect to Witnesses GAP and GAO, newly discovered information relating to witness credibility may amount to a new fact.<sup>138</sup> While the credibility of Witness GBH, including the issue that the witness "bore a grudge" against Kajelijeli, was considered at trial<sup>139</sup> and on appeal,<sup>140</sup> the Appeals Chamber considers that Witness GBH's purported recantation is new information of an evidentiary nature which could not have been taken into account by the Trial Chamber or the Appeals Chamber in assessing Witness GBH's credibility because it was made in 2007 after the conclusion of Kajelijeli's trial and appeal proceedings. As noted above with respect to Witness GAP, Witness GBH's purported admission to testifying falsely against Kajelijeli could affect Witness GBH's general credibility. Therefore, Witness GBH's purported recantation amounts to a new fact for the purposes of review under Rule 120 of the Rules.

44. The Appeals Chamber notes that Witness GBH's purported recantation was only available after Kajelijeli's trial and appeal proceedings. Therefore, the new fact was not known to Kajelijeli at the time of his proceedings and could not have been discovered through the exercise of due diligence.

45. The Appeals Chamber is not satisfied, however, that the new fact could have been a decisive factor in reaching the original decision. The Appeals Chamber recalls that Witness GBH was only one of numerous witnesses whose testimony the Trial Chamber relied on in finding that Kajelijeli held a *de facto* superior position over the *Interahamwe*.<sup>141</sup> Furthermore, while the Trial Chamber mainly relied on the testimony of Witness GBH in finding that Kajelijeli was actively involved in the training of the *Interahamwe*, it concluded that his testimony was corroborated by Witnesses GDD and GAO.<sup>142</sup> In any event, as previously stated, the findings that Kajelijeli was actively involved in the training of the *Interahamwe* and that he held a *de facto* superior position over them,

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<sup>136</sup> Response, para. 98.

<sup>137</sup> Response, paras. 101-107.

<sup>138</sup> See *supra*, paras. 24, 32.

<sup>139</sup> Trial Judgement, paras. 149, 704.

<sup>140</sup> Appeal Judgement, paras. 15, 18, 31, 33, fn. 34.

<sup>141</sup> See *supra*, para. 10.

<sup>142</sup> Trial Judgement, para. 400.



do not underpin any of his convictions affirmed on appeal.<sup>143</sup> Therefore, the new fact could not have been a decisive factor in reaching the original decision.

46. Accordingly, the Appeals Chamber dismisses Kajelijeli's request for review based on the alleged new fact relating to Witness GBH's purported recantation.

#### 6. Witness GBE's Robbery Conviction

47. Kajelijeli seeks review of his convictions based on a newly disclosed Rwandan judicial document stating that Witness GBE was convicted of robbery.<sup>144</sup> The document mentions robbery as part of the witness's criminal record.<sup>145</sup> Kajelijeli claims that this document demonstrates that Witness GBE lied during Kajelijeli's trial, when he denied having been imprisoned by Kajelijeli for robbery.<sup>146</sup> Kajelijeli submits that Witness GBE's robbery conviction undermines Witness GBE's credibility and amounts to a new fact.<sup>147</sup>

48. The Prosecution contends that Kajelijeli's claim relating to Witness GBE's robbery conviction is unfounded<sup>148</sup> and that these allegations were considered at trial and, as such, do not constitute new facts.<sup>149</sup>

49. The Appeals Chamber recalls that the credibility of Witness GBE, including that the witness was a thief and was arrested several times by Kajelijeli, was considered at trial<sup>150</sup> and on appeal.<sup>151</sup> The Appeals Chamber finds that Witness GBE's robbery conviction is simply additional evidence of an issue already considered during the original proceedings. Thus, Witness GBE's robbery conviction does not amount to a new fact for the purposes of review under Rule 120 of the Rules.

#### **B. Alleged New Facts Relating to Kajelijeli's Presence at Nkuli Canteen on 6 April 1994**

50. Based on the testimony of Witness GDD, the Trial Chamber found that following the death of President Habyarimana, Kajelijeli led a meeting at the canteen next to the Nkuli Commune Office on the evening of 6 April 1994,<sup>152</sup> which was attended by, *inter alia*, a chief warrant officer in the Rwandan army named Joseph Karorero ("Karorero").<sup>153</sup> The Trial Chamber found that, on

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<sup>143</sup> See *supra*, para. 27.

<sup>144</sup> Request for Review, para. 83, referring to *ibid.*, Annex 19, p. 123/A (Registry pagination). See also Reply, para. 53.

<sup>145</sup> Request for Review, Annex 19, p. 123/A (Registry pagination).

<sup>146</sup> Request for Review, para. 83.

<sup>147</sup> Request for Review, para. 83. See also Reply, para. 54.

<sup>148</sup> Response, para. 66.

<sup>149</sup> Response, paras. 65, 67.

<sup>150</sup> Trial Judgement, paras. 117, 148, 519.

<sup>151</sup> Appeal Judgement, paras. 15, 18, 22-26, 31, 33, fn. 34.

<sup>152</sup> Trial Judgement, paras. 469, 819.

<sup>153</sup> Trial Judgement, para. 469.

the morning of 7 April 1994, an attack against Tutsis was carried out in furtherance of an agreement reached on the evening of 6 April 1994.<sup>154</sup> Partly based on this finding, the Trial Chamber found that Kajelijeli had the requisite intent to destroy in whole or in part the Tutsi ethnic group<sup>155</sup> and convicted him of genocide and extermination as a crime against humanity.<sup>156</sup> On appeal, Kajelijeli primarily challenged the credibility of Witness GDD and the Trial Chamber's reliance on his uncorroborated testimony.<sup>157</sup> The Appeals Chamber rejected this ground of appeal.<sup>158</sup>

#### 1. Witness GDD's Statements before Rwandan Authorities

51. Kajelijeli submits that newly disclosed evidence, consisting of Witness GDD's confession before Rwandan judicial authorities on 30 June 1998 ("Witness GDD's Statement") and the judgement of the Musanze High Court in Ruhengeri of 12 May 2000 concerning Witness GDD ("Musanze Judgement"), contain information which is inconsistent and irreconcilable with Witness GDD's testimony during Kajelijeli's trial.<sup>159</sup> According to Kajelijeli, the two documents show that Witness GDD failed to mention Kajelijeli in Witness GDD's Statement and the Musanze Judgement, despite naming leaders and perpetrators of the killings of Tutsis in Nkuli Commune.<sup>160</sup> Kajelijeli contends that the documents contain new facts which were unknown to him at the time of his trial despite his diligent attempt to obtain them.<sup>161</sup> Kajelijeli argues that the Trial Chamber relied solely on the evidence of Witness GDD in finding that he had instructed Witness GDD to kill Tutsis and that Kajelijeli was present at Nkuli canteen when plans were made to kill Tutsis and, as such, the alleged new fact could have impacted the Trial Chamber's findings, particularly with respect to his genocidal intent.<sup>162</sup>

52. The Prosecution submits that the alleged new facts do not contradict Witness GDD's testimony during Kajelijeli's trial.<sup>163</sup> It argues that both documents pertain to different accused and focus on other issues, and thus do not contain new facts.<sup>164</sup> The Prosecution asserts that Kajelijeli

<sup>154</sup> Trial Judgement, paras. 487, 488, 739, 819-822, 828.

<sup>155</sup> Trial Judgement, paras. 819, 820, 822, 828.

<sup>156</sup> Trial Judgement, paras. 842, 845, 896, 905, 907.

<sup>157</sup> Appeal Judgement, para. 92.

<sup>158</sup> Appeal Judgement, paras. 94-97.

<sup>159</sup> Request for Review, paras. 58-60, referring to *ibid.*, Annex 13, pp. 230/A-226/A (Registry pagination), Annex 14, pp. 224/A-185/A (Registry pagination). See also Reply, paras. 74, 76.

<sup>160</sup> Request for Review, para. 59.

<sup>161</sup> Request for Review, para. 61.

<sup>162</sup> Request for Review, para. 65. See also Reply, para. 76.

<sup>163</sup> Response, paras. 116-118, 122, 123.

<sup>164</sup> Response, paras. 116-118, 122, 123, 126, 127.

failed to exercise due diligence in discovering the alleged new facts<sup>165</sup> and that they could not have been decisive in reaching the verdict.<sup>166</sup>

53. The issue regarding Kajelijeli's presence and participation in the meeting at Nkuli canteen on 6 April 1994 was litigated at trial<sup>167</sup> and on appeal in this case.<sup>168</sup> While the two documents that Kajelijeli now submits were not before the Trial Chamber or Appeals Chamber, the issue regarding Witness GDD's inconsistent prior statements was litigated at trial<sup>169</sup> and on appeal.<sup>170</sup> At trial, Kajelijeli challenged the fact that Witness GDD's first statement, from June 2000, does not mention Kajelijeli's role in convening the night-time meeting in Nkuli Commune on 6 April 1994 and his activities in the morning on 7 April 1994, whereas his second statement, given in July 2000, does allege these activities.<sup>171</sup> The Appeals Chamber found that the Trial Chamber acted within its discretion in accepting Witness GDD's testimony.<sup>172</sup> Furthermore, as with Witnesses GAP and GDQ, the Appeals Chamber considers that Witness GDD's failure to mention Kajelijeli in a separate trial involving a different accused does not constitute a new fact for the purposes of review under Rule 120 of the Rules.<sup>173</sup> Therefore, Witness GDD's Statement and the Musanze Judgement are simply additional evidence of issues already considered during the original proceedings and the information contained therein to which Kajelijeli points does not amount to a new fact that would warrant review under Rule 120 of the Rules.

## 2. Karorero's Testimony in the *Karemera et al.* Trial

54. Kajelijeli seeks review on the basis of the testimony of Karorero in the *Karemera et al.* trial on 17 November 2009, which, Kajelijeli claims, contradicted Witness GDD's testimony during Kajelijeli's trial that a meeting took place on the evening of 6 April 1994 and that Karorero attended the meeting.<sup>174</sup> Karorero testified in the *Karemera et al.* trial that he was not present and was not aware of a meeting which took place on the evening of 6 April 1994.<sup>175</sup> Kajelijeli argues that Karorero's testimony corroborates Witness BTH's allegation that Witness GDD was involved in a scheme to produce false evidence.<sup>176</sup> Kajelijeli submits that Karorero's testimony is a new fact

<sup>165</sup> Response, paras. 119, 120, 124.

<sup>166</sup> Response, paras. 121, 125-127.

<sup>167</sup> Trial Judgement, paras. 464-469.

<sup>168</sup> Appeal Judgement, para. 96.

<sup>169</sup> Trial Judgement, para. 467.

<sup>170</sup> Appeal Judgement, para. 96.

<sup>171</sup> See *Kajelijeli* Transcript, 4 October 2001 pp. 68-100.

<sup>172</sup> Appeal Judgement, para. 96.

<sup>173</sup> See *supra*, paras. 23, 39.

<sup>174</sup> Request for Review, paras. 62-65, referring to *Karemera et al.* Transcript, 17 November 2009 p. 13.

<sup>175</sup> *Karemera et al.* Transcript, 17 November 2009 p. 13.

<sup>176</sup> Request for Review, para. 63.

which was unknown to him at the time of his proceedings and could have impacted the Trial Chamber's findings as to his presence in the canteen and with respect to his genocidal intent.<sup>177</sup>

55. The Prosecution responds that Karorero's testimony in the *Karemera et al.* trial is not a new fact, since the information contained in Karorero's testimony was available and considered at trial.<sup>178</sup> It contends that Kajelijeli's claim that he was unable to call Karorero as a Defence witness is unfounded.<sup>179</sup> Furthermore, the Prosecution argues that Karorero's testimony could not have proven decisive to the original decision and that ignoring it would not amount to a miscarriage of justice.<sup>180</sup>

56. The Appeals Chamber observes that Kajelijeli's arguments pertaining to the credibility of Witness GDD, including the allegation of false testimony, were litigated at trial<sup>181</sup> and on appeal.<sup>182</sup> Likewise, the issue regarding the existence of a meeting at Nkuli canteen on the evening of 6 April 1994 was litigated at trial.<sup>183</sup> The Trial Chamber found Witness GDD's evidence about the meeting "detailed, credible, [and] internally consistent".<sup>184</sup> The Appeals Chamber rejected Kajelijeli's challenges to the witness's credibility and to the Trial Chamber's reliance on this witness concerning the evening of 6 April 1994.<sup>185</sup>

57. The Appeals Chamber finds that Karorero's testimony in the *Karemera et al.* trial is merely additional evidence of issues already considered during the original proceedings and does not constitute new evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings.<sup>186</sup> Therefore, the Appeals Chamber finds that Karorero's testimony in the *Karemera et al.* trial does not amount to a new fact that would warrant review under Rule 120 of the Rules.

58. Accordingly, the Appeals Chamber dismisses Kajelijeli's Request for Review based on the alleged new fact relating to Kajelijeli's presence at Nkuli canteen on 6 April 1994.

<sup>177</sup> Request for Review, paras. 63-65. *See also* Reply, para. 85.

<sup>178</sup> Response, paras. 177-179.

<sup>179</sup> Response, para. 180.

<sup>180</sup> Response, paras. 181, 182.

<sup>181</sup> Trial Judgement, paras. 117, 151, 467, 468.

<sup>182</sup> Appeal Judgement, paras. 15, 18, 31-34, 36, 94-97, 168, 170, fn. 34. *See also ibid.*, paras. 73, 89.

<sup>183</sup> *See* Trial Judgement, paras. 467-469.

<sup>184</sup> Trial Judgement, para. 468.

<sup>185</sup> Appeal Judgement, paras. 92-97.

<sup>186</sup> Additionally, the allegation that one of the many officials present did not attend the meeting is not a fundamental feature of Witness GDD's evidence, and as such could not disturb the Trial Chamber's finding on his credibility, a finding that was confirmed on appeal. *See* Appeal Judgement, paras. 18, 33-37, 94-97.

**C. Alleged New Fact Relating to Kajelijeli's Presence during the Killing of "Kanoti's Wife"**

59. Based mainly on the testimony of Witness GDQ, the Trial Chamber found that Kajelijeli was present at the roadblock in front of Witness GDQ's house on 8 April 1994, where a woman who was thought to be Tutsi and her son were singled out and subsequently killed by an *Interahamwe* named Musafiri, and that Kajelijeli was heard to say, "[n]o Tutsi should survive at Mukingo".<sup>187</sup> Based, in part, on this finding, the Trial Chamber convicted Kajelijeli of genocide.<sup>188</sup> Kajelijeli appealed this finding, mainly challenging the credibility of Witness GDQ.<sup>189</sup> The Appeals Chamber rejected Kajelijeli's appeal.<sup>190</sup>

60. Kajelijeli seeks review on the basis of a confession statement given by Witness ANU on 17 December 2002 before *Gacaca* proceedings in Rwanda, which was presented as an exhibit in the *Karempera et al.* trial during the testimony of Witness ANU from 13 through 19 June 2007.<sup>191</sup> Kajelijeli submits that Witness ANU's statement contained a table listing victims of the crimes committed in Ruhengeri Prefecture in 1994.<sup>192</sup> In the table listing the victims, Witness ANU indicated a woman who was said to be the wife of Kanoti and two children being killed by several assailants including Musafiri and Witness GAO at Buhuro Hill.<sup>193</sup> Kajelijeli argues that Witness ANU's statement was irreconcilable with Witness GDQ's testimony that the killing took place at the roadblock in front of Kajelijeli's building and Witness GDQ's house at Byangabo.<sup>194</sup> He contends that this raises questions regarding the location of the killing<sup>195</sup> and the credibility of Witness GDQ.<sup>196</sup>

61. Kajelijeli submits that the information contained in Witness ANU's statement was not at issue during Kajelijeli's trial.<sup>197</sup> Kajelijeli further asserts that he was not aware of the existence of Witness ANU's statement and faults the Prosecution for its failure to disclose the statement during his trial.<sup>198</sup> Kajelijeli maintains that this alleged new fact could have been decisive in considering the factual findings relating to his presence during the killing and his genocidal intent.<sup>199</sup>

<sup>187</sup> Trial Judgement, paras. 712-714, 739.

<sup>188</sup> Trial Judgement, paras. 826, 828, 836, 838, 845.

<sup>189</sup> Appeal Judgement, para. 179.

<sup>190</sup> Appeal Judgement, paras. 181-186.

<sup>191</sup> Request for Review, paras. 66-72.

<sup>192</sup> Request for Review, para. 66, referring to *ibid.*, Annex 15, p. 175/A (Registry pagination).

<sup>193</sup> Request for Review, Annex 15, p. 175/A (Registry pagination) («*Une dame en fuite et deux enfants venus de Kigali (une dame dont on disait qu'elle était l'épouse de Kanoti, fils de Mannyeli).*»).

<sup>194</sup> Request for Review, para. 66.

<sup>195</sup> Request for Review, para. 67.

<sup>196</sup> Request for Review, paras. 66, 72. See also Reply, para. 86.

<sup>197</sup> Request for Review, para. 68. See also Reply, para. 86.

<sup>198</sup> Request for Review, paras. 68-70.

<sup>199</sup> Request for Review, paras. 71, 72.

62. The Prosecution responds that the information contained in Witness ANU's statement is not a new fact since the location of the killing of the woman thought to be Kanoti's wife and her son was at issue during the original proceedings.<sup>200</sup> It contends that Kajelijeli fails to demonstrate that he exhausted all possible means to obtain Witness ANU's statement.<sup>201</sup> It further argues that Kajelijeli misrepresents Witness ANU's statement<sup>202</sup> and that the statement could not have been decisive in Kajelijeli's case since it does not contradict Witness GDQ's testimony.<sup>203</sup>

63. The Appeals Chamber notes that both the identity of the victim and the location of the killing on 8 April 1994 were considered at trial<sup>204</sup> and on appeal in this case.<sup>205</sup> With regard to the identity of the victim, the Trial Chamber considered the evidence that Kanoti had married several times and did not find that the victim of the killing at the roadblock was Kanoti's wife, rather, a Tutsi woman.<sup>206</sup> The Appeals Chamber did not find the Trial Chamber's assessment of the identity of the victim and of Witness GDQ's credibility to be erroneous.<sup>207</sup> With respect to the location of the killing, Kajelijeli challenged on appeal the Trial Chamber's finding that a roadblock was set up in front of Witness GDQ's house on 8 April 1994 and that a Tutsi woman was killed there.<sup>208</sup> The Appeals Chamber declined to examine Kajelijeli's challenge since he failed to substantiate this argument.<sup>209</sup> The Appeals Chamber finds that Witness ANU's statement is merely additional evidence of issues already considered during the original proceedings. As the statement does not contain new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings, it does not amount to a new fact that would warrant review under Rule 120 of the Rules.

64. Accordingly, the Appeals Chamber dismisses Kajelijeli's request for review based on the alleged new fact relating to his presence during the killing of "Kanoti's wife".

#### **D. Alleged New Fact Relating to the Distribution of Tutsi Properties in Mukingo Commune**

65. The Trial Chamber found that Kajelijeli played a role in the distribution of Tutsi properties to the *Interahamwe*.<sup>210</sup> The Trial Chamber found that this finding is "limited to the question of whether [Kajelijeli] exercised *de facto* authority of the *Bourgmestre* of Mukingo commune from

<sup>200</sup> Response, paras. 183, 186, 187.

<sup>201</sup> Response, para. 189.

<sup>202</sup> Response, para. 185.

<sup>203</sup> Response, paras. 191, 192.

<sup>204</sup> Trial Judgement, paras. 712, 713.

<sup>205</sup> Appeal Judgement, paras. 179-186.

<sup>206</sup> Trial Judgement, paras. 713, 714; Appeal Judgement, para. 182.

<sup>207</sup> Appeal Judgement, paras. 182, 184.

<sup>208</sup> Appeal Judgement, para. 179.

<sup>209</sup> Appeal Judgement, para. 181.

<sup>210</sup> Trial Judgement, para. 323.

February 1993 to 26 June 1994 [...] not [...] whether or not [Kajelijeli] exercised authority in any other capacity”.<sup>211</sup>

66. Kajelijeli seeks review on the basis of a newly disclosed decision by the Prefect of Ruhengeri in relation to a Mukingo Communal Council meeting on 11 May 1994 (“Ruhengeri Prefect Decision”).<sup>212</sup> According to the decision, the Council “reached an agreement about the lands of those who ha[d] fled and those who had been killed”.<sup>213</sup> Kajelijeli submits that the Ruhengeri Prefect Decision demonstrates that it was the commune and not him who was responsible for managing Tutsi properties, hence contradicting the Trial Chamber’s finding that Kajelijeli was responsible for the distribution of Tutsi properties.<sup>214</sup>

67. The Prosecution responds that the issues contained in the Ruhengeri Prefect Decision were at issue during his proceedings<sup>215</sup> and do not contradict the Appeals Chamber’s findings that Kajelijeli was involved in the distribution of Tutsi properties.<sup>216</sup> It further claims that Kajelijeli could have obtained the decision had he exercised the requisite due diligence.<sup>217</sup> Finally, the Prosecution submits that the Ruhengeri Prefect Decision could not have impacted the Trial Chamber’s findings.<sup>218</sup>

68. The Appeals Chamber notes that the issue of whether the commune and/or Kajelijeli were responsible for managing Tutsi properties was addressed at trial<sup>219</sup> and on appeal.<sup>220</sup> As such, the Ruhengeri Prefect Decision is simply additional evidence of a fact that was already at issue during the trial and appeal proceedings and does not amount to a new fact that would warrant review under Rule 120 of the Rules. In any event, the Appeals Chamber considers that the alleged new fact could not have been a decisive factor in reaching the original decision since the finding that Kajelijeli was responsible for the distribution of Tutsi properties, as set forth above,<sup>221</sup> does not underpin any of his convictions.

69. Accordingly, the Appeals Chamber dismisses Kajelijeli’s Request for Review based on the alleged new fact relating the distribution of Tutsi properties in Mukingo Commune.

<sup>211</sup> Trial Judgement, para. 324.

<sup>212</sup> Request for Review, paras. 78-80, referring to *ibid.*, Annex 18, p. 125/A (Registry pagination). See also Reply, paras. 79-81.

<sup>213</sup> Request for Review, Annex 18, p. 125/A (Registry pagination).

<sup>214</sup> Request for Review, para. 78.

<sup>215</sup> Response, paras. 148, 152, 153.

<sup>216</sup> Response, paras. 142-150, 152.

<sup>217</sup> Response, paras. 153, 154.

<sup>218</sup> Response, paras. 155-159.

<sup>219</sup> See Trial Judgement, paras. 313-320, 323, 324.

<sup>220</sup> Appeal Judgement, paras. 65-67.

<sup>221</sup> See *supra*, para. 27.

**E. Alleged New Fact Relating to the Search for Tutsi Survivors on 8 April 1994**

70. Based on the testimony of Witness GBH, the Trial Chamber found that, on 8 April 1994, Kajelijeli and the *Interahamwe* inspected bodies and searched for Tutsi survivors.<sup>222</sup> The Trial Chamber accepted Witness GBH's testimony that Kajelijeli shunned Witness GBH's plea to stop the killings by saying "that it was necessary to continue, look for those or hunt for those who had survived".<sup>223</sup> The Trial Chamber relied, in part, on this factual finding to determine Kajelijeli's genocidal intent.<sup>224</sup>

71. Kajelijeli seeks review on the basis of a newly disclosed report by the Rwandan Prosecutor's Office dated 23 February 2001 ("2001 Report").<sup>225</sup> Kajelijeli submits that the information contained in the 2001 Report is irreconcilable with Witness GBH's testimony that Kajelijeli went to Rachel Mukanturo's house on 8 April 1994 to look for Tutsi survivors, since the 2001 Report asserts that the house was destroyed the previous day.<sup>226</sup> Kajelijeli contends that this alleged new fact undermines Witness GBH's credibility and could have been a decisive factor in reaching the original decision, given that his testimony was relied upon for a number of findings, particularly regarding Kajelijeli's genocidal intent.<sup>227</sup>

72. The Prosecution responds that the 2001 Report is not a new fact but rather additional information pertaining to an issue that was considered during Kajelijeli's proceedings.<sup>228</sup> It claims that Kajelijeli had knowledge of the 2001 Report and its contents during his proceedings,<sup>229</sup> and fails to show that he exercised the requisite due diligence to obtain the 2001 Report.<sup>230</sup> The Prosecution further argues that the 2001 Report could not have been decisive in the Trial Chamber's findings since it does not concern the same incident for which Kajelijeli was convicted.<sup>231</sup>

73. The Appeals Chamber finds that the information contained in the 2001 Report is not a new fact. While the 2001 Report was not before the Trial Chamber or Appeals Chamber in this case, the question of whether Rachel Mukanturo's house had already been destroyed on 7 April 1994 was addressed at trial.<sup>232</sup> Therefore, the newly disclosed evidence is simply additional evidence of an

<sup>222</sup> Trial Judgement, paras. 705, 739, 827.

<sup>223</sup> Trial Judgement, paras. 705, 739, 827.

<sup>224</sup> Trial Judgement, paras. 827, 828.

<sup>225</sup> Request for Review, para. 97, referring to *ibid.*, Annex 21, pp. 119/A-98/A (Registry pagination). See also Reply, para. 83.

<sup>226</sup> Request for Review, para. 97.

<sup>227</sup> Request for Review, paras. 100, 101. See also Reply, para. 83.

<sup>228</sup> Response, paras. 161, 162.

<sup>229</sup> Response, para. 164.

<sup>230</sup> Response, para. 163.

<sup>231</sup> Response, paras. 165, 166.

<sup>232</sup> *Kajelijeli* Transcript, 15 April 2003 pp. 70, 71 ("Q. Now, Mr. Kajelijeli, what, if anything, you did, after you returned home from Rwinzovu on the 8th? A. You will excuse me – if you will excuse me, I would like to add



issue already considered during the proceedings and does not amount to a new fact that would warrant review under Rule 120 of the Rules.

74. Accordingly, the Appeals Chamber dismisses Kajelijeli's Request for Review based on the alleged new fact relating to the search for Tutsi survivors on 8 April 1994.

#### **F. Alleged New Fact Relating to the Killings in Munyemvano's Compound**

75. The Trial Chamber found that Kajelijeli held a position of authority over the *Interahamwe* and that he was present during, supervised, and commanded the attack at Munyemvano's compound in Rwankeri on 7 April 1994.<sup>233</sup> Partially on the basis of these killings, the Trial Chamber found Kajelijeli guilty of genocide and extermination as a crime against humanity.<sup>234</sup> On appeal, Kajelijeli challenged the Trial Chamber's assessment of the evidence, in particular its acceptance of the testimony of Witnesses ACM and GBG as being credible.<sup>235</sup> The Appeals Chamber rejected this ground of appeal.<sup>236</sup>

76. Kajelijeli seeks review of his convictions based on the 2001 Report.<sup>237</sup> Kajelijeli submits that the 2001 Report contradicts Witness GBG's testimony that Kajelijeli participated in an attack on Munyemvano's compound in Rwankeri Cellule, where, amongst others, the families of Sukari, Gateyiteyi, and Rudakorerwa were killed.<sup>238</sup> According to the 2001 Report, the families of Sukari, Gateyiteyi, and Rudakorerwa were killed in Busogo Parish.<sup>239</sup> Kajelijeli argues that these two

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something concerning Rachel. [...] What I would like to add is that her house, the refugee who had been renting it was chased, and this house was destroyed on the 7th of April 1994. And those who destroyed it on the 7<sup>th</sup> – this case for destroying this house on the 7th, are being followed in the judicial process in Rwanda. And I would like to – I'm saying this because there are people who say that they were using – operating in this house on the 8th of April '94, and this time around I have proof [...]. Q. What is this proof that you have that the house was destroyed on the 7th of April 1994? A. At one time some people who pleaded guilty and accused others, I'm talking of people like those in Mutobo area, and they said that those who were accused had destroyed the house, and these, I think were among the 31 persons being pursued – prosecuted in Rwandan courts. That's the way I have tested this is true, and those who can see these case files can verify this because this was announced over the radio.”); *Kajelijeli* Transcript, 22 April 2003 pp. 6, 7 (“Q. Witness, why did you then go to Rachel's house to look for her on the 8th of April 1994, if you knew she was not back? A. It is you who is saying that. You have no evidence about that. You have no proof. Your witness who came here, was contradicted by another witness. In the file that I referred to, it was stated that Rachel's house was destroyed on 7th of April, and the people who destroyed this house are being tried for it. I don't know why you are pursuing Kajelijeli on this matter. [...] Q. The *Interahamwe* destroyed Rachel's house on the 7th of April; isn't it? A. I don't know whether it was *Interahamwe* who did this. [...] Q. Witness, you said you had proof as to the people who destroyed Rachel's house on the 7th of April 1994. Who are these people, and what are their names? A. Thank you, Your Honour. I would like to repeat and give a reference. There are 31 people accused. There's so many names and I can't recall them all, but many of them have come here, some have accepted their crime; others are still undergoing trial.”).

<sup>233</sup> Trial Judgement, paras. 597, 739, 832, 900.

<sup>234</sup> Trial Judgement, paras. 832, 835-838, 842, 845, 900, 905, 907.

<sup>235</sup> Appeal Judgement, paras. 153-156.

<sup>236</sup> Appeal Judgement, paras. 158-164.

<sup>237</sup> Request for Review, paras. 103-107.

<sup>238</sup> Request for Review, para. 104.

<sup>239</sup> Request for Review, Annex 21, p. 108/A (Registry pagination).

accounts are irreconcilable as the families could not have been killed in two different locations.<sup>240</sup> Kajelijeli submits that this alleged new fact could have been a decisive factor in the case with respect to the Trial Chamber's findings on his presence and participation in the attack at Munyemvano's compound on 7 April 1994.<sup>241</sup>

77. The Prosecution reiterates that the 2001 Report is not a new fact but rather additional information pertaining to an issue that was considered during Kajelijeli's proceedings.<sup>242</sup> It further contends that the 2001 Report is not conclusive and instead relates to different accused in a different jurisdiction regarding different allegations.<sup>243</sup> Finally, the Prosecution submits that the 2001 Report could not have affected the verdict in Kajelijeli's case.<sup>244</sup>

78. As with the alleged new fact relating to the search for Tutsi survivors on 8 April 1994,<sup>245</sup> the Appeals Chamber finds that the relevant information contained in the 2001 Report is not a new fact. The issue regarding the location of the killings on 7 April 1994 was litigated at trial<sup>246</sup> and on appeal.<sup>247</sup> In particular, the Trial Chamber considered evidence that no massacre occurred at Munyemvano's compound and that the killings took place in Busogo Parish.<sup>248</sup> Additionally, the Trial Chamber assessed the inconsistencies regarding the killing of Gateyiteyi and found that, while the killer of Gateyiteyi could not be identified,<sup>249</sup> many Tutsis were massacred at Munyemvano's compound and that Kajelijeli was present during that attack.<sup>250</sup> The Appeals Chamber found that the Trial Chamber reasonably assessed the evidence in relation to this attack.<sup>251</sup> Therefore, the newly disclosed evidence is simply additional evidence of issues already considered during the proceedings and does not amount to a new fact that would warrant review under Rule 120 of the Rules.

79. Accordingly, the Appeals Chamber dismisses Kajelijeli's Request for Review based on the alleged new fact relating to the killings at Munyemvano's compound.

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<sup>240</sup> Request for Review, para. 105.

<sup>241</sup> Request for Review, para. 107. *See also* Reply, para. 84.

<sup>242</sup> Response, paras. 167, 168, 170.

<sup>243</sup> Response, para. 169.

<sup>244</sup> Response, paras. 174, 175.

<sup>245</sup> *See supra*, para. 73.

<sup>246</sup> Trial Judgement, paras. 591, 596.

<sup>247</sup> Appeal Judgement, paras. 162, 163.

<sup>248</sup> Trial Judgement, para. 596.

<sup>249</sup> Trial Judgement, para. 595.

<sup>250</sup> Trial Judgement, para. 597.

<sup>251</sup> Appeal Judgement, para. 158.

#### IV. CONCLUSION


80. The Appeals Chamber reiterates that review is an exceptional remedy. In the instant case, Kajelijeli has failed to demonstrate that such a remedy is warranted, Judge Robinson partially dissenting.

#### V. DISPOSITION

81. For the foregoing reasons, **THE APPEALS CHAMBER DENIES**, Judge Robinson partially dissenting, the Request for Review.

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

Done this 29th day of May 2013,  
At The Hague,  
The Netherlands.

  
\_\_\_\_\_  
Judge Patrick Robinson  
Presiding

Judge Robinson appends a partially dissenting opinion.

[Seal of the Tribunal]



**PARTIAL DISSENTING OPINION OF JUDGE PATRICK ROBINSON**

1. The key issue in relation to Witness GAO is the significance of his letter of 16 October 2006 to the President of the Busogo *Gacaca* Court in Rwanda (“Letter of 16 October 2006”), recanting his entire testimony at Kajelijeli’s trial.<sup>1</sup> In that letter Witness GAO, as stated in paragraph 29 of the Decision, claimed that “Kajelijeli did not attend a meeting on 7 April 1994 where a plan was made to kill Tutsis, did not order the killing of Tutsis in Mukingo Commune, and did not give orders to kill Tutsis who took refuge in the Ruhengeri Court of Appeal”. I agree with the Majority that the Letter of 16 October 2006 constitutes a new fact for the purposes of review proceedings under Rule 120 of the Rules.<sup>2</sup> However the Majority has expressed dissatisfaction with the decisiveness of that new fact for the purposes of review proceedings.<sup>3</sup> In doing so it has identified two bases for that conclusion. First, it refers to another letter prepared by Witness GAO (“22 December 2006 Letter”) in which he explained that the purported recantation was made under false pretences. Secondly, it notes that Witness GAO maintained his testimonies before the Tribunal. For those reasons the Majority found that the Letter of 16 October 2006 was “of limited probative value and could not have been a decisive factor in reaching the original decision”.<sup>4</sup> I disagree with that conclusion.

2. The crucial issue is the reliability of the Letter of 16 October 2006 as well as the 22 December 2006 Letter. The determination of the reliability of those letters calls for a determination of the credibility of Witness GAO. It is in this regard that the Majority Decision signally falls short. If Witness GAO is determined to be credible in relation to the 22 December 2006 Letter there would be a basis for concluding that the Letter of 16 October 2006 could not be decisive; on the other hand, if Witness GAO is determined not to be credible in relation to the 22 December 2006 Letter there would be a basis for concluding that the Letter of 16 October 2006 could be decisive. Significantly, the Majority Decision does not even comment on the credibility of Witness GAO, a failure that is perhaps understandable, since it does not purport to be making an assessment of his credibility. In my view, the Appeals Chamber can only discharge its review function in relation to Witness GAO’s purported recantation if it makes a determination of that witness’s credibility, and in the circumstances of this case, the way to accomplish this task is for the Chamber itself to adopt a procedure allowing it and the parties to question Witness GAO on the several issues that arise from the Letter of 16 October 2006 and the 22 December 2006 Letter. For example, when at paragraph 34 of the Decision, it is said that in the 22 December 2006 Letter Witness GAO “explained that the purported recantation was made under false pretences”, it is

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<sup>1</sup> Decision, paras. 29-35.

<sup>2</sup> Decision, paras. 32-33.

<sup>3</sup> Decision, para. 34.

<sup>4</sup> Decision, para. 34.

obviously critically essential for the Appeals Chamber to ascertain what these pretences were, and even more importantly, whether it finds Witness GAO credible in that regard. I note that in the 22 December 2006 Letter Witness GAO effectively states that the Letter of 16 October 2006 was a ploy to catch “red-handed” individuals who had sought to bribe him for his recantation.<sup>5</sup> Incredibly, the Majority Decision appears to have accepted this explanation without having any basis whatsoever, other than Witness GAO’s say-so, for believing that his explanation is true. In effect, the Majority has merely rubberstamped Witness GAO’s explanation. The position taken by the Majority is the more remarkable in light of the submission by the Prosecution that Witness GAO had explained to investigators that the Letter of 16 October 2006 was “false”, “written under duress because [he] was threatened by certain prisoners that [were] detained in the same facility” and that he “was offered money in exchange for his letter of 16 October 2006” and “received payment from persons who sought the letter”.<sup>6</sup>

3. Moreover, I find incomprehensible the value that the Majority Decision places on what it describes as Witness GAO maintaining his testimonies before the Tribunal.<sup>7</sup> Let us examine the instances when Witness GAO is said to have maintained his previous testimonies. The Appeals Chamber has before it his statement of 28 and 29 March 2008 in which he said that “[a]gain, I confirm and stand by my previous trial testimonies before the ICTR Trial Chambers”;<sup>8</sup> these testimonies, of course, include his testimony in the *Kajelijeli* trial. But, in my view, this pious statement is of limited value since there is no mention in it of the Letter of 16 October 2006 recanting his testimony in the *Kajelijeli* trial. Some value could be attached to it if Witness GAO had acknowledged the existence of the Letter of 16 October 2006 and then stated that, notwithstanding that letter, he stood by his trial testimony in the *Kajelijeli* case. Here again, one must also note that the Majority Decision has simply accepted this statement as confirming his trial testimony without any attempt being made to determine that he was a witness of truth when he made it in 2008.

4. The Majority Decision also cites his testimony in the *Karemera et al.* case as another instance where he maintains his trial testimony in the *Kajelijeli* case.<sup>9</sup> However, that case does not in any way support the position taken by the Majority. All that it shows is that his testimony confirming his *Kajelijeli* trial testimony was strongly contested by the Defence in the *Karemera et al.* case, that is, the Defence hotly contended that he was not speaking the truth.<sup>10</sup> I note that the

<sup>5</sup> Prosecution Submissions, Annex 1, p. 799/H (Registry Pagination).

<sup>6</sup> See Prosecution Submissions, Annex 1, p. 793/H (Registry Pagination).

<sup>7</sup> Decision, para. 34.

<sup>8</sup> Statement of 29 March 2008, p. 1 (Registry Pagination, p. 764/H).

<sup>9</sup> See Decision, para. 34 & fn. 115.

<sup>10</sup> *Karemera et al.* Transcript, 5 May 2009, pp. 4-15.

Trial Chamber in the *Karemera et al.* case made no specific determination in its judgement of the credibility of Witness GAO on this issue, although it did say that it would treat his evidence with caution because of his relationship with another witness.<sup>11</sup> In that welter of conflicting positions it maybe questioned whether the Majority has any basis for accepting Witness GAO's testimony in the *Karemera et al.* case that his previous trial testimonies, including his *Kajelijeli* trial testimony, were truthful; certainly, it can derive no help from any finding of the Trial Chamber on Witness GAO's credibility.

5. The Majority invokes Witness GAO's maintaining his previous trial testimonies to highlight an element of consistency which they apparently see as strengthening the case for accepting his explanation of the recantation letter. But, in my view, this element of consistency has been overvalued, if not wholly misconstrued; set against the background of the recantation letter, the subsequent sameness in the positions taken by the witness is but part of a larger demonstration of inconsistency following his testimony at *Kajelijeli*'s trial. Moreover, that sameness of position might be nothing more than the witness being consistently untruthful after the recantation letter.

6. This Review therefore raises the important question of how the Appeals Chamber determines the credibility of a witness, such as Witness GAO, in carrying out its review functions under Article 25. Note that this determination is not similar to the function of the Appeals Chamber when in its appellate role it is required to respond to a ground of appeal that a trial chamber has wrongly assessed the credibility of a witness. In such a case, the Appeals Chamber will examine the trial record and come to its conclusion, having regard to the deferential principle that takes into account the advantage the trial chamber derives from observing the witness and judging his demeanour. The instant case, however, is different and the Appeals Chamber must make its own original determination of the credibility of Witness GAO. In this situation, in my view, its function is not very different, if different at all, from that of a first-instance trial chamber, which, in carrying out its functions, must make a determination of the credibility of a witness. To counter this approach it may be said that the Appeals Chamber does not have the power to question witnesses. I do not pass on the question whether the Appeals Chamber has such a power in the exercise of its appellate function. But it is obvious that in the exercise of its review function the Statute and the Rules must be read as enabling the Appeals Chamber to adopt the procedures necessary for it to discharge that function. It is settled that the Statute and the Rules are to be interpreted as a treaty;<sup>12</sup>

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<sup>11</sup> See *Prosecutor v. Édouard Karemera and Matthieu Ndirumpatse*, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012, para. 117.

<sup>12</sup> See *Joseph Kanyabashi v. The Prosecutor*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 15; *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR-98-37-

the teleological construction advocated finds full support in Article 31(1) of the Vienna Convention on the Law of Treaties 1969 as well as the Tribunal's case law.<sup>13</sup> In the exercise of the review function the right and duty of the Appeals Chamber to question witnesses may be most relevant in determining the newness and decisiveness of a fact.

7. I am fortified in the appropriateness of the procedure of a pre-review hearing by a decision of the ICTY Appeals Chamber in the *Šljivančanin* review proceedings. In that case a witness, who had testified at Šljivančanin's trial, was prepared to offer testimony that, it was submitted, would invalidate Šljivančanin's conviction for aiding and abetting murder.<sup>14</sup> The ICTY Appeals Chamber, by majority, ordered a pre-review hearing to examine the evidentiary value and relevance, if any, of the witness's testimony and whether that testimony constituted a new fact.<sup>15</sup> Following the pre-review hearing the request for review was granted.<sup>16</sup> The ICTY Appeals Chamber commented favourably on the witness's demeanour and specifically found that the witness, in his testimony at the pre-review hearing, was credible.<sup>17</sup> This decision is very persuasive as to the need for the Appeals Chamber in this case to adopt a procedure whereby Witness GAO would be questioned by the Chamber and the parties, thereby placing itself in the best position to observe his demeanour and ultimately make a determination as to his credibility.

8. I make it clear that I am not saying that in all cases of review the Appeals Chamber must question witnesses to determine their credibility. The point I make is that in the particular circumstances of this case the recanting by the witness of his recantation gives rise to a very special concern about his credibility; that issue of credibility must be determined if the Appeals Chamber is to properly discharge its review function and it can only be determined on the basis of the questioning of that witness by the Appeals Chamber and the parties; it is an issue that cannot be determined solely on the basis of the record before the Appeals Chamber.

9. There is yet another ground for disagreeing with the Majority Decision. The fair trial rights of an accused, which apply as much to appellate as to trial proceedings, must also apply to review proceedings. Accordingly, the obligation imposed on Chambers by Article 19(1) of the Statute which, relevantly, provides that "[t]he Trial Chambers shall ensure that a trial is fair" and proceeds

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A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others, 8 June 1998, para. 28.

<sup>13</sup> See *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 71-78.

<sup>14</sup> *The Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Scheduling Order for Hearing Regarding Veselin Šljivančanin's Application for Review, 20 April 2010 ("*Šljivančanin* Scheduling Order"), p. 1; *The Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Review Judgement, 8 December 2010 ("*Šljivančanin* Review Judgement"), para. 5.

<sup>15</sup> *Šljivančanin* Scheduling Order, p. 1; See *Šljivančanin* Review Judgement, para. 6.

<sup>16</sup> *Šljivančanin* Review Judgement, para. 7.

“with full respect for the rights of the accused” is applicable, and Kajelijeli, whose sentence of 45 years is effectively one of life imprisonment, should be afforded the opportunity to question Witness GAO about the truthfulness of the 22 December 2006 Letter recanting his recantation letter. By the same token, the obligation to ensure a fair trial should result in the Prosecution being afforded the right to question the witness if, for example, he maintains that the Letter of 16 October 2006 represents the truth. Another factor favouring the approach of questioning Witness GAO is that it is wholly consistent with the adversarial character of the Tribunal’s proceedings. Generally, in the common law adversarial system a court would not arrive at a decision detrimental to a party on the basis of some item of evidence that has been presented by, or on behalf of, the other party without allowing the prejudiced party to challenge that evidence by any means, including cross-examination if the evidence comes from a witness. Certainly, that would be the case where the effect of the court’s decision is, as it is in this case, to terminate proceedings instituted by the prejudiced party. There is no reason why the position at the Tribunal should be any different.

10. It is, of course, possible that Witness GAO may be so discredited in the questioning in relation to both letters that neither can be relied upon. But the possibility of that outcome in no way invalidates or renders unnecessary the need for him to be questioned, since the questioning would have provided the Chamber with the evidence it needs to make a fully informed decision. Another outcome of the questioning is that the Appeals Chamber may consider instituting proceedings under Rule 91 for false testimony.


11. In sum, I disagree with the Majority Decision because it could only be arrived at on the basis that the Majority found Witness GAO credible in the 22 December 2006 Letter recanting his recantation letter. But the Majority have not put themselves in a position to pass any judgement on his credibility. This, it is maintained, should be done by a procedure whereby the witness is questioned by the Appeals Chamber and the parties, thereby enabling the Chamber to observe his demeanour and make a definitive determination of his credibility.

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

Done this 29th day of May 2013,  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
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Judge Patrick Robinson

<sup>17</sup> *Štjivančanin* Review Judgement, para. 24.