ICTR-96.10-A and ICTR-96.17.A
8 SEPTEMBER 2004
(6977/H - 6957/H)

6977

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Before: **Judge Theodor Meron, Presiding Judge**
Judge Florence Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Adama Dieng**

Date: **8 September 2004**

ICTR Appeals Chamber
Date: 08 September 04
Action: PG
Copied To: Concerned Judges
Parties, Judicial Archives
LOs, LSS

THE PROSECUTOR

v.

Elizaphan NTAKIRUTIMANA and Gérard NTAKIRUTIMANA

Cases No. ICTR-96-10-A and ICTR-96-17-A

REASONS FOR THE DECISION ON REQUEST FOR ADMISSION OF ADDITIONAL EVIDENCE

2004 SEP 10 A 9:11
ICTR
JUDICIAL RECORDS/ARCHIVES
RECEIVED

Counsel for the Prosecution

Mr. James Stewart

Counsel for the Accused

Mr. David Jacobs
Mr. Ramsey Clark

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 "International Tribunal," respectively) is seised of the "Urgent Consolidated Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115", filed confidentially by Gérard and Elizaphan Ntakirutimana ("Appellants") on 3 June 2004 ("Motion"), and of the "Motion for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115 of the Rules of Procedure and Evidence," filed confidentially by the Appellants on 23 June 2004 ("Second Motion"). The Appeals Chamber dismissed both motions in its Decision on Request for Admission of Additional Evidence, rendered on 5 July 2004. The reasons for this Decision follow.

A. Background

2. In the Motion the Appellants request (i) an order from the Appeals Chamber for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"), (ii) an order permitting the filing of an addendum to their Appeal Briefs, (iii) an order permitting filing of oversized motion, (iv) a reconsideration by the Appeals Chamber of its Decision on Request for Additional Evidence[1] ("Rule 115 Decision"), and (v) a hearing of the Motion.

3. The Prosecution, in its response to the Motion filed on 14 June 2004[2] ("Prosecution Response"), argues that the Motion of the Appellants should be dismissed in its entirety, although it does not object to the page extension. The Prosecution is content that the Motion be decided without oral hearing.

4. In the Second Motion the Appellants request admission of materials from proceedings before a United States Immigration Court in a case involving several individuals who testified as witnesses at the Appellants' trial.[3] The Appellants also request admission of transcripts of the testimony of Witness BH (Prosecution Witness DD in the instant case) and Witness BI (Prosecution

[1] Decision on Request for Additional Evidence, rendered 8 April 2004.
[2] "Prosecution Response to Defense Urgent Consolidated Motion for the Admission of Additional Evidence Pursuant to Rule 115," filed on 14 June 2004.
[3] Stating that the record of the immigration proceedings is not public, the Appellants' Second Motion refers to the immigration proceedings by an alias *In the Matter of AAA*. The Appeals Chamber does the same in this Decision.

Witness YY in the instant case) who testified in the *Muhimana* case on 8 April 2004. The Prosecution opposes the request and argues that the Second Motion should also be dismissed.[4]

5. The Appeals Chamber decided both motions on the basis of the Parties' written submissions.[5]

B. The Applicable Law

6. Rule 115, as amended on 27 May 2003, reads:

> (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.
>
> (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.
>
> (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
>
> (D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

7. For evidence to be admitted pursuant to Rule 115(B), the Appellant must establish "that (i) the evidence was not available at trial in any form and could not have been discovered through the exercise of due diligence, and (ii) that the evidence is relevant to a material issue, credible, and such that it could have had an impact on the verdict, *i.e.* could have shown that the conviction was unsafe."[6]

8. The Appeals Chamber notes that Rule 115(B) was amended on 27 May 2003 at the International Tribunal's 13th plenary session, approximately three months after the Trial Chamber rendered its Judgement in this case.[7] Under Rule 6(C) of the Rules, an amendment "shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case."

---

[4] "Prosecution Response to Motion for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115," filed as confidential on 29 June 2004.

[5] Including "Defence Reply to the Prosecution Response to the Urgent Consolidated Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115" dated 18 June 2004," dated 18 June 2004, ("Reply").

[6] "Rule 115 Decision," paras. 4 and 5, *see also Prosecutor* v. *Krstić*, "Decision on Applications for Admission of Additional Evidence on Appeal," Case No. IT-98-33-A, 5 August 2003, pp. 3-4.

[7] Prior to the amendment, Rule 115(B) provided that "[t]he Appeals Chamber shall authorize the presentation of such evidence if it considers that the interests of justice so require."

As the Appeals Chamber has previously indicated, the standard incorporated by the amended Rule 115(B) merely codifies the case law applying the prior version of Rule 115(B).[8] There being no prejudice to the Appellants, the Appeals Chamber considers that Rule 115(B) as amended applies to the Motion and the Second Motion.

C. Timeliness of the Motions

9. Rule 115(A) of the Rules, as amended in May 2003, requires parties to file motions to admit additional evidence not later than seventy five days from the date of the Trial Chamber Judgement, unless good cause is shown for further delay.[9] In the present case, the Judgement was delivered on 21 February 2003. The Motion was filed on 3 June 2004, which is more than 15 months after delivery of the Judgement, and a month before the hearing of the appeals, scheduled for 7 to 9 July 2004. The Second Motion was filed even later, on 23 June 2004. Both Motions come therefore after the expiry of the time period stipulated in the new Rule 115(A). However, as the Appeals Chamber previously explained in its Rule 115 Decision, as the time period stipulated in the new Rule 115(A) had already expired before the rule was amended, the Appellant would be prejudiced if his Motions were treated as subject to the new due date. Therefore the Appeals Chamber holds that the due date in the old Rule 115(A) continues to govern this case, as envisioned by Rule 6(C) of the Rules. The Motion and the Second Motion are therefore timely.

D. Discussion

I. The Motion

10. The Appellants seek to have admitted as additional evidence (i) a statement dated 13 and 14 January 2004 and transcripts of the testimony of Witness KJ (Prosecution Witness OO in the instant case), who testified in the case of *Bagosora et al.* from 19 to 27 April 2004,[10] and (ii) the transcripts of the testimony of Witness AT (Prosecution Witness GG in the instant case) who testified in the *Muhimana* case on 19 and 20 April 2004.[11]

11. The first question to be considered is whether the above evidence was available at trial within the meaning of Rule 115(B). While the witness testified, and was examined and cross-examined, during the trial proceedings in this case, the physical availability of the witness during trial does not resolve the question of availability for the purposes of Rule 115(B) analysis. This

[8] *See* "Rule 115 Decision," para. 6.
[9] Prior to its amendment, Rule 115 motions could be filed as late as fifteen days before the hearing of the appeal. See Rule 115(A) of the Rules of Procedure and Evidence (as amended 6 July 2002).
[10] *Prosecutor* v. *Bagosora et al.* "Military I", Case No. ICTR-98-41-T.
[11] *Prosecutor* v. *Muhimana*, Case No. ICTR-95-1B-T.

inquiry turns on the availability of particular evidence which the Appellants seek to present, and while the trial availability of the source of that evidence – here, one of the Prosecution witnesses – is a necessary part of the analysis, it is not a dispositive one.[12] In this case, the evidence the Appellants seek to admit is the testimony Witnesses OO and GG gave in subsequent judicial proceedings. This testimony, the Appellants argue, is so inconsistent with the witnesses' trial testimony in this case as to cast doubt upon their credibility and lead the Trial Chamber, had it had access to this later testimony, to render a different verdict.

12. As the most natural reading of the term "available" suggests, this new testimony was not available during the trial in this case for the simple reason that the witnesses in question have not yet given it. It is true that the witnesses were present on the stand during trial, and, of course, they possessed the allegedly contradictory information they were to give later in the *Bagosora* and *Muhimana* proceedings. The question then is whether a diligent defence counsel has applied all reasonable efforts to elicit these contradictory statements in the course of examining the witnesses' credibility.[13] If counsel has appropriately tested the veracity of the witness on cross-examination, and despite such efforts the witness gives evidence in a later case which casts his credibility into doubt, the new evidence should be viewed as not having been available at trial or discoverable by a diligent counsel.

13. In this case, the matters to which the evidence proffered speaks were discussed prominently at trial, and the Defence cross-examined Witness OO and Witness GG about their testimony, which is now allegedly contradicted by the evidence they gave in subsequent trials. Given that defence counsel applied reasonable efforts to test the truthfulness of these witnesses at trial, the Appeals

[12] In so concluding, the Appeals Chamber agrees with the decision reached on this issue by the ICTY Appeals Chamber. In the case of *Prosecutor* v. *Krstić*, IT-98-33-A, the ICTY Appeals Chamber was presented with a request to admit, under ICTY Rule 125(B) which is identical to the corresponding rule in the ICTR, the testimony that Mr. Richard Butler, the Prosecution's military expert during the *Krstić* trial proceedings, had given in a later trial, that of *Prosecutor* v. *Blagojević*, IT-02-60-T. *See Prosecutor* v. *Krstić*, Appeal Transcript, p. 182 (the Defence counsel "moving the introduction of Mr. Butler's testimony under Rule 115"). The ICTY Appeals Chamber granted the motion. *See ibid.*, pp. 183, 216. As the ruling was oral, the ICTY Appeals Chamber did not discuss the question of availability. The ICTY Appeals Chamber did not, however, disagree with the parties' submission that the new testimony of Mr. Butler was not available at trial within the meaning of Rule 115 because "Mr. Butler's testimony incorporate[d] his latest thinking and analysis of the relevant evidence." *Prosecutor* v. *Krstić*, "Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115," filed on 18 November 2003, para. 17; *see also* "Defence Reply to the Prosecution's Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115," filed on 20 November 2003, paras. 1-3 (not contesting the Prosecution's analysis of availability).

[13] *Cf. Prosecutor* v. *Krstić*, Reasons for the Decisions on Applications for Admission of Additional Evidence on Appeal, IT-98-33-A, 6 April 2004, para. 10.

Chamber concludes that the evidence now tendered was not available at trial within the meaning of Rule 115.[14]

1. Witness OO

14. Having determined that the evidence the Appellants seek to admit was not available at trial, the question now is whether this evidence is such that, had it been presented at trial, it could have affected the Trial Chamber's verdict. In the Motion, the Appellants present excerpts of transcripts of Witness OO's testimony in *Bagosora et al.* dated 19, 20 and 27 April 2004 to show that the witness's evidence on certain issues contradicts his evidence in the present case, and that the witness's credibility is therefore undermined.

15. The Appellants submit that the witness gave contradictory evidence regarding the transfer from Kibuye town of a certain Major Jabo, who is said to have opposed the killings in the region. In the present case, the witness stated that Major Jabo was transferred in mid April, at least before the attack on Gatwaro stadium, which occurred on 18 April 1994.[15] In cross-examination he claimed that Major Jabo had left by 14 April.[16]

16. By contrast, in *Bagosora et al.*, in the extracts cited by the Appellants, the witness explained that he went to Kigali with Major Jabo on 14 and 15 April 1994. They returned to Kibuye, and two days thereafter Major Jabo was transferred from Kibuye. When cross-examined about the apparent inconsistency between his evidence in *Ntakirutimana* and *Bagosora et al.*, the witness explained that "I don't know whether I was talking about the trip to Kigali, but if that is the date which I gave,

---

[14] It merits reminding that even where the evidence was *not* available at trial within the meaning of Rule 115, that conclusion does not conclude the inquiry. The Appeals Chamber must still proceed to the second step of the analysis and consider the evidence on its merits, but under a more stringent standard of asking whether the evidence *would* have affected the Trial Chamber's verdict. *See, e.g.*, *Prosecutor* v. *Ntakirutimana*, Decision on Request for Admission of Additional Evidence, 8 April 2004, para. 5 ("Where the evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party must show also that exclusion of the additional evidence would lead to a miscarriage of justice."); *Prosecutor* v. *Krstić*, IT-98-33-A, Reasons for the Decision on Applications for Admission of Additional Evidence on Appeal, 6 April 2004, para. 12 ("In order to have additional evidence admitted where it was available at trial or could have been discovered through the exercise of due diligence, the appellant must establish that its exclusion would lead to a miscarriage of justice.") (citations omitted). In addition, it must be noted that the Appeals Chamber always retains the power, once it decides to admit additional evidence under Rule 115, to call the witness in question to present the evidence in person and to be available for cross-examination and questioning. The Appeals Chamber can invoke this power under either Rule 54, combined with Rule 107, which confer upon the Appeals Chamber the power to issue any orders necessary to perform its functions, or Rule 98, combined with Rule 107, which permit the Appeals Chamber to summon witnesses. The experience of the ICTY Appeals Chamber is again instructive. With respect to Mr. Butler's evidence in *Prosecutor* v. *Krstić*, the ICTY Appeals Chamber ordered that the evidence be presented through Mr. Butler's in-court testimony. *See Prosecutor* v. *Krstić*, IT-98-33-A, Appeal Transcript, p. 183. The *Krstić* Appeals Chamber followed the same approach with respect to three other witnesses whose evidence it admitted under Rule 115, ordering those witnesses to be present in court for examination. *See Prosecutor* v. *Krstić*, IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003; Decision on the Admissibility of Material Presented by the Prosecution in Rebuttal to Rule 115 Evidence Admitted on Appeal, 19 November 2003.

[15] T, 1 November 2001, pp. 141-144.

then I've already apologised because I said that I cannot give you an exact date. When I gave that answer, I was thinking of the question that had been put to me regarding the trip to Kigali. I don't know whether he was asking me a question regarding the first occasion or the second occasion when Jabo left."[17] On review of the transcripts in this case, however, it is clear that Witness OO's testimony about the departure of Major Jabo related not to the alleged trip to Kigali but rather to the date of Major Jabo's actual transfer from Kibuye during the events. The witness did not testify in this case to Major Jabo visiting Kigali and returning to Kibuye prior to his transfer.[18] As such, there appears to be a possible inconsistency between the witness's evidence in the two cases.

17. The date on which Major Jabo left Kibuye relates to the Defence claim that, because of Jabo's opposition to the killings, Gérard Ntakirutimana would have been unable to go to the gendarmerie on 15 or 16 April to procure gendarmes and weaponry for the subsequent attacks. In that way, the issue of the date of Jabo's departure – and that of the credibility of Witness OO's statement to that effect – do relate to an important part of the verdict. After extensive cross-examination in this case, Witness OO confirmed that Jabo left Kibuye by 14 April. This testimony was the basis on which the Trial Chamber concluded that it was possible for Gérard Ntakirutimana to go to the gendarmerie on 15 or 16 April.

18. The Appeals Chamber must determine whether the Trial Chamber would have reached the same conclusion with respect to Witness OO's credibility in light of the presented evidence. The Trial Chamber considered the Defence argument that Witness OO's evidence as to the date of Major Jabo's departure was contradictory, as at one time the witness fixed that date as being before 18 April and at another time as being after 18 April.[19] The Trial Chamber nevertheless concluded that the witness gave a satisfactory explanation for these inconsistencies, and therefore credited Witness OO's testimony that Jabo left on 14 April.[20] In *Bagosora*, Witness OO stated that Jabo was transferred out of Kibuye around 17 April. This date is consistent with the evidence of Witness OO on which the Defence relied at trial to show that the witness was not credible.[21] Because the evidence which the Defence now seeks to admit is substantively the same as the evidence the Trial Chamber has already considered, the Appellants failed to show that the Trial Chamber would not

[16] T, 2 November 2001, p. 52.
[17] T, 27 April 2004, p. 39.
[18] See in particular, T, 1 November 2001, pp. 142-144, T, 2 November 2001, pp. 51-54.
[19] Trial Judgement, paras. 168, 174.
[20] *Ibid.*, para. 180.
[21] *Ibid.*, para. 168. Of course, during his *Bagosora* testimony Witness OO now added an additional detail, namely that he and Major Jabo made a trip from Kibuye to Kigali on either 14 or 15 April. Although this is a detail not present in the witness's earlier testimony, it is not of such a magnitude that it could have altered the Trial Chamber's assessment of his credibility.

have adhered by its conclusion that "the inconsistencies [in Witness OO's testimony] are not so material as to affect the substance of his testimony"[22] even if it had the new evidence before it.

19. The Appellants also argue that the witness presented contradictory evidence regarding his knowledge of sketches and ability to use them.[23] In this case, during cross-examination, the witness explained that "I've never had to read sketches because I have never had training in this area". By contrast, in *Bagosora et al.*, the witness testified that although he had not had an "in depth" course on how to read maps, he had received training in how to use a map, that he could draw sketches and that he could find bearings on maps.[24] As in the present case, the witness was nevertheless reluctant to identify locations on a map in court, preferring instead to draw his own sketch. [25] The witness therefore appeared to provide differing evidence about training he may have received in the use of maps and sketches. This evidence of inconsistency, however, is collateral to factual matters determined by the Trial Chamber, and therefore could not have affected the verdict.

20. In addition, the Appellants submit that there exist material inconsistencies in the witness's explanations in relation to the chronology of events in his previous witness statements.[26] In *Bagosora et al.*, the witness was questioned about the chronology of events. In the Motion, the Appellants cite an exchange between the witness and the Bench, during which the witness states that "if your read my statement, you will see that I narrated events one after the other according to the sequence of their occurrence." The witness also confirms that he related only the sequence of events and not the dates of their occurrence.[27] The Appeals Chamber notes that, although the Appellants indicate in their Motion that the witness was referring to his 1998 statement, it is unclear from the transcripts whether this is the case. The Appeals Chamber is unable therefore to consider the merits of this submission.

---

[22] *Ibid.*, para. 180.
[23] Motion, paras. 16-17.
[24] T, 20 April 2004, pp. 34-41.
[25] T, 20 April 2004, p. 39. "The problem isn't that it -- whether or not it's difficult for me to read the map, but, rather, the following: The person who drafted -- I don't know who drafted this map. I don't know if this person did not make any mistakes, and as I am going to be reading the map, I'm not sure that I'll be able to see the mistakes that the persons might have made."
[26] In the present case, inconsistencies between the chronology of events in his written statement of 6 – 11 August 1998 and his testimony were assessed by the Trial Chamber: "Several inconsistencies between the chronology of events as represented in Witness OO's statement of 6-11 August 1998 and his testimony before the Chamber, including the date of departure of Jabo, were addressed by the witness: 'When the investigators were questioning me they were taking down notes and when they went to type out my statement ... they did not maintain the chronology of events. And I did not have the opportunity to read that over with them to be able to correct that error.' He added: 'I signed the statement all right ... And I said to myself that even if there was a problem with the statement, I was going to solve it since I would be present [before the Trial Chamber] myself.' The Chamber accepts this explanation of the witness and concludes that the inconsistencies are not so material as to affect the substance of his testimony." Trial Judgement, para. 180 (citations omitted).
[27] T, 20 April 2004, pp. 7-8.

21. Finally, the Appellants submit that in his written statement of 13 and 14 January 2004, the witness affirmed the accuracy of his earlier statements. However, the Appeals Chamber considers that in his statement of 13 and 14 January 2004, the witness does not explicitly state that the content and chronology of his earlier statement were accurate. Rather, he confirmed only that he had made an earlier statement, which he did not wish to change, but that he wanted to add to it.

22. The Appeals Chamber therefore rejects the Appellants' request for admission of the evidence given by Witness OO in the case of *Bagosora et al.* under Rule 115.

23. The Appeals Chamber is also not persuaded by the Appellants arguments that it should reconsider its previous Rule 115 Decision in this case, wherein the Appeals Chamber dismissed the Appellants' argument that the witness presented inconsistent evidence in this case and in *Niyitegeka*.

2. Witness GG

24. The Appellants seek to have admitted the evidence of Witness AT who testified in the *Muhimana* case and appeared in the instant case under the pseudonym GG. Prosecution Witness GG's evidence was relied upon by the Trial Chamber in its findings on the participation of Gérard Ntakirutimana in attacks at the Mugonero Complex and at Muyira Hill.[28]

25. The Appellants submit that a review of the testimony of the witness in *Muhimana* reveals important inconsistencies with his evidence in the instant case.[29] They argue that the witness's credibility is undermined on the basis that, in *Muhimana*, he deviated from his evidence given in this case about the number of vehicles he saw on 16 April 1994 at the Mugonero Complex, so as "to meet the needs of the Muhimana case," [30] that he furnished specific times for events, which he was unable to do in the present case, and that he again presented contradictory evidence about his schooling.

26. The Appellants contend that the witness changed his evidence significantly about his observations of Gérard Ntakirutimana at the start of the attacks on Mugonero Complex on 16 April 1994.[31] In the instant case, the witness's mention of Gérard Ntakirutimana, cited in the Motion, arose during his cross-examination on the alleged shooting of Charles Ukobizaba on 16 April 1994. Asked to confirm whether his evidence in examination-in-chief was that this was his first sighting of Gérard Ntakirutimana, the witness explained that he had initially seen Gérard Ntakirutimana not

[28] Trial Judgement, paras 291, 629-636.
[29] Motion, paras. 18, 20.
[30] Motion, para. 23.

during this alleged shooting, but earlier in the day, with Mathias Ngirinshuti and Enoch Kabaga, "placing the attackers in such a way that they surrounded the hospital." The witness was not asked for further details about this observation.[32]

27. In *Muhimana*, the witness was questioned extensively about the arrival and identity of the attackers on the morning of 16 April 1994 at the Mugonero complex. The witness identified Gérard Ntakirutimana in the hospital vehicle with other attackers. Once the shooting started, the witness fled first to the Church and then sought refuge in the hospital building.[33]

28. It is clear that in both cases, the witness was consistent that he first saw Gérard Ntakirutimana before he saw him shooting Charles Ukobizaba at the start of the attack, and that he fled towards the Church once the shooting commenced.

29. It must be acknowledged that there are certain inconsistencies in the witness's evidence regarding the arrival of the attackers and the number of vehicles he saw at the start of the "main attack" at the Mugonero Complex. In the present case, Witness GG's evidence is that on 16 April 1994 he saw a second wave of attackers arrive at the Mugonero Complex for the "main attack". He described seeing Elizaphan Ntakirutimana and Obed Ruzindana, and a number of attackers including Mika and Sikubwabo. The witness clarified that he saw the vehicles of Elizaphan Ntakirutimana and of Obed Ruzindana.[34] By contrast, in *Muhimana*, in addition to these two vehicles, the witness mentions seeing the vehicle of Sikubwabo, the hospital vehicle driven by Gérard Ntakirutimana, the vehicle with Kayishema and a truck carrying soldiers.[35]

30. The witness's evidence in *Muhimana* therefore appears to differ from his testimony in the present case insofar as he testified to seeing not only the vehicle of Elizaphan Ntakirutimana and of Obed Ruzindana, but also the hospital vehicle driven by Gérard Ntakirutimana and a number of other vehicles. In the present case, evidence about Gérard Ntakirutimana driving the hospital vehicle is absent.

31. It is, however, normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at

---

[31] Motion, paras. 21-22.
[32] T, 24 September 2001, pp. 124-125.
[33] T, 19 April 2004, pp. 8-11.
[34] T, 21 September 2001, pp. 135 – 142.
[35] T, 19 April 2004, p. 16 ("We first saw the vehicle of Ntakirutimana, Elizaphan. It was a Toyota vehicle. He parked the vehicle in front of his office. And the other vehicles also parked in front of his office. Afterwards, we saw the vehicle of Ruzindana, which was carrying Mika and some soldiers. After that, we saw another vehicle -- Ruzindana's vehicle was red. It was not covered. This was followed by the vehicle of the Gishyita *bourgmestre*; that is Sikubwabo. After that we saw the hospital vehicle that was carrying soldiers and which came from Kibuye. After that we saw the vehicle of Kayishema, who was accompanied by another truck in which there were soldiers.").

trial and depending on the questions posed to the witness by the Prosecution. It is, moreover, not unusual for a witness's testimony about a particular event to improve when the witness is questioned about the event again and has his memory refreshed. The witness may become more focused on the event and recall additional details. Given that the *Muhimana* proceedings were subsequent to the trial proceedings in this case, the fact that Witness GG gave additional details about the events at the Mugonero Compex during his *Muhimana* testimony does not necessarily indicate that the witness was not credible.

32. The Appellants also rely on other alleged inconsistencies in the evidence of Witness GG, arguing that they undermine his credibility. The Appellants argue that although in the instant case the witness testified that he was unable to furnish precise times, in *Muhimana* he provided precise times as to events during the attacks. In their Reply, the Appellants underscore that in making its finding that Gérard Ntakirutimana shot Charkes Ubokizaba on 16 April 1994, the Trial Chamber relied on the corroboration of time between Witness GG and Witness HH.[36]

33. In the present case, the witness testified of two attacks which occurred at the Mugonero complex on 16 April 1994. Questioned about the time of the first attack, the witness indicated that "the sun was already shining", "the attack began when the sun had already risen for quite some time", "it started in the morning", "I would say that it was a short time before midday" and "it began in the morning".[37] The witness also indicated that during the events he did not have a watch.[38] When asked whether he understood the concept of "noon" the witness stated that "for we people who do not have a watch, we normally use the sun."[39]

34. In *Muhimana*, the witness testified that the main attack occurred around 0900hrs and that he sought refuge in the hospital around 1100hrs.[40] He explained that he did not have a watch, and therefore could only estimate the time at which he sought refuge in the hospital.[41]

35. Finally, the Appellants submit that Witness GG provided different answers in the present case and in *Muhimana* about the number of years of education he had received. They argue that the witness's readiness to furnish inaccurate answers and to rationalize inconsistencies are material.[42] In the present case, the witness explained that he attended school for only one year, during which he met Obed Ruzindana. Challenged with his testimony in the *Kayishema and Ruzindana* case that he

[36] Reply paras. 19-20.
[37] T, 24 September 2001, pp. 97-100, and 104-105.
[38] *Ibid.*, p. 99.
[39] *Ibid.*, p. 138.
[40] T, 19 April 2004, p. 37.
[41] T, 19 April 2004, p. 13, p. 51.
[42] Motion, paras 23-24.

had had four years of education, the witness explained that he had never stated that he had been to school for four years.[43]

36. In *Muhimana*, the witness confirmed that he had spent fours years at school, and testified that he had not been a strong student, and that he cannot read or write. He stated that he had been "promoted from one class to another, just to please [him.]" Confronted with his testimony in the present case, namely that he had only attended school for one year, the witness explained that "if you were to ask me the question, I would tell you that I didn't even do the first year of primary school." He added that "he could not boast that [he] went to school when the schooling was not useful to me", and that "one year and four years are the same thing."[44]

37. A comparison of the evidence shows that in *Muhimana* not only did the witness furnish additional evidence implicating Gérard Ntakirutimana in the preparation of the attacks on the morning of 16 April 1994, but he was also more specific about the times the events happened. Despite these additional details, however, the witness's evidence in *Muhimana* is materially consistent with the witness's version of events in the present case. Moreover, as already explained, it is not unusual for a witness to remember additional details when testifying about the same event in subsequent proceedings.[45]

38. The witness in this case did mention seeing Gérard Ntakirutimana "placing the attackers in such a way that they surrounded the hospital." This observation was before the shooting of Charles Ukobizaba, and is consistent with the witness's evidence in *Muhimana* that he saw Gérard Ntakirutimana at the beginning of the attacks.

39. Although the witness gave more precise times in *Muhimana*, these were generally consistent with his evidence in this case as to the unfolding of the events.[46] The witness's failure to furnish precise times regarding the attack and shooting of Charles Ukobizaba did not prevent the Trial Chamber from relying on his evidence insofar as it was corroborated by that of Witness HH on a number of details.[47]

40. The evidence of inconsistencies about the number of years the witness attended school could not have affected the Trial Chamber's assessment on the credibility of Witness GG. In fact, the

[43] T, 24 September 2001, pp. 55-60.
[44] T, 19 April 2004, pp. 43, 44.
[45] *See* para. 31, *supra*.
[46] And, as explained above, *see* paras. 31, 37, *supra*, a more specific testimony given about the same event in a subsequent proceeding does not necessarily cast doubt upon the credibility of the witness's testimony in the earlier proceeding.

question of the number of years spent at school by the witness was in issue during Witness GG's examination. The witness was confronted with the contradiction between his evidence in *Kayishema and Ruzindana* regarding the number of years he attended school, and despite the apparent inconsistency and the witness's affirmation that he had not previously testified that he had been schooled for four years, the Trial Chamber still found the witness credible and relied on his evidence.

41. Consequently, it has not been shown that the Trial Chamber's findings on Witness GG's credibility could have been affected presented with the witness's additional evidence in *Muhimana*.

II. The Second Motion

42. In this Motion the Appellants first seek admission of materials from the proceedings of an immigration court in the United States.[48] The Appellants seek to support a defence raised at trial and pursued on appeal of the existence of a political campaign to falsely incriminate and convict the Appellants. They submit that the additional evidence indirectly casts doubt as to the credibility of all of Prosecution's factual witnesses.

43. The Prosecution first opposes this part of the Second Motion on the grounds that the Appellants failed to provide all of the evidence that they are apparently seeking to have admitted as additional evidence. The Prosecution secondly argues that the findings of another judge in other proceedings concerning unrelated issues in a completely different jurisdiction are of little value in determining whether the Trial Chamber in this case reached reasonable conclusions from the testimony of Prosecution Witnesses SS, UU and YY.

---

[47] It should be noted that the Trial Chamber did not find it proved beyond reasonable doubt that Gérard Ntakirutimana conveyed attackers on the morning of 16 April 1994.

[48] The Appellants failed to present this evidence with their motion, submitting it only several days later, on 5 July 2004, in a confidential "Annexure to July 3, 2004 Reply to Prosecutor Response to Appellants [sic] Motion of June 23, 2004 for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115 of the Rules of Procedure and Evidence and Motion for an Order Authorizing the Filing of Additional Evidence in Excess of Page Limitations." Originally, the Appellants only provided a list of seven exhibits which they wished to admit (listing the decision of the U.S. Immigration Judge and six witness testimonies), failing to attach any of them to the motion. The Appellants did attach what they claim to be a relevant excerpt from the Immigration Judge's decision. That excerpt, however, was not even a photocopy of a portion of a decision but a few pages of text re-typed by counsel themselves. The excerpt therefore possessed no indicia of its real origin or reliability to enable the Appeals Chamber to evaluate this request. At the time the Second Motion was filed with the Appeals Chamber, the Appellants failed to provide any basis on which the Appeals Chamber could evaluate their request. The hearing of the appeal was scheduled from 7 to 9 July 2004. Were any additional evidence admitted, the parties would have had to argue its reliability and weight during that hearing. The Appellants are hereby reprimanded for failing to submit the evidence they sought to admit along with their Second Motion, and consequently failing to facilitate the Chamber's consideration of their request in the short time available before the appeal hearing.

44. Given that the evidence the Appellants present in their Second Motion post-dates the trial proceedings in the present case, there is no dispute that the evidence was not available at trial within the meaning of Rule 115.

1. Witness SS

45. As to Witness SS, the Second Motion highlights the following four excerpts of the U.S. Immigration Judge's decision:

> The most remarkable claim is that of SS, who stated that at Gitwe he saw AAA rape and kill the witness' fiancée, FFF. The witness was hiding by the side of the road only 10 meters away from where AAA committed this crime, yet remained undetected by the Respondent and the group of 20 men Respondent was leading. The witness apparently did nothing to intervene to try to assist his fiancée, but simply watched this all occur while remaining in hiding. The Court has serious reasons to doubt the veracity of this version of events.
>
> ....
>
> SS stated that he was only 10 meters (30-35 feet) away from the Respondent at Mugonero when he saw Respondent put his foot on the head of a dead girl. SS was about 25 meters away from AAA during the April 16 attack at Mugonero. At that time, the witness saw AAA carrying a rifle, leading a crowd. In the chaos of the attack, he saw AAA shoot at two men. At Bisesero, he saw the Respondent shooting people, and was about 30 to 50 meters from Respondent at the time. Considering that these attacks were carried out in a context of total chaos, these claims of such close proximity to a gun-toting AAA are quite questionable.
>
> ....
>
> SS's statements about Respondent's political activities are obviously false. Dr. Des Forges indicated that it was unlikely the Respondent would have taken a leadership role at meetings were much more prominent figures were present. The Witnesses' claims about Respondent being involved in political meetings are just not credible.
>
> ....
>
> SS was interviewed by Africa rights representatives in 1997 or 1998. In Immigration Court, he could not recall whether in that interview he mentioned AAA's role, or the rape and murder of FFF.[49]

46. As to the first excerpt, the rape of FFF is not an issue in the present appeal and was not part of SS's testimony. This issue is therefore immaterial to the present case. Even more importantly, as recounted in the excerpt in question, the testimony of witness SS is not incredible. The fact that the witness would have done nothing to assist his fiancée while she was raped and killed by the Respondent can easily be explained by the presence of a group of 20 men led by the Respondent and the fear the witness would have had for his own life. The same applies to the second excerpt and the Immigration Judge's conclusion that close proximity of the witness to a gun-toting AAA

would be highly questionable in a context of total chaos. The chaotic context within which the witness is said to have observed the crimes being committed is not incompatible with this observation having occurred at close proximity. As to the third excerpt, the testimony in question is immaterial to the present appeal. Moreover, even if the opinion of Dr. Des Forges could affect the Immigration Judge's assessment of the credibility of Witness SS, that subsequent assessment would have been based on the opinion of Dr. Des Forges and not on the witness's live testimony. The inference as to the credibility of Witness SS would therefore be too attenuated to support a conclusion that the evidence presented could have altered the Trial Chamber's assessment of Witness SS's credibility. For the same reasons, the fourth excerpt does not appear determinative of the witness credibility either.

2. Witness UU

47. The Trial Chamber found, on the basis of the evidence of Witness UU:

> that Witness UU knew Gérard Ntakirutimana and was in a position to identify him. The Chamber also finds that the Accused attended three meetings in Kibuye town, held between 10 and 18 June 1994 (approximately), at which he made statements about the need to eliminate all Tutsi and called for more arms and ammunition. The details are set out in the discussion above. At those meetings Gérard Ntakirutimana also participated in the distribution of weapons, discussed the planning of attacks at Bisesero, was assigned a role in such an attack, and reported back on its success. Witness UU's evidence, taken together with the whole of Witness OO's evidence (see, in particular, II.3.7 above) leads the Chamber to conclude that Gérard Ntakirutimana played a prominent role in some attacks in Bisesero during the period of April to June 1994.[50]

48. During the immigration hearing, the Government withdrew Witness UU, and did not call him to testify. The Immigration Judge's finding that Witness UU fabricated his evidence rests on the opinion of Dr. Alison Des Forges that the witness's account of a meeting on June 1994 was not plausible. The Immigration Judge added that "presumably, it was Des Forges who advised the Government attorneys about the false preposterous claims." As such, the Immigration Judge's opinion on Witness UU's lack of credibility is based on Dr. Des Forges's opinion and the government's withdrawal of the witness, and not on the witness's live testimony before the immigration hearing. This being so, and for reasons already explained, the findings of the immigration Judge for Witness UU could not have affected the Trial Chamber's assessment of Witness UU in this case.

[49] Attachment A to the Second Motion, at 3-4; *see also* Second Motion, paras. 26-28.
[50] Trial Judgement, para. 720.

3. Witness YY

49. The Appellants argue that Witness YY was part of a political campaign to incriminate them, and refer to the Immigration Judges observations on the credibility of the government case in the immigration hearing to support this proposition.

50. In the Immigration Judgement, the Judge observed that the withdrawal by the Government of two witnesses put some degree of a taint on all eyewitness evidence offered by the Government, which presumably includes Witness YY. According to the Appellants, the Immigration Judge found Witness YY's claim of observing AAA shoot persons at Mugonero and Bisesero questionable, and found that the witnesses, including YY, grossly exaggerated the number of attackers and victims at Mugonero and Gitwe.

51. These observations, even if correct, could not have affected the Trial Chamber's findings in this case. The fact that Witness YY may have exaggerated the number of victims and attackers before the Immigration Judge does not cast doubt over his credibility as in the present case. Witness YY already estimated in the present case that there were 50000 refugees at the Mugonero Complex,[51] which was approximately 30000 more than the next highest estimation, made by Witness MM. The Trial Chamber therefore was already aware of this possible criticism of Witness YY's evidence when it assessed his credibility.

52. Regarding the allegation that the Appellants attended an MRND political meeting, it appears, according to the excerpt presented by the Appellants, that Witness EEE and not Witness YY was the source of this evidence. Similarly, there is no mention in the excerpt of the Immigration Judgement on which the Appellants rely on a finding that Witness YY's observation of AAA shooting at persons is questionable.

4. *Muhimana* Transcripts

53. The Appellants also request admission of transcripts of the testimony of Witness BH (Prosecution Witness DD in the instant case) and Witness BI (Prosecution Witness YY in the instant case) who testified in the *Muhimana* case.[52] The Appellants submit that the testimony recently given by witnesses DD and YY in that case is inconsistent with the testimony these witnesses gave at the Appellants' trial. These inconsistencies, the Appellants allege, undermine the

[51] Trial Judgement, para. 71.
[52] It must be noted that nowhere in their Second Motion did the Appellants expressly request the admission of the testimony derived from the *Muhimana* proceedings. While the Appeals Chamber construes the Appellant's extensive discussion of this testimony as a request for admission under Rule 115, it warns the Appellants that a failure to formally request admission of particular evidence could be sufficient ground not to consider that evidence at all.

Trial Chamber's findings with respect to the credibility and reliability of the witnesses in question. The Prosecution argues that there is no inconsistency between the evidence given by DD at the Appellants' trial and his testimony at the *Muhimana* trial. The Prosecution also argues that there is no inconsistency between the evidence given by YY at the Appellants' trial and his testimony in *Muhimana*, and even if there was, given the reliance of the Trial Chamber in the Appellants' Trial upon the testimony of a number of witnesses, it could have had no impact on the outcome of the appeal.

a. Witness DD

54. The Appellants note that in his original statement in this case, dated 11 November 1999, Witness DD made no mention of either of them being at Mubuga school. In a Reconfirmation statement of 28 July 2001, the witness is said to have alleged that Elizaphan Ntakirutimana killed his wife and two children and that Gérard Ntakirutimana killed the witness's uncle and a child in the Mubuga primary school. According to the Appellants, on 22 October 2001 the Prosecution filed a letter/second reconfirmation statement, in which the witness indicated that Elizaphan Ntakirutimana was not at Mubuga school, and that it was Gérard Ntakirutimana who murdered the witness's wife and two children there. Finally, according to the Appellants, during his testimony in the present case DD made no mention of Mubuga school.

55. The Appellants argue that the witness's reliability is called into question on the basis that he testified in *Muhimana* to the killing of his wife in Mugonero, whereas in 2001 statements he mentioned that they were killed at Mubuga school. This argument is not convincing. In *Muhimana*, the witness only indicated, very generally, that his family had been killed at the Mugonero hospital. The Appeals Chamber notes that earlier in his testimony, he had described his family as his four children, his wife, his father and his mother, and "also members of another family that was related to us." Without more details, and given the witness's very general and imprecise description of his family, which included even members of another, related family, it is difficult to conclude whether the witness's reference to "his family" in *Muhimana* was meant to include his wife and children among those who had been killed at Mugonero. The Trial Chamber was made aware of the inconsistencies between the witness's various statements regarding the killing of his wife and children, yet still found him credible. The proffered additional evidence could not have had an impact upon the verdict.

b. Witness YY

56. The Appellants argue that in his testimony in *Ntakirutimana*, Witness YY testified that on the morning of 16 April 1994 he initially saw two cars driving towards Elizaphan Ntakirutimana's

house, and then saw four cars, including Elizaphan Ntakirutimana's vehicle, coming from the direction of the house and arriving at the Mugonero Complex.[53] According to the Appellants, Witness YY estimated the distance from which he observed the vehicles to be 20 meters.[54] The Appellants note that in the *Muhimana* trial, by contrast, Witness YY testified that he saw only two vehicles, and made no mention of a vehicle belonging to Elizaphan Ntakirutimana.[55] Moreover, so the Appellants note, Witness YY now testified that he observed the vehicles from the distance of 30 to 40 meters.[56] On the basis of these inconsistencies, the Appellants argue that Witness YY has fabricated his testimony in the instant case and the Trial Chamber erred in crediting Witness YY's testimony. Without his testimony, the Appellants contend, the Trial Chamber could not have found that Elizaphan Ntakirutimana "conveyed attackers to the Mugonero Complex on the morning of 16 April 1994.[57]

57. The Appeals Chamber has already considered an analogous argument of the Appellants with respect to discrepancies in the evidence given by Witness GG in the instant case and in the *Muhimana* proceedings.[58] There, the Appellants also relied on inconsistencies in the evidence given by the witness in two different proceedings with respect to the number of vehicles he saw arrive at the Mugonero Complex. While acknowledging these inconsistencies, the Appeals Chamber concluded that they were not of such magnitude that they could have altered the Trial Chamber's verdict. The same conclusion follows here.

58. In addition, it must be noted that the Trial Chamber did not rely solely on Witness YY's evidence in placing Elizaphan Ntakirutimana at the Mugonero Complex. The Trial Chamber's finding was also based on the evidence given by Witness MM, Witness GG, Witness PP and Witness HH.[59] In light of that testimony, the Trial Chamber could legitimately have found Witness YY to be credible. Moreover, even if Witness YY were found not to be credible, the evidence of the other witnesses would have been sufficient to support the Trial Chamber's finding that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex on 16 April 2004. The additional evidence of Witness YY is therefore not such that it could have influenced the Trial Chamber's determination on that factual issue.

---

[53] Second Motion, para. 35.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*, para. 36 (quoting Trial Judgement, para. 310).
[58] *See* paras. 25, 29-31, *supra*.
[59] Trial Judgement, paras. 226-260.

E. Conclusion

59. For the foregoing reasons, the Appeals Chamber has **DISMISSES** the Motion and the Second Motion on 5 July 2004.

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

Theodor Meron
Presiding Judge

Done this 8th day of September 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

Separate Opinion of Judge Schomburg

1. While I agree with the disposition set out in the decision, I respectfully disagree with some of the reasons given.

2. In my opinion, availability of evidence pursuant to Rule 115(B) of the Rules has to be defined narrowly. In fact, it is limited to exceptional scenarios where evidence did exist during trial, but was not accessible due to specific factual obstacles beyond the control of the International Tribunal (*e.g.*, archives not yet opened, non-co-operation of States).

3. In the present case the witness was available at trial for examination-in-chief, cross-examination and re-examination. Therefore, the decisive factor is the physical availability of the witness at trial, and not the content of any later testimony of this witness. This later testimony did not yet exist during trial, thus the question of availability of a testimony in a later case does not arise. Subsequent testimony does not – and by nature cannot – have any impact on the issue of the availability of the testimony upon which the Trial Chamber based its decision due to the fact that only this first testimony forms part of the trial record.

4. Credibility is a secondary question only, emanating from substantial factual discrepancies. Credibility, to be assessed by the trier of fact, should not be confused with availability. A later testimony containing substantial discrepancies does not necessarily endanger the assessment of the first testimony which can be the correct one. Furthermore, how can the Appeals Chamber, confronted with substantial discrepancies, come to the conclusion that the later testimony, the requested additional evidence, was credible, this being one prerequisite of Rule 115 (B) of the Rules?

5. The problem and its solution have to be found in the nature of the discrepancy. Marginal discrepancies are attributable to human nature. Substantial discrepancies, however, that go to the heart of a conviction/verdict and could have occasioned a miscarriage of justice, have to be first clarified by the second trier of fact.

6. Only in those cases where such a fundamental discrepancy has not been resolved by the second trier of fact, it is for the Appeals Chamber to clarify this discrepancy. Therefore, *sedes materiae* is not Rule 115 of the Rules but the obligation to search for the truth. Truth cannot be established by assessing which of the conflicting testimonies are more credible or less credible. Only establishing the underlying facts once and forever can resolve the problem at issue. Acting this way means to manage a case proactively. To hold otherwise would mean that any new

testimony could trigger further motions to present additional evidence under Rule 115 of the Rules, thus creating the risk of a successfully obstructive conduct of a party.

7. Under extraordinary circumstances – *e.g.*, if the Appeals Chamber becomes aware of a substantial discrepancy that goes to the heart of a conviction/verdict and could have occasioned a miscarriage of justice –, the Appeals Chamber may resort to summoning the witness *proprio motu* pursuant to Rule 98, sentence 2 of the Rules in order to finally resolve the discrepancies found in the witness's conflicting testimonies already given.

Wolfgang Schomburg

Dated this eighth day of September 2004
At The Hague
The Netherlands.

[Seal of the Tribunal]