



ICTR-98-44A-A  
28 OCTOBER 2004  
(852/H - 838/H)

Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Florence Mumba  
Judge Wolfgang Schomburg  
Judge Inés Mónica Weinberg de Roca

**Registrar:** Mr. Adama Dieng

**Decision of:** 28 October 2004

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JUDICIAL RECORDS/ARCHIVES  
ICTR

**Juvénal KAJELIJELI**  
(Appellant)

v.

**THE PROSECUTOR**  
(Respondent)

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

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**DECISION ON DEFENCE MOTION FOR THE ADMISSION OF ADDITIONAL  
EVIDENCE PURSUANT TO RULE 115 OF THE RULES OF PROCEDURE AND  
EVIDENCE**

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**Counsel for the Prosecution**  
Melanie Werrett  
James Stewart

**Counsel for the Appellant**  
Professor Lennox S. Hinds

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 "Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence", filed by counsel for Juvénal Kajelijeli ("Defence" and "Appellant", respectively) on 16 February 2004 ("Motion").

#### A. Procedural history

2. At trial, the Appellant was found guilty of Genocide, Direct and Public Incitement to Commit Genocide, and Extermination as a Crime Against Humanity.<sup>1</sup> He subsequently filed an appeal against the Trial Judgement<sup>2</sup> and, for this purpose, he seeks the admission of additional evidence.

3. On 26 February 2004, the Prosecution filed a response opposing the Motion.<sup>3</sup> Finding that the Motion constituted an incomplete and deficient filing, the Pre-Appeal Judge<sup>4</sup> ordered the Defence to file an addendum to the Motion, including the additional evidence referred to in the Motion and providing detailed submissions on the effect of the additional evidence upon the verdict.<sup>5</sup> On 8 March 2004, the Defence filed an addendum to the Motion and a reply to the Response.<sup>6</sup> The Prosecution subsequently filed an amended response on 12 March 2004 opposing the Motion and the Addendum.<sup>7</sup>

4. Finding that the Defence submissions on the availability of the additional evidence sought for admission were not sufficiently detailed, the Pre-Appeal Judge ordered the Defence to file a detailed explanation on how and when the evidence was obtained and whether such evidence could

<sup>1</sup> *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44-T, Judgement and Sentence, 1 December 2003 ("Trial Judgement").

<sup>2</sup> On 31 December 2003, the Defence filed confidentially the Appellant's Notice of Appeal ("Notice of Appeal"). On 22 April 2004, the Defence filed the Appellant's Grounds of Appeal Against Conviction and Sentence and the Appellant's Brief on Appeal ("Grounds of Appeal"). On 28 April 2004, the Defence filed the Appellant's Amended Notice of Appeal ("Amended Notice of Appeal").

<sup>3</sup> Prosecution Response to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 26 February 2004 ("Response").

<sup>4</sup> Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 10 December 2003, designating Judge Florence Ndepele Mwachande Mumba to serve as Pre-Appeal Judge in the present case.

<sup>5</sup> Order for the Defence to File Additional Evidence in Support of Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 26 February 2004 ("Order of 26 February 2004").

<sup>6</sup> Addendum to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence and Reply to Prosecutor's Response, 8 March 2004 ("Addendum").

<sup>7</sup> Amended Prosecution Response to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 12 March 2004 ("Amended Response").

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have been discovered through the exercise of due diligence.<sup>8</sup> On 13 May 2004, the "Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence" was filed confidentially.<sup>9</sup> The Prosecution filed a response on 18 May 2004 opposing the Motion, the Addendum, and the Detailed Explanation.<sup>10</sup> In a letter received by the Appeals Chamber on 21 May 2004, the Appellant requested an extension of time to reply to the Response to Detailed Explanation, and on 24 May 2004, the Defence filed a reply.<sup>11</sup> On 3 June, the Defence filed confidentially a request to supplement the Detailed Explanation, on the basis that the Reply was filed without the Appellant's input.<sup>12</sup> The Prosecution filed a response on 14 June 2004 opposing the Request.<sup>13</sup> On 15 June 2004, the Appeals Chamber issued its "Decision on Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24 2004", in which the Defence was granted leave to file an amended reply to the Response to Detailed Explanation.<sup>14</sup> The Amended Reply, filed confidentially by the Defence on 22 June 2004, did not contain any further submissions in reply to the Response to Detailed Explanation since, having reviewed the proposed submissions of the Appellant, the Defence was of the opinion that the proposed submissions did not fall within the scope of Rule 115 of the Rules, or the Decision of 15 June 2004.<sup>15</sup>

#### B. The Motion

5. In the Motion, the Appellant seeks to have the following items admitted as additional evidence on appeal:

- (a) The open and closed session transcripts of the testimony of Prosecution Witness GAP given in the trial of *Bizimungu et al*<sup>16</sup> on 19-20 January 2004;

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<sup>8</sup> Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 May 2004 ("Order of 4 May 2004").

<sup>9</sup> Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 13 May 2004 ("Detailed Explanation").

<sup>10</sup> Prosecution's Response to Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 18 May 2004 ("Response to Detailed Explanation").

<sup>11</sup> Appellant's Reply to Prosecution's Response to Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 24 May 2004 ("Reply").

<sup>12</sup> Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24, 2004, 3 June 2004 ("Request").

<sup>13</sup> Prosecution Response to Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24, 2004, 14 June 2004.

<sup>14</sup> Decision on Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24 2004, 15 June 2004 ("Decision of 15 June 2004").

<sup>15</sup> Appellant's Amended Reply to the Prosecution's Response to Appellant's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 22 June 2004.

<sup>16</sup> *The Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50 ("*Bizimungu et al*"), currently before Trial Chamber II. Case No. ICTR-98-44A-A

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(b) Prosecution Witness GAP's pre-trial statements of 24 September 2002, 16 October 2002, 19 March 2003, 17 April 2003, 14 July 2003, 15 July 2003, and 25 September 2003, entered into evidence in the trial of *Bizimungu et al*;

(c) The pre-trial statements of Prosecution Witness GFF, dated 26 September 2002, 17 July 2003 and November 2003, a proposed Prosecution witness in the case of *Nzitorera*<sup>17</sup>;

(d) The pre-trial statements of Prosecution Witness GFA, dated 24 September 2002 and October 2002, a proposed Prosecution witness in the case of *Bizimungu et al*;

(e) The pre-trial statement of Prosecution Witness GBU, dated 13 November 2002, a proposed Prosecution witness in the case of *Nzitorera*;

(f) A confessional statement of Prosecution Witness GDD made to the Rwandan Judicial Authorities on 30 June 1998; and

(g) The pre-trial statements of Prosecution Witness GBC, dated September 2002 and 19 June 2003, a proposed Prosecution witness in the case of *Nzitorera*.

6. The Prosecution opposes the Motion and the Addendum on the grounds that "the Appellant has failed to show that the evidence could have had an impact on the verdict such that the verdict was unsafe."<sup>18</sup>

### C. Applicable law

7. Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), as amended on 27 May 2003, reads as follows:

(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 117.

(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.

<sup>17</sup> *The Prosecutor v. Nzitorera*, Case No. ICTR-98-44-I ("*Nzitorera*"), currently before Trial Chamber III.

<sup>18</sup> Response, para. 2; Amended Response, para. 4. In the Response, the Prosecution opposed the Motion on two additional grounds, namely that the Appellant failed to identify how the evidence of the witnesses is relevant to a material issue in the trial and the Appellant failed to provide the Appeals Chamber with the evidence sought for admission. However, the Prosecution abandoned these arguments upon the Appellant's filing of the Addendum.  
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8. The Appeals Chamber will only consider those items of evidence as potentially admissible which have in fact been submitted, are accompanied by precise references to the findings of fact made by Trial Chamber to which the evidence is directed, and include detailed submissions on the effect of that evidence on the verdict.

9. A party seeking to have additional evidence admitted on appeal must satisfy all the elements that the test set out in Rule 115 of the Rules imposes. The moving party is required primarily to establish that the evidence sought for admission "was not available at trial" in any form<sup>19</sup> and that it could not have been discovered through the exercise of due diligence.<sup>20</sup>

10. Where the Appeals Chamber is satisfied that the evidence sought for admission was unavailable at trial and could not have been discovered through the exercise of due diligence, the moving party must show that the evidence is relevant and credible "such that it *could* have had an impact on the verdict, *i.e.*, could have shown, in the case of a request by a defendant, that a conviction was unsafe."<sup>21</sup>

11. Where the Appeals Chamber considers that the evidence was available at trial or could have been discovered through the exercise of due diligence, "the moving party is required to undertake the additional burden of establishing that the exclusion of the additional evidence *would* lead to a miscarriage of justice,"<sup>22</sup> in that if it had been available at the trial it *would* have affected the verdict."<sup>23</sup> The purpose of this heightened standard is "to ensure the finality of judgements and the application of maximum effort by counsel at trial to obtain and present the relevant evidence."<sup>24</sup>

12. The Appeals Chamber will consider where appropriate the significance of the additional evidence in the context of the evidence admitted at trial and on appeal and not in isolation.<sup>25</sup>

<sup>19</sup> See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("Krstić Subpoenas Decision"), para. 4. See also *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 ("Krstić Rule 115 Decision"), p. 3.

<sup>20</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for Extension of Time Limit and Admission of Additional Evidence, 15 October 1998 ("Tadić Rule 115 Decision"), paras 35-45; *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("Kupreškić Appeal Judgement"), para. 50; *Prosecutor v. Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 ("Delić Review Decision"), para. 10; *Krstić Subpoenas Decision*, para. 5; *Krstić Rule 115 Decision*, p.3.

<sup>21</sup> *Krstić Rule 115 Decision*, p. 3. See also *Kupreškić Appeal Judgement*, para. 68.

<sup>22</sup> See *Prosecutor v. Barayagwiza*, Case No. ICTR-97-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 11.

<sup>23</sup> *Krstić Rule 115 Decision*, p. 4. See also *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Decision, 31 May 2000, paras. 41, 44; *Delić Review Decision*, para. 15; *Krstić Subpoenas Decision*, para. 16.

<sup>24</sup> *Prosecutor v. Krstić*, Case No.: IT-98-33-A, Reasons for the Decisions on Applications for Admission of Additional Evidence, 6 April 2004, (*Krstić Reasons for Rule 115 Decision*), para. 12.

<sup>25</sup> See *Krstić Rule 115 Decision*, p. 4. See also *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-A, Decision on the Motions of the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001 ("Kupreškić Rule 115 Decision"), para. 12; and *Kupreškić Appeal Judgement*, paras. 66 and 75.

#### D. Preliminary findings

13. The Appeals Chamber recalls that the Appellant was reminded of these requirements in the Order of 26 February 2004. Despite this reminder, the Appellant failed to submit in the Addendum, or to discuss in the substantive arguments of the Motion and Addendum, the following items of evidence: the open and closed session transcripts of the testimony of Witness GAP given at trial on 19-20 January 2004; Witness GAP's statements of 15 July 2003 and 25 September 2003; Witness GFF's statement of November 2003; Witness GFA's pre-trial statement of October 2002; and Witness GBC's pre-trial statement of September 2002. The Appeals Chamber therefore finds that these items are not admissible as additional evidence on appeal.

14. In addition, with respect to Witness GDD's confessional statement to the Rwandan authorities dated 30 June 1998, it is clear from the record that this statement was available at trial as it was in the possession of the Defence at that time. The Appeals Chamber notes that the authenticity and reliability of the confessional statement is questionable. Furthermore, the Appeals Chamber does not find that its exclusion on appeal would constitute a miscarriage of justice such that if it had been admitted at trial, it would have affected the outcome of the verdict of guilt against the Appellant under Count 2 for genocide or Count 6 for crimes against humanity. The Appeals Chamber does not find that the content of Witness GDD's alleged confessional statement contradicts his trial testimony thereby undermining his credibility. In his alleged confessional statement, Witness GDD named those individuals who directly *participated* with him in the massacres in Nkuli *Commune* and did not mention the Appellant's role in planning or organising them. The Appeals Chamber does not find that this omission conflicts with or undermines Witness GDD's testimony at trial that the Appellant played a central role in convening the meeting for planning the massacres the night before they occurred or in organising their commission the following morning. Furthermore, Witness GDD stated in his confessional statement that he was a simple farmer at the time of the massacres. The Appeals Chamber fails to see how this necessarily contradicts his testimony at trial that he was employed at the Nkuli *Commune*. Witness GDD could have identified his profession or training as that of being a farmer while also being employed at the *commune* for that specific time period. Finally, even if the Appeals Chamber were to consider the alleged confessional statement of GDD to be reliable and to have undermined Witness GDD's credibility in his testimony at trial, the Appeals Chamber notes that the evidence still would not have affected the Trial Chamber's verdict of guilt under counts two and six against the Appellant for involvement and participation in attacks in Nkuli *Commune*. The Trial Chamber made several other findings of fact in support of a finding of guilt against the Appellant on those counts.<sup>26</sup>

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<sup>26</sup> See Trial Judgement at paras. 819-828 and 896-904.  
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## E. Discussion

15. The Appeals Chamber recalls that the admissibility of additional evidence on appeal depends on the non-availability of the evidence at trial in spite of the exercise of due diligence, and that the moving party is required to provide detailed submissions as to this issue.<sup>27</sup> The Appellant was reminded of this requirement in the Order of 4 May 2004. In determining admissibility, the Appeals Chamber would usually first decide whether or not the evidence was available at trial. However, as the Appellant has failed to establish that the evidence *could* have had an impact on the verdict of the Trial Judgement, for the reasons set out below, and has therefore failed to satisfy the less stringent test, the Appeals Chamber finds it unnecessary to first address the issue of availability.

### 1. **Witness GAP**

16. The Appellant argues that Witness GAP's statements of 24 September 2002, 16 October 2002, 19 March 2003, 17 April 2003 and 14 July 2003 contradict his trial testimony such that his overall credibility is called into question and, consequently, the findings of the Trial Chamber based on that testimony.<sup>28</sup> Specifically, the Appellant argues that Witness GAP's statements impact on the Trial Chamber's findings with respect to the Appellant's involvement in the training of the *Interahamwe* in Mukingo Commune,<sup>29</sup> the Appellant's leadership of the *Interahamwe*,<sup>30</sup> and the Appellant's activities on 7 April 1994.<sup>31</sup>

#### (a) Witness GAP's participation in the genocide of 1994

17. The Appellant claims that Witness GAP's statements of 16 October 2002, 19 March 2003, 17 April 2003 and 14 July 2003 contradict his trial testimony concerning his participation in the massacres for which he was being detained in Rwanda. In the written statements, Witness GAP admits before the Rwandan authorities to killing two Tutsis, being responsible for a roadblock where four Tutsis were killed, and pleading guilty to his participation in the genocide in 1994. According to the Appellant, Witness GAP claimed at trial that he was innocent of the crimes for which he was being detained in Rwanda.

18. The Appeals Chamber finds that Witness GAP's above statements could not have affected the verdict of the Trial Chamber. The Appeals Chamber points out that Witness GAP's statements

<sup>27</sup> Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002. Paragraph 7 provides, *inter alia*, that motions filed pursuant to Rule 115 of the Rules shall contain "arguments in relation to the requirement of non-availability at trial".

<sup>28</sup> Motion, paras. 50-52; Addendum, paras. 8-28.

<sup>29</sup> Trial Judgement, para. 400.

<sup>30</sup> Trial Judgement, para. 404.

<sup>31</sup> Trial Judgement, para. 483.

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refer to crimes committed in 1994, whereas in his testimony at trial, he failed to plead guilty to the crimes with which he was charged with concerning massacres which occurred in 1991.<sup>32</sup> In addition, the Appeals Chamber notes that Witness GAP did not deny, outright, participating in the massacres of 1991. During cross-examination, Witness GAP stated that "even crimes that I may have committed, I committed them under [the Appellant's] authority."<sup>33</sup>

(b) The Appellant's involvement in the training of the *Interahamwe*

19. The Appellant next argues that there exist inconsistencies between Witness GAP's statement of 14 July 2003, and his testimony on the Appellant's involvement in the training of the *Interahamwe*. In his statement, Witness GAP claims that he provided military training to the *Interahamwe*. According to the Appellant, Witness GAP deliberately misled the Trial Chamber in his testimony at trial to believe that the Appellant, and not him, was actively involved in the training of the *Interahamwe*.<sup>34</sup>

20. In the view of the Appeals Chamber, the fact that the witness indicated in his written statement of 14 July 2003, taken in another case, that he gave military training to the *Interahamwe*, does not contradict his testimony or preclude that the Appellant also actively participated in the training of the *Interahamwe*. Moreover, on the basis of the references provided by the Appellant, there is no indication that the witness deliberately misled the Trial Chamber on the matter.

(c) Delivery of weapons

21. The Appellant argues that Witness GAP's pre-trial statement of 24 September 2002, in which he claims that, in the early morning of 7 April 1994, weapons were delivered to the *commune* office and that the Appellant had these weapons loaded onto his truck, is contrary to his trial testimony. The Appellant submits that Witness GAP never testified to these allegations, and that if he were believed, it would also be inconsistent with the testimony of Witness GAO that the Appellant, at the request of a certain Michel Niyigaba, arranged for weapons to be delivered to the *Interahamwe* at Rwankeri. The Appellant argues that had he had weapons in his truck and he was present at Rwankeri, there would have been no need on his part to request another delivery of weapons to the *Interahamwe* there.

22. Having reviewed Witness GAP's pre-trial statement of 24 September 2002 and the relevant trial testimony, the Appeals Chamber finds that the additional evidence could not have affected the Trial Chamber's verdict. Even if the weapons had been loaded onto the Appellant's truck and he

<sup>32</sup> T. 3 December 2001, pp. 41-42, 45.

<sup>33</sup> T. 3 December 2001, p. 49.

<sup>34</sup> Motion, para. 51 ; Addendum, para. 9.

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had been present at Rwankeri with the weapons, it does not necessarily follow that the Appellant did not ask that more weapons be delivered to the *Interahamwe* at Rwankeri.

(d) Witness GAP's movements on 7 April 1994

23. The Appellant contends that Witness GAP's statement of 24 September 2002 contradicts Witness GAP's trial testimony that the *Bourgmestre* ordered him not to leave the *commune* office for the entire day of 7 April 1994. In his statement, Witness GAP claimed that on the morning of 7 April 1994, he and the *Bourgmestre* followed the Appellant to Byangabo in their official vehicle.

24. Witness GAP's pre-trial statement of 24 September 2002 is not inconsistent with his trial testimony concerning the events which took place at the Mukingo *bureau communal* on the morning of 7 April 1994. At trial, Witness GAP testified that in the early morning of 7 April 1994, he was present when the Appellant arrived at the *bureau communal* and for the duration of the Appellant's meeting with the *Bourgmestre*, where the Appellant asked the *Bourgmestre* for some police officers to help the *Interahamwe* kill Tutsis.<sup>35</sup> Although the witness did indicate that he "remained at [his] duty station", this need not be interpreted to mean that the witness was ordered by the *Bourgmestre* to stay at the *commune* office.<sup>36</sup> Having reviewed the trial testimony of Witness GAP, the Appeals Chamber is of the opinion that Witness GAP's statement about his movements *after* the Appellant's meeting with the *Bourgmestre* is not inconsistent with his trial testimony. Moreover, Witness GAP's pre-trial statement actually confirms his trial testimony concerning the Appellant's arrival at the Mukingo *bureau communal* in the early morning of 7 April 1994, and the Appellant's request for police officers. For the foregoing reasons, the Appeals Chamber finds that the pre-trial statement of 24 September 2002 could not have affected the Trial Chamber's verdict.

**2. Witness GFF**

25. According to the Appellant, Witness GFF's statements of 26 September 2002 and 17 July 2003 conflict with the trial testimonies of Witnesses GDD, GAO and GBV. He contends that as a result of these inconsistencies, these witnesses' credibility as well the findings of the Trial Chamber based on their evidence, are called into question.<sup>37</sup>

(a) The Appellant's movements on the night of 6 April and morning of 7 April 1994

26. The Appellant submits that, according to his statement of 26 September 2002, Witness GFF saw the Appellant at Nzirorera's house in Mukingo *commune* at "precisely the time period" that Witness GDD, in his trial testimony, claimed that the Appellant left the meeting held at the canteen

<sup>35</sup> See e.g., T. 28 November, pp. 15 and 120-121; T. 3 December 2001, pp. 105, 111, 118-124.

<sup>36</sup> T. 4 December 2001, p. 47.

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next to the Nkuli *bureau communal*. In addition, the Appellant argues that, according to his statement of 17 July 2003, Witness GFF claimed that sometime after Nzirorera's mother informed him "on the late evening" that the President had been killed, the Appellant brought weapons in his communal vehicle and distributed them to the *Interahamwe* at a meeting in Mukingo. The Appellant claims that Witness GFF's evidence conflicts with the trial testimony of Witness GDD that he met the Appellant between 22:00hrs and 23:00hrs on 6 April 1994 at the *commune* office in Nkuli.<sup>38</sup>

27. In the view of the Appeals Chamber, Witness GFF's statements do not contradict Witness GDD's trial testimony with regard to the timing of events on the late night and early morning of 6 and 7 April 1994. The Appeals Chamber points out that there is no clear delineation of time in the statements of Witness GFF with respect to the Appellant's movements after the meeting at the canteen, nor any indication of what "late evening" actually means. Compared to Witness GDD's trial testimony on the timing of events on the night of 6 and 7 April 1994, Witness GFF's evidence is sparse and lacking in detail. As such, the Appeals Chamber does not find that Witness GFF's evidence constitutes a significant departure from the trial testimony of Witness GDD, or that the Trial Chamber's verdict could have been different had this evidence been available at trial.

(b) The events that unfolded at Byangabo on the morning of 7 April 1994

28. According to the Appellant, Witness GFF's statement of 26 September 2002 contradicts the trial testimony of Witnesses GAO<sup>39</sup> and GBV<sup>40</sup> concerning the events on the morning of 7 April 1994. The Appellant contends that Witness GFF's description of the killing of Rukara and subsequent massacres of Tutsis at Byangabo, conflicts with the evidence of Witnesses GAO and GBV that the Appellant was present at Byangabo, where he incited the *Interahamwe* to kill Tutsis, immediately before Rukara was killed. The Appellant further argues that Witness GFF's failure to mention the Appellant with regard to the incitement of the *Interahamwe* to kill Tutsis at Byangabo Market on the morning of 7 April 1994, is at variance with the trial testimony of Witnesses GAO and GBV.

29. The Appeals Chamber notes that Witness GFF's statement is sparse and superficial with respect to Rukara's death and the events that unfolded at Byangabo market on the morning of 7 April 1994, and, as such, it does not constitute a departure from Witness GBV and GAO's detailed testimony on these points. Witness GFF's statement on the death of Rukara is that he, Witness GFF, and Michel Niyigaba killed him, and that they did so as an example for others to follow. He says

<sup>37</sup> Motion, paras 53-54; Addendum, paras 29-54.

<sup>38</sup> Referring to T. 3 October 2001, p.20; T. 4 October 2001, pp. 64-65.

<sup>39</sup> T. 23 July 2001, p. 25.

<sup>40</sup> T. 4 July 2001, pp. 106-107.

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nothing about where or how Rukara was killed. Nor does Witness GFF go into detail about events at Byangabo market. Given this lack of detail in the statement, the Appeals Chamber considers that the failure to mention the Appellant in relation to Byangabo is not in itself at variance with the evidence of Witnesses GBV and GAO.

**3. Witness GFA**

(a) The Appellant's presence with the *Interahamwe* at Byangabo on 7 April 1994

30. The Appellant submits that Witness GFA's pre-trial statement of 24 September 2002 conflicts with the trial testimony of Witnesses GAO and GBV such that it calls into question the credibility of these witnesses and, consequently, the findings of the Trial Chamber based on their testimony.<sup>41</sup>

31. The Appellant claims that Witness GFA's statement of 24 September 2002 conflicts with the trial testimony of Witnesses GAO and GBV that the Appellant was present at Byangabo, and that he addressed a number of the *Interahamwe*. He contends that the statement of Witness GFA is irreconcilable with the evidence of Witnesses GAO and GBV that the Appellant met with the *Interahamwe* at Byangabo, incited them to kill Tutsis, and that immediately thereafter Rukara was killed.<sup>42</sup>

32. The Appeals Chamber does not consider that there exist such inconsistencies between the statement of Witness GFA and the evidence of Witnesses GAO and GBV. In his statement, Witness GFA, who was at Byangabo, clearly mentioned seeing the Appellant on the morning of 7 April 1994, with the president of the *Interahamwe* amongst others. The witness then explains how, after the meeting, he was involved in the killing of Rukara. Although Witness GFA's statement may not be as detailed as the testimony of Witnesses GAO and GBV with respect to the events that unfolded at Byangabo Market on the morning of 7 April 1994, it is generally consistent with their evidence as summarised by the Trial Chamber.<sup>43</sup>

(b) The delivery and distribution of weapons at Nkuli Commune on 7 April 1994

33. The Appellant submits that Witness GFA's indication in his witness statement of 24 September 2002, that around 06:00hrs he saw the Appellant at Nzirorera's house, conflicts with Witness GDD's trial testimony that between 05:00hrs and 06:00hrs the Appellant was woken up by a communal policeman to be informed about a delivery of weapons at Nkuli *bureau communal*.<sup>44</sup>

<sup>41</sup> Motion, paras 56-57; Addendum, paras 86-105.

<sup>42</sup> Referring to T. 23 July 2001, p. 25 (GAO); T. 4 July 2001, pp. 106-107 (GBV).

<sup>43</sup> Trial Judgement, paras. 490-493.

<sup>44</sup> Addendum, paras. 88-89 (referring to T. 3 October 2001, pp. 29-32).

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34. In the view of the Appeals Chamber, Witness GFA's assertions in his statement about the timing of events on the morning of 7 April 1994 do not contradict the trial testimony of Witness GDD. The Appeals Chamber notes that it is entirely possible that the Appellant was woken up between 05:00hrs and 06:00hrs and that he was present at the meeting at the house of Nzirorera's mother at approximately 06:00hrs. Thus the Appeals Chamber finds that Witness GDD's credibility is not affected and for the foregoing reasons, Witness GFA's pre-trial statement of 24 September 2002 could not have affected the Trial Chamber's verdict.

#### 4. Witness GBU

35. The Appellant submits that Witness GBU's statement of 13 November 2002 contradicts the trial testimony of Witnesses GAO, GBV and GDD such that it undermines the credibility of these Witnesses and, consequently, the findings of the Trial Chamber based on their trial testimony.<sup>45</sup>

36. The Appellant claims that, "on information and belief," Witness GBU is in fact Prosecution Witness GAO. He argues on this basis that given that Witness GAO had testified that he could neither read nor write, the fact that he signed the statement of 13 November 2002 "completely destroys" his credibility as it would suggest that, contrary to the Trial Chamber's findings,<sup>46</sup> Witness GAO is in fact literate. As noted by the Prosecution<sup>47</sup>, the Appeals Chamber points out that a person's ability to sign his or her own name does not necessarily mean that he or she is literate. Moreover, even were the Appeals Chamber to accept that there were question marks surrounding Witness GAO's claim of illiteracy, the Trial Chamber's relevant findings were based not solely on his evidence, but also notably on that of Witnesses GBV, GBE and GDQ.

37. The Appellant also posits that there are a number of inconsistencies between Witness GBU's statement and the trial testimony of Witnesses GDD, GAO and GBV regarding the events of 7 April 1994. The Appeals Chamber has considered these and finds them to be without any substance.

38. With respect to the vehicle in which the Appellant was seen, Witness GBU's statement is not inherently inconsistent with the evidence of Witnesses GBV and GDD. Witness GBU claims that around 06:00hrs he saw the Appellant arrive at a meeting at Nzirorera's house in a white Suzuki with a certain Bambonye. Witness GDD saw the Appellant in a red Hilux pick-up truck with the *Interahamwe* and the President of the CDR after the delivery of weapons at the Nkuli *bureau communal*, which occurred between 05:00hrs and 06:00hrs.<sup>48</sup> Witness GBV spoke of seeing the

<sup>45</sup> Motion, para. 55; Addendum, para. 55 - 85.

<sup>46</sup> Trial Judgement, para. 522.

<sup>47</sup> Amended Response, para. 36.

<sup>48</sup> See Trial Judgement para. 474; T. 3 October 2001, pp. 33-34, 37 and 38-40.  
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Appellant at Byangabo in a red Hilux with the *Interahamwe* between 08:00hrs and 09:00hrs.<sup>49</sup> Each of the witnesses speaks of a different occasion on which the Appellant was seen and, given the timings of the sightings, their evidence is not incompatible.

39. The Appellant also submits that Witness GBU's statement conflicts with the testimony of Witnesses GAO and GBV with respect to the events that unfolded at Byangabo.<sup>50</sup> Witness GBU claims that after the meeting at the house of Nzirodera's mother, which had started around 06:00hrs, the Appellant and a certain Bambonye came to look for him and other *Interahamwe* in a market close to the witness's house. The Appellant recounted the meeting and told them of the decision taken at the meeting to kill Tutsis. There is no indication in the witness's statement as to how long the meeting at Nzirodera mother's house lasted. Witness GAO and GBV testified that between 08:00hrs and 09:00hrs, the Appellant spoke to a number of the *Interahamwe* at Byangabo market, giving them instructions to kill Tutsis. Witness GAO also mentioned Bambonye.<sup>51</sup>

40. Although Witness GBU's statement does not provide an exact time, except to say that it was after the meeting which had started around 06:00hrs, Witnesses GAO and GBV corroborate each other in estimating that they saw the Appellant between 08:00hrs and 09:00hrs. It remains thus that Witnesses GBU, GAO and GBV, all place the Appellant at Byangabo Market on the morning of 7 April 1994 giving instructions to the *Interahamwe* to kill Tutsis. In the view of the Appeals Chamber, the fact that Witness GAO provides further details and describes the Appellant also speaking to the *Interahamwe* at his bar is not irreconcilable with Witness GBU's limited statement on the events.

41. Finally, as indicated above, the Appeals Chamber does not find that Witness GBU's claim that "at about 06:00 hours," he saw the Appellant at the house of Nzirodera's mother, conflicts with Witness GDD's testimony that the Appellant was woken up subsequent to the delivery of weapons at Nkuli *bureau communal* between 05:00hrs and 06:00hrs on 7 April 1994. It is entirely possible that the Appellant was woken up between 05:00hrs and 06:00hrs and that he attended the meeting at the house of Nzirodera's mother at approximately 06:00hrs.

42. Thus, the Appeals Chamber considers that Witness GBU's pre-trial statement could not have affected the verdict had it been available at trial.

<sup>49</sup> T. 4 July 2001, pp. 106-112.

<sup>50</sup> Referring notably to T. 24 July 2001, pp. 28-29 (GAO) and T. 4 July 2001, pp. 105-106; T. 5 July 2001, pp. 114-116 (GBV).

<sup>51</sup> See Trial Judgement, paras 490-493.

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## 5. Witness GBC

43. Finally, the Appellant submits that Witness GBC's statement of 19 June 2003 contradicts the trial testimony of Witness GDD such that it undermines the credibility of Witness GDD and, consequently, the findings of the Trial Chamber based on this trial testimony. Witness GBC, who was at his aunt's house in Gitwa sector, Nkuli *commune*, indicates in his statement that around 05:00hrs on the morning of 7 April 1994, "Hutus dressed in MRND and CDR uniforms" killed his aunt and about 50 other relatives in the neighbourhood. The attackers were armed with guns, grenades and machetes. The Appellant argues that Witness GBC's statement calls into question notably Witness GDD's evidence and the findings of the Trial Chamber that killings of Tutsis in Nkuli *commune* had been planned at the meeting on the evening of 6 April 1994 at the Nkuli canteen; that during the meeting the Appellant encouraged participants to kill Tutsis; and that the Appellant had made the necessary arrangements for weapons to be delivered from the Mukamira army camp the following morning. The Appellant also contends that Witness GBC's claim that Nzirorera delivered 10 boxes of weapons around 07:00hrs on 7 April 2004 at the Nkuli *commune* office contradicts Witness GDD's evidence that the Appellant was personally present at the office to acknowledge the delivery of the weapons.<sup>52</sup>

44. The Appeals Chamber finds that there is no inconsistency between the statement of Witnesses GDC and GDD's evidence. The Appellant does not demonstrate how the occurrence of the killings in Gitwa sector, in any way cast doubt over his involvement at the meeting the night before to plan killings of the Tutsis. Quite the reverse, the statement of Witness GBC would be consistent with the evidence in the case that massacres of Tutsis started on the morning of 7 April. The mere fact that Witness GBC saw massacres not directly involving the Appellant does not undermine Witness GDD's evidence that the Appellant participated in a meeting the night before to plan killings of Tutsis.

45. With respect to the delivery of weapons at Nkuli *commune*, Witness GDD testified specifically about the delivery of weapons requested by the Appellant from the army camp during the meeting of 6 April at the Nkuli *commune*. This delivery occurred between 05:00hrs and 06:00hrs on 7 April. According to Witness GDD, the Appellant thereafter left for Mukingo. Witness GDD's evidence is that the weapons were then distributed to the *Interahamwe*. Witness GBC claims that Nzirorera brought machetes and boxes around 07:00hrs, which were then stored in the *commune* office. The fact that Witness GBC does not mention the Appellant is consistent with GDD's testimony that he had left to go to Mukingo. In the view of the Appeals Chamber, Witnesses GDD and GBC seem to be referring to two separate events.

<sup>52</sup> Motion, paras 58-59; Addendum, paras 106-121.  
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### **F. Disposition**

46. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

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

Penurbaan

Judge Fausto Pocar, Presiding

Done this 28th day of October 2004,  
At the Hague,  
The Netherlands.

[Seal of the International Tribunal]

