

ICTR-99-46-A
10 December 04
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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Adama Dieng

Decision of: 10 December 2004

ICTR Appeals Chamber
Date: 10 December 04
Action:
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Parties, Judicial Hr
LOs, LSS [Signature]

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ICTR
JUDICIAL PROCEEDINGS ARCHIVES

THE PROSECUTOR

v.

André NTAGERURA
Emmanuel BAGAMBIKI
Samuel IMANISHIMWE

Case No. ICTR-99-46-A

**DECISION ON PROSECUTION MOTION FOR ADMISSION
OF ADDITIONAL EVIDENCE**

Office of the Prosecutor

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIGU-MORRISON
SIGNATURE: [Signature] DATE: 10/12/04

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 (hereinafter "Tribunal") is seized of the "Prosecution Motion for Admission of Additional Evidence, pursuant to Rule 115 of the Rules of Procedure and Evidence" (hereinafter "Motion for Additional Evidence"), filed on 10 May 2004.

A. Procedural background

2. On 25 February 2004, Trial Chamber III rendered its Judgement acquitting André Ntagerura (hereinafter "Ntagerura") and Emmanuel Bagambiki (hereinafter "Bagambiki") of the charges brought against them, and sentenced Samuel Imanishimwe to 27 years imprisonment for crimes against humanity, genocide and violations of common Article 3 to the Geneva Conventions and of Additional Protocol II.¹ Thereafter, Samuel Imanishimwe filed a Notice of Appeal against the Judgement, whereas the Prosecution appealed against the acquittals of Ntagerura and Bagambiki, as well as against some aspects of Samuel Imanishimwe's convictions and sentence.

3. Relying on Rule 115 of the Rules of Procedure and Evidence of the Tribunal (hereinafter "Rules"), the Prosecution now seeks the admission of two witness statements as additional evidence in furtherance of its appeal. The witnesses were code-named AST and ASV for purposes of protection. The two statements concern Bagambiki's responsibility for acts which allegedly took place in the Gashirabwoba football field, and for which the Trial Chamber found Bagambiki not guilty. The Prosecution also requests protective measures for Witnesses AST and ASV.

4. In decisions rendered on 18 and 19 May 2004, the Pre-Appeal Judge granted leave to Bagambiki and Ntagerura to file their response to the Motion for Additional Evidence within ten days of being served with the French translation of the said Motion.²

5. On 2 June 2004, the Pre-Appeal Judge issued an order inviting the Prosecution to proceed with the confidential filing of the unredacted versions of statements by Witnesses AST and ASV for

¹ *The Prosecution v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, ICTR-99-46-T, Judgement and Sentence, 25 February 2004 (hereinafter "Judgement").

which it sought admission, and requested the Prosecution to attach to the new motion the up-to-date details justifying the protective measures requested for the two witnesses.³

6. Pursuant to this Order, the Prosecution filed on 7 June 2004 the unredacted versions of statements by Witnesses AST and ASV under seal.⁴ On the same day, the Prosecution filed the "Prosecution Motion for Protective Measures for Witnesses whose Evidence is being tendered under Rule 115" (hereinafter "Motion for Protective Measures") in response to the Pre-Appeal Judge's request. In the said motion, to which it attached new documents to serve as justification for granting the protective measures requested, the Prosecution reiterated its request that the protective measures prescribed in the Trial Chamber's Decision of 3 March 2000⁵ be extended to Witnesses AST and ASV.

7. On 30 June 2004, Bagambiki filed his response to the Motion for Protective Measures.⁶ Following service of the French translation of the Motion for Additional Evidence,⁷ Bagambiki confidentially filed his response on 2 July 2004,⁸ whereas Ntagerura filed his response on 6 July 2004.⁹ The Prosecution filed its reply to Ntagerura's Response on 9 July 2004¹⁰ and its reply to Bagambiki's Response on 19 July 2004.¹¹ In its reply of 19 July 2004, the Prosecution directly referred to the arguments raised in its Reply of 9 July 2004.

² *Décision relative à la requête de la Défense d'Emmanuel Bagambiki en vue du report du délai du dépôt de la réponse à une requête du Procureur*, 18 May 2004; *Décision relative à la requête de André Ntagerura pour report du délai de réponse à la requête du Procureur*, 19 May 2004.

³ *Ordonnance*, 2 June 2004.

⁴ Witness Statements Filed Confidentially in Relation to Prosecution's Motion for Additional Evidence under Rule 115, Under Seal, 7 June 2004.

⁵ *The Prosecution v. Emmanuel Bagambiki and Samuel Imanishimwe*, ICTR-97-36-I and 36-T, Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses, 3 March 2000.

⁶ *Réponse de la Défense de Monsieur Emmanuel Bagambiki à la Requête du Procureur aux fins de mesures de protection en faveur des témoins dont les dépositions sont envisagées en vertu de l'article 115*, 30 June 2004.

⁷ The Appeals Chamber notes that the French translation of the Motion for Additional Evidence was served on Bagambiki on 23 June 2004, and on Ntagerura on 28 June 2004.

⁸ *Réponse de la Défense de Monsieur Emmanuel Bagambiki à la Requête du Procureur aux fins d'admission de moyens de preuve supplémentaires conformément à l'article 115 du Règlement de procédure et preuve*, 2 July 2004 (hereinafter "Bagambiki's Response").

⁹ *Réponse d'André Ntagerura à la Requête du Procureur aux fins d'admission de moyens de preuve supplémentaires conformément à l'article 115 du Règlement de procédure et de preuve*, 6 July 2004 (hereinafter "Ntagerura's Response").

¹⁰ Prosecutor's Reply to "Réponse d'André Ntagerura à la Requête du Procureur aux fins d'admission de moyens de preuve supplémentaires conformément à l'article 115 du Règlement de Procédure et de Preuve", 9 July 2004 (hereinafter "Reply").

¹¹ Prosecutor's Reply to "Réponse de la Défense de Monsieur Emmanuel Bagambiki à la Requête du Procureur aux fins d'admission de moyens de preuve supplémentaires conformément à l'article 115 du Règlement de Procédure et Preuve", 19 July 2004. The Appeals Chamber notes that Bagambiki's Response was served on the Chamber and on the Prosecution only on 14 July 2004. Accordingly, the Chamber considers that this reply was filed within the prescribed time limit.

B. Applicable law

8. The admissibility of additional evidence is governed by Rule 115 of the Rules, which reads as follows:

Rule 115

Additional Evidence

(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.

9. The admission of additional evidence is subject to several conditions. The evidence submitted must first be relevant and credible. Moreover, the party adducing the additional evidence must establish that the said evidence “was not available at trial” in any form whatsoever,¹² and demonstrate that it could not have been discovered through the exercise of due diligence.¹³ This of necessity implies that the party in question must show that it sought to make “appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the

¹² Rule 115(B) of the Rules. See *The Prosecution v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Decision on Request for Admission of Additional Evidence, 8 April 2004, para. 5; *Juvénal Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Decision on Defense Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004 (“Kajelijeli Rule 115 Decision”), para. 10. See also the decisions of the ICTY Appeals Chamber in: *Prosecution v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“Krstić Subpoenas Decision”), para. 4, and Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 (“Krstić Rule 115 Decision”), p. 3.

¹³ *Juvénal Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, 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, 27 February 2004, p. 2; *Kajelijeli Rule 115 Decision*, para. 9. See also the decisions of the ICTY Appeals Chamber in: *Prosecution v. Tadić*, 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 to 45; *Prosecution v. Kupreškić et al*, IT-95-16-A, Judgement, 23 October 2001 (“Kupreškić Appeal Judgement”), para. 50; *Prosecution v. Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 (“Delić Review Decision”), para. 10; *Krstić Rule 115 Decision*, p. 3.

International Tribunal to bring evidence [...] before the Trial Chamber.”¹⁴ In this connection, Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses.¹⁵ The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously.¹⁶

10. Second, any evidence that was not available at trial and could not have been discovered through the exercise of due diligence must be related to a material issue, it must be credible and must be such that it *could* have had an impact on the verdict, *i.e.* it *could* have shown that the judgement was unfounded.¹⁷

11. Where the evidence is relevant and credible but was available at trial and could have been discovered through the exercise of due diligence, the moving party will be required to establish that the exclusion of the additional evidence *would amount to* a miscarriage of justice, inasmuch as, had it been available at trial, it *would have had* an impact¹⁸ on the verdict.¹⁹

12. The Appeals Chamber also recalls that the additional evidence must always be assessed on the basis of the evidence presented at trial, and not in isolation.²⁰

C. Arguments of the parties

13. The Prosecution requests to have admitted as additional evidence statements by Witnesses AST and ASV relating to the massacre perpetrated at the Gashirabwoba football field on 12 April 1994. In support of its request, the Prosecution first submits that, although it exercised due

¹⁴ *Tadić* Rule 115 Decision, paras 40, 44 to 45, 47; *Kupreškić* Appeal Judgement, para. 50.

¹⁵ *Tadić* Rule 115 Decision, para. 40; *Kupreškić* Appeal Judgement, para. 50; *Krstić* Subpoenas Decision, para. 5.

¹⁶ *Krstić* Subpoenas Decision, para. 14.

¹⁷ *Kupreškić* Appeal Judgement, para. 68; *Krstić* Rule 115 Decision, p. 3.

¹⁸ The Appeals Chamber notes that the translation into French of this ‘test’ in ICTR and ICTY decisions varies from decision to decision and that the ‘test’ is sometimes incorrectly translated as “*pourrait causer une erreur judiciaire*”. The Appeals Chamber considers that the French translation of “the moving party will be required to establish that the exclusion of the additional evidence *would amount to* a miscarriage of justice, inasmuch as, had it been available at trial, it *would have had* an impact on the verdict” should be read as follows: “la partie requérante sera tenue d’établir que l’exclusion de ces moyens de preuve supplémentaires *entraînerait* un déni de justice, dans la mesure où s’ils avaient été disponibles au procès, ils *auraient influé* sur le jugement.”

¹⁹ *Kajelijeli* Rule 115 Decision, para. 11; *Krstić* Subpoenas Decision, para. 16; *Delić* Decision, para. 5; *Krstić* Rule 115 Decision, p. 4.

²⁰ *Prosecution v. Kupreškić et al.*, IT-95-16-A, Decision on Motions for the Admission of Additional Evidence filed by the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić, 26 February 2001, para. 12; *Prosecution v. Kupreškić et al.*, “Decision on the Admission of Additional Evidence following Hearing of 30 March 2001, 11 April 2001”, para. 8; *Kupreškić* Appeal Judgement, paras 66 and 75.

diligence, the additional evidence was not available at trial. The Prosecution further submits that the climate of insecurity and fear that prevailed at the time of trial in Cyangugu *préfecture* was such that witnesses were apprehensive about cooperating with the Tribunal.²¹ It was not until after the Judgement was pronounced that, notwithstanding the pervasive climate of anxiety, Witnesses AST and ASV, who were hitherto unknown to the Prosecution, came forward and made themselves known to it.²²

14. The Prosecution submits moreover that “this evidence, if found to be reliable and credible, could, and would, affect the Trial Chamber’s findings. The verdicts finding Bagambiki not guilty of genocide and extermination are in error.”²³ The Prosecution further submits that “the findings of the Trial Chamber regarding the lack of credibility of Prosecution Witnesses LAH and LAB, which were crucial to the not guilty verdicts, would be affected,” considering that the statements by Witnesses AST and ASV “provide support for the evidence of Witnesses LAH and LAB, respecting Bagambiki’s participation in the attack at Gashirabwoba on 12 April 1994.”²⁴

15. Bagambiki challenges the admission of the additional evidence contained in the two witness statements on the grounds that the evidence was available at trial, that it is neither reliable nor credible, and that had it been presented at trial, it would not have changed the outcome.

16. With regard to the availability of the evidence, Bagambiki submits that the Prosecution did not exercise due diligence in searching for the witnesses. According to him, the Prosecution at no time sought admission of new witnesses prior to the closing of the trial, and did not apprise the Trial Chamber of problems encountered during the investigations, nor of difficulties in identifying and locating certain witnesses.²⁵ He further submits that of the 160 witnesses identified and met by Prosecution investigators, only 41 were retained in the end; 4 eyewitnesses were specifically removed from the appearance list, whereas they could well have provided capital information on the Gashirabwoba field.²⁶ Lastly, Bagambiki submits that Witnesses AST and ASV could easily have been found by the Prosecution,²⁷ who, in addition, has not demonstrated how the fear of testifying

²¹ Motion for Additional Evidence, para. 5. See also “Solemn Declaration of Samuel Akorimo” dated 10 May 2004 attached to the Motion (“Solemn Declaration of Samuel Akorimo”).

²² Motion for Additional Evidence, para. 6; Solemn Declaration of Samuel Akorimo, paras 6 and 7.

²³ Motion for Additional Evidence, para. 7.

²⁴ *Idem.* See also paras 8 to 12.

²⁵ Bagambiki’s Response, paras 14, 17 to 20, 28 to 36.

²⁶ *Ibid.*, paras 21 to 34.

²⁷ *Ibid.*, paras 43 to 47.

would have been more significant for AST and ASV than for the other witnesses who came forward at that time.²⁸

17. Bagambiki also submits that the testimonies of Witnesses ASV and of AST are neither credible nor reliable. On the one hand, Bagambiki emphasizes that Witness ASV is not an eyewitness to some of the events he testifies about and that Witness AST even seems not to know him.²⁹ On the other hand, Bagambiki asserts that the statements by Witnesses ASV and AST contradict not only the testimony of Witness LAC, a survivor of the massacres who was deemed credible by the Trial Chamber, but also the testimonies of Witnesses LAB and LAH to which the Prosecution refers.³⁰

18. Ntagerura also challenges the Motion for Additional Evidence. He submits first of all that the said evidence was available at trial. In this regard, he highlights the fact that, between the submission of the Indictment in 1996 and the passing of the Judgement in February 2004, the Prosecution had ample time to carry out the investigations diligently.³¹ He submits that the Prosecution did not provide any proof that the investigations had been conducted diligently.³² Ntagerura further submits that, despite the alleged pervasive and generalized atmosphere of heightened anxiety, the Prosecution demonstrated that the evidence was clearly easy to obtain.³³

19. With regard to the reliability of the evidence, Ntagerura emphasizes that the statements the Prosecution is seeking to include in the appeal “*surgissent dans un contexte d’indignation de la population rwandaise suivant l’acquittement de Bagambiki et Ntagerura*”.³⁴ He points out that Witnesses ASV and AST seem not to have come forward spontaneously when the verdict was pronounced, but only as a result of the fact that the Prosecution mentioned that the acquittals of Bagambiki and Ntagerura may have been caused by the lack of evidence. Ntagerura thus submits that, in a context like this, the statements by Witnesses AST and ASV do not meet the reliability test under Rule 115 of the Rules, all the more so as the statements in question are neither sworn nor made in the form of a solemn declaration.³⁵

²⁸ *Ibid.*, paras 37 to 49.

²⁹ *Ibid.*, paras 53 to 55.

³⁰ *Ibid.*, paras 55 to 60.

³¹ Ntagerura’s Response, paras 8 to 12, 25.

³² *Ibid.*, paras 12 to 19, 22.

³³ *Ibid.*, paras 20 to 24.

³⁴ *Ibid.*, para. 41.

³⁵ *Ibid.*, para. 43.

20. Lastly, Ntagerura submits that the Prosecution has not demonstrated in what way the exclusion of the evidence would amount to a miscarriage of justice against him.³⁶ He submits that, even if the statements by Witnesses AST and ASV were to corroborate the testimonies of LAH and LAB, that would not change the outcome of the Judgement in his regard, considering that Witnesses LAH and LAB were found not to be credible.³⁷

21. In its Reply, the Prosecution recalls that Witnesses AST and ASV were not known to it either before or during trial, despite all due diligence exercised in conducting the investigations.³⁸ It submits that the testimonies of Witnesses AST and ASV are sufficiently reliable and relevant to guarantee that they would have had an impact on the verdict. According to the Prosecution, even if this evidence were to be considered as if it had been available at trial, excluding it on appeal would undoubtedly amount to a miscarriage of justice.³⁹

D. Analysis

22. The Appeals Chamber will first rule on the relevance and credibility of the evidence that the Prosecution is seeking to introduce. The Appeals Chamber finds that the statements by Witnesses AST and ASV refer to a material issue examined in the Judgement, and are therefore relevant. Turning to the credibility and reliability of the evidence, the Appeals Chamber recalls that evidence will only be found inadmissible if it is so lacking in terms of indicia of reliability as to be devoid of any probative value.⁴⁰ The Appeals Chamber emphasizes that this should not be interpreted to mean that definite proof of reliability is necessary for the evidence to be admitted. The Appeals Chamber finds that *prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.⁴¹ With regard to the reliability of the two statements here, the Appeals Chamber recognizes that the indignation felt in Cyangugu *préfecture* when the Judgement was pronounced could raise doubts as to the intentions of the witnesses who come forward only at this stage of the proceedings. *A contrario*, it is quite possible that the nature of the findings by the Trial Chamber could have pushed people who had witnessed the events to reconsider their reticence or apprehensions about giving evidence. In the absence of convincing evidence that these statements

³⁶ *Ibid.*, paras 28 and 30.

³⁷ *Ibid.*, paras 31 to 39.

³⁸ Prosecutor's Reply, paras 3 to 5.

³⁹ *Ibid.*, paras 6 to 8.

⁴⁰ *The Prosecution v. Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 286; *The Prosecution v. Rutaganda*, ICTR-96-3-A, Appeal Judgement, 26 May 2003, ("*Rutaganda Appeal Judgement*"), para. 266.

⁴¹ *Rutaganda Appeal Judgement*, para. 266 citing *Prosecution v. Delalić*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 31.

are devoid of any probative value, the Appeals Chamber finds that the evidence presented by the Prosecution here is reliable and credible for admission purposes under Rule 115.

23. Having found that the additional evidence is both relevant and credible, the Appeals Chamber must now determine whether that evidence was unavailable at trial in spite of the exercise of due diligence.

24. The sizeable number of witnesses the Prosecution identified as potential Prosecution witnesses supports the view that the atmosphere of heightened anxiety identified by the Prosecution was not such as to jeopardize the search for witnesses. The circumstances surrounding the Prosecution's initial contact with Witnesses AST and ASV, as recounted in Samuel Akorimo's Solemn Declaration,⁴² in addition to the fact that the said witnesses stated that they had been in Rwanda since 1994, with the exception of a few months in 1994 for Witness ASV, and that they are still residing in Cyangugu *préfecture*, tend to establish that these two witnesses could have been interviewed by the Prosecution at the time of the trial if it had exercised due diligence. Furthermore, the Appeals Chamber finds that the Prosecution does not show in what way it allegedly exercised due diligence, and does not show that it carried out any particular investigation at that time to present all the available evidence before the Trial Chamber. Accordingly, the Appeals Chamber finds that the evidence the Prosecution seeks to introduce on appeal was available at trial.

25. The Appeals Chamber must therefore determine whether the exclusion of the evidence in question would amount to a miscarriage of justice. The Appeals Chamber notes that Witnesses ASV and AST recounted the same version of facts concerning the circumstances surrounding the departure of Côme Simugomwa from the Gashirabwoba football field on 11 April 1994, the arrival of Bagambiki to the field on the morning of 12 April 1994, his return a short time afterwards and the shooting that followed. The Appeals Chamber notes, however, that ASV stated that he was not present during the departure of Côme Simugomwa and during Bagambiki's first visit on the morning of 12 April 1994, but rather that other refugees told him about what had happened. Contrary to the allegations of the Prosecution, the Appeals Chamber finds that the statements by Witnesses AST and ASV do not corroborate the testimonies of Witnesses LAH and LAB. Whilst Witness LAH mentions 8 April 1994 as the date on which Côme Simugomwa left, Witness LAB does not mention this event in his testimony. In addition to the fact that Witness LAH testified that the shooting with which Bagambiki was charged took place on 9 April 1994, the events recounted by Witnesses LAH and LAB differ from those referred to by Witnesses AST and ASV: nothing is

said about Bagambiki's first visit to the football field in the morning, and the account of the shooting differs quite significantly. The Appeals Chamber also notes that the Trial Chamber did not accept the testimonies of Witnesses LAH and LAB, not only because they were not adequately corroborated, but particularly because their testimonies were suspect, and were neither reliable nor credible.⁴³ The Trial Chamber preferred instead to accept the version of facts deemed convincing and credible as presented by Witness LAC, which version is partly corroborated by Witnesses AST and ASV.


26. In these circumstances, the Appeals Chamber is not satisfied that the Prosecution has established that the exclusion of the additional evidence would, in the instant case, amount to a miscarriage of justice. Accordingly, the Appeals Chamber is not convinced that, had the evidence of Witnesses AST and ASV been adduced at trial, it would have changed the outcome of the trial.

E. Disposition

27. For the foregoing reasons, the Appeals Chamber denies the Motion for Additional Evidence filed by the Prosecution. As a result, the Appeals Chamber finds the Motion for Protective Measures moot.

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

Done at The Hague, The Netherlands, on 10 December 2004.


Theodor Meron
Presiding Judge



⁴² Solemn Declaration of Samuel Akorimo, paras 6 to 7.

⁴³ Judgement, paras 438 to 440.