



Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-2001-73-A
16th September 2009
{611/H - 596/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 16 September 2009

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PROTAIS ZIGIRANYIRAZO

v.

THE PROSECUTOR

Case No. ICTR-01-73-A

**DECISION ON ZIGIRANYIRAZO'S MOTION FOR ADMISSION OF
ADDITIONAL EVIDENCE ON APPEAL**

Counsel for Protais Zigiranyirazo:

Mr. John Philpot
Mr. Peter Zaduk
Ms. Fiona Gray
Mr. Kyle Gervais

ICTR Appeals Chamber
Date: *16th September 2009*
Action: *R. Tumor*
Copied To: *Concerned Judges, SLO's, LOS, ALO's, Parties, CME, GSB.*

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NAME - NOM: *KOBEI RUMELIO A. AFANDE*
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Tribunal", "Appeals Chamber", respectively) is seized of a motion filed on 16 July 2009 by Mr. Zigiranyirazo to admit additional evidence.¹ The Prosecution responded on 17 August 2009,² and Mr. Zigiranyirazo filed his reply on 27 August 2009.³

A. Background

2. The Trial Chamber convicted Mr. Zigiranyirazo for committing genocide and extermination as a crime against humanity by participating in a joint criminal enterprise to kill Tutsis at Kesho Hill in Gisenyi Prefecture on 8 April 1994.⁴ In addition, it convicted him for aiding and abetting genocide based on his acts at the Kiyovu Roadblock in Kigali on 12 and 17 April 1994.⁵ He was sentenced to 20 years of imprisonment.⁶

3. Mr. Zigiranyirazo filed his Notice of Appeal on 19 January 2009, challenging his convictions and sentence, which the Appeals Chamber authorized him to amend on 10 March 2009.⁷ The Prosecution filed its Notice of Appeal against Mr. Zigiranyirazo's sentence on 15 January 2009.⁸ With the filing of Mr. Zigiranyirazo's Reply brief on 10 July 2009, the briefing of both appeals in this case concluded.⁹ The hearing is scheduled for 28 September 2009.¹⁰

¹ Motion under Rule 115 RPE and Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal (Arts 12-15) and Motion to Supplement Court Record, 16 July 2009 ("Motion").

² Prosecutor's Response to "Motion under Rule 115 RPE and Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal (Arts 12-15) and Motion to Supplement Court Record", 17 August 2009 ("Response").

³ Reply to Prosecutor's Response to Motion under Rule 115 RPE and Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal (Arts 12-15) and Motion to Supplement Court Record, 27 August 2009 ("Reply").

⁴ Trial Judgement, paras. 330, 410, 427, 436, 439, 447.

⁵ Trial Judgement, paras. 251, 426, 427, 447.

⁶ For his genocide conviction in relation to the events at Kesho Hill, the Trial Chamber sentenced Zigiranyirazo to 20 years of imprisonment. For his genocide conviction in relation to the events at the Kiyovu Roadblock, it sentenced Zigiranyirazo to 15 years of imprisonment. For his conviction for extermination as a crime against humanity in relation to the events at Kesho Hill, Zigiranyirazo received a sentence of 20 years of imprisonment. The Trial Chamber ordered that these sentences be served concurrently. *See* Trial Judgement, paras. 468-471.

⁷ Notice of Appeal, 19 January 2009. On 18 March 2009, the Appeals Chamber granted Mr. Zigiranyirazo's request of 9 February 2009 to amend his Notice of Appeal and accepted as filed the Amended Notice of Appeal (Amended Notice of Appeal (Rule 108 RPE), 9 February 2009 ("Zigiranyirazo Notice of Appeal")) annexed to his motion. *See* Decision on Protasis Zigiranyirazo's Motion for Leave to Amend Notice of Appeal, 18 March 2009.

⁸ Prosecutor's Notice of Appeal, 15 January 2009.

⁹ In respect of Mr. Zigiranyirazo's appeal, on 19 May 2009, Zigiranyirazo filed his Appellant's brief. *See* Appellant's Brief, 19 May 2009 ("Zigiranyirazo Appeal Brief"). The Prosecution filed its Respondent's brief on 29 June 2009. *See* Prosecutor's Respondent's Brief, 29 June 2009 ("Prosecution Response Brief"). Zigiranyirazo filed his Reply brief on 10 July 2009. *See* Appellant's Reply Brief, 10 July 2009. As for the Prosecution's appeal, it filed its Appellant's brief on 16 February 2009. *See* Prosecutor's Appellant's Brief, 16 February 2009. On 1 May 2009, Zigiranyirazo submitted

4. Mr. Zigiranyirazo requests that the Appeals Chamber admit five categories of additional evidence related to: (1) Major Aloys Ntabakuze's activities on 8 April 1994;¹¹ (2) the site-visit;¹² (3) Defence Witness RDP46;¹³ (4) Defence Witness BNZ60;¹⁴ and (5) General Gratien Kabiligi's activities in April 1994.¹⁵ The Prosecution responds that the Motion lacks merit and should be dismissed.¹⁶ The Appeals Chamber will discuss each of these categories of evidence in turn.

B. Discussion

5. Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides a mechanism for admission of additional evidence on appeal where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.¹⁷ According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible.

6. When determining the availability of evidence at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."¹⁸ Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it could have been a decisive factor in reaching the decision at trial.

7. Furthermore, in accordance with established jurisprudence, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving

his Respondent's brief. See Defence Response to Prosecutor's Appellant's Brief (Appeal Against Sentence), 1 May 2009. The Prosecution filed its Reply brief on 11 May 2009. See Prosecutor's Brief in Reply, 11 May 2009.

¹⁰ Scheduling Order, 20 July 2009.

¹¹ Motion, paras. 6, 13-50.

¹² Motion, paras. 6, 51-71.

¹³ Motion, paras. 6, 72-91.

¹⁴ Motion, paras. 6, 92-105.

¹⁵ Motion, paras. 6, 106-131.

¹⁶ Response, paras. 3, 88.

¹⁷ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Request to Admit Additional Evidence, 27 April 2007, para. 6 ("*Muvunyi* Rule 115 Decision"), citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4 ("*Nahimana et al.* Rule 115 Decision (8 December 2006)").

¹⁸ *Muvunyi* Rule 115 Decision, para. 6, citing *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 5, quoting *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted).

party can establish that the exclusion of it *would* amount to a miscarriage of justice.¹⁹ That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.²⁰

1. Major Aloys Ntabakuze's Presence at Kesho Hill

8. The Trial Chamber found that, following an unsuccessful attack on Tutsi refugees at Kesho Hill in Gisenyi Prefecture, Mr. Zigiranyirazo arrived there on the morning of 8 April 1994 as part of a convoy of military personnel and *Interahamwe* militiamen.²¹ The Trial Chamber further found that Mr. Zigiranyirazo and other speakers then addressed the assailants, who applauded before commencing the attack.²² In making its findings, the Trial Chamber relied on the testimonies of Prosecution Witnesses AKK, AKL, AKP, AKR, and AKO.²³

9. The Trial Chamber found that Witness AKR provided corroboration of Mr. Zigiranyirazo's presence and address at Kesho Hill.²⁴ The Trial Chamber noted that, although the witness could not hear what Mr. Zigiranyirazo said to the assailants, he did see the assailants applaud the speakers and stated that a "military man" led them in the attack.²⁵ It considered that this account was consistent with the testimony of Witness AKL "that Major Ntabakuze led the assailants up the hill in pursuit of the Tutsi."²⁶

10. Mr. Zigiranyirazo submits that conclusive evidence from Colonel Joseph Dewez, the Belgian commander of UNAMIR's Kigali Battalion ("KIBAT"),²⁷ as well as entries from the *KIBAT Chronique*, a record of the unit's activities in Rwanda from 6 to 19 April 1994, demonstrate that Major Ntabakuze was in Kigali at midday on 8 April 1994, not at Kesho Hill in Gisenyi Prefecture.²⁸ According to Mr. Zigiranyirazo, this evidence undermines the credibility of Witness AKL, a key witness whose testimony underpins his conviction, who referred to Major Ntabakuze's presence during the attack, as well as that of Witness AKR.²⁹

11. Mr. Zigiranyirazo contends that this exculpatory evidence was presented during the *Bagosora et al.* trial and that his counsel only learned of it upon reading the *Bagosora et al.* Trial

¹⁹ *Muvunyi* Rule 115 Decision, para. 7, citing *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6 (citing cases).

²⁰ *Muvunyi* Rule 115 Decision, para. 7, citing *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6.

²¹ Trial Judgement, paras. 329, 400, 407.

²² Trial Judgement, paras. 330, 401, 407, 408.

²³ Trial Judgement, para. 329.

²⁴ Trial Judgement, para. 311.

²⁵ Trial Judgement, para. 311.

²⁶ Trial Judgement, para. 311.

²⁷ See Motion, Exhibit A (testimony of Colonel Joseph Dewez: *The Prosecutor v. Théoneste Bagosora et al.*, Case No. 98-41-T, T. 23 June 2005 pp. 14, 15, 30).

²⁸ Motion, paras. 13-16, 20, 21.

Judgement.³⁰ In his view, any delay in bringing this evidence is attributable to the Prosecution which violated its disclosure obligations under Rule 68 of the Rules.³¹ Mr. Zigiranyirazo notes that the KIBAT *Chronique* was filed in the *Bagosora et al.* trial in 2003 and Colonel Dewez testified on 23 June 2005, well before Witness AKL appeared in his case on 15 February 2006.³²

12. The Prosecution responds that this argument should be summarily dismissed because Mr. Zigiranyirazo did not elaborate on the relevant ground of appeal of his Notice of Appeal in his Appeal Brief.³³ In its view, Mr. Zigiranyirazo is inappropriately circumventing the Appeals Chamber decision which denied him an extension of the 30,000-word limit.³⁴ Alternatively, the Prosecution submits that Mr. Zigiranyirazo lacked diligence in presenting the testimony of Colonel Dewez and the KIBAT *Chronique*, further emphasizing that the material did not trigger its disclosure obligations under Rule 68 of the Rules.³⁵ It argues that this evidence would not impact the verdict since it is not relevant to his conviction.³⁶

13. As a preliminary matter, the Appeals Chamber agrees that a request to admit additional evidence pursuant to Rule 115 of the Rules is not the proper vehicle for advancing substantive arguments that should be properly addressed in the briefs. However, in this case, Mr. Zigiranyirazo's Notice of Appeal sufficiently elaborates the arguments challenging the credibility of Witnesses AKL and AKR on this point,³⁷ and his appeal under this ground is entirely contingent on the admission of additional evidence. Consequently, the Appeals Chamber will address this argument on its merits.

14. It is clear that the proffered evidence was available at trial given its admission in a separate proceeding before the Tribunal prior to the hearing of Witness AKL. As discussed in more detail below, the Appeals Chamber does not consider that this evidence is exculpatory in relation to Mr. Zigiranyirazo's conviction based on the events at Kesho Hill, in particular, in relation to the credibility of Witness AKL. In view of this, the Appeals Chamber considers that the proffered evidence did not trigger the Prosecution's disclosure obligations under Rule 68 of the Rules, and it is not persuaded that Mr. Zigiranyirazo exercised the requisite diligence in discovering this publicly available material.

²⁹ Motion, paras. 15, 17-19, 22, 23, 29; Reply, paras. 8-17.

³⁰ Motion, paras. 13, 44.

³¹ Motion, paras. 31-43; Reply, paras. 6, 7.

³² Motion, paras. 14, 32-34.

³³ Response, para. 5.

³⁴ Response, para. 6.

³⁵ Response, paras. 7-11, 25-27.

³⁶ Response, paras. 7, 12-24.

³⁷ See Zigiranyirazo Notice of Appeal, para. 4.

15. Turning to whether the denial of the admission of this material *would* result in a miscarriage of justice, a review of the Trial Chamber's findings underpinning Mr. Zigiranyirazo's criminal responsibility for the attack at Kesho Hill makes no mention of Ntabakuze leading the attack,³⁸ and its discussion of Ntabakuze is thus not central to his conviction. The Trial Chamber's discussion of Ntabakuze is limited to showing that the accounts of Witness AKL, who mentioned Ntabakuze, and Witness AKR, who saw a "military man," included a common element: the presence of a military figure leading the attack.³⁹ Indeed, an examination of Witness AKL's testimony about Major Ntabakuze reflects that his testimony can only reasonably be taken to reflect that a military figure lead the attack. Witness AKL acknowledged that he did not personally have an adequate basis of knowledge for identifying the military person he saw as Major Ntabakuze; rather, he learned about Major Ntabakuze's identity from other unidentified sources.⁴⁰ In this context, any conflicting evidence concerning Major Ntabakuze's whereabouts on the morning of 8 April 1994 would not undermine Witness AKL's credibility, and thus the denial of the admission of this additional evidence would not result in a miscarriage of justice.

16. Accordingly, the Appeals Chamber denies the admission of Colonel Dewez's testimony and the KIBAT *Chronique*.

2. Site Visit

17. The Trial Chamber found that Mr. Zigiranyirazo was present at Kesho Hill at some point on the morning of 8 April 1994 and that he addressed the assembled assailants before they launched an attack on the Tutsi refugees there.⁴¹ The Trial Chamber also found that he was present at the Kiyovu Roadblock, near his residence in Kigali, on 12 and 17 April 1994 where he aided and abetted the killings there.⁴² In respect to the events at Kesho Hill, Mr. Zigiranyirazo presented an alibi that he remained at the Presidential residence at Camp Kanombe just outside of Kigali ("Kanombe") on 8 April 1994.⁴³ With regards to the Kiyovu Roadblock, the Trial Chamber also considered evidence placing him at Rubaya Tea Factory ("Rubaya") in Gisenyi Prefecture for approximately one week from 11 April 1994.⁴⁴

18. At trial, Mr. Zigiranyirazo emphasized the distance between Kanombe and Kesho Hill to demonstrate that, in light of the alibi evidence, it would have been impossible for him to have been

³⁸ Trial Judgement, paras. 329, 330.

³⁹ Trial Judgement, para. 311.

⁴⁰ See T. 15 February 2006 pp. 22, 48, 49.

⁴¹ Trial Judgement, paras. 329, 330, 400, 401.

⁴² Trial Judgement, paras. 251, 413, 427.

⁴³ Trial Judgement, paras. 301, 323.

⁴⁴ Trial Judgement, paras. 231, 245-250.

at both places on the same day.⁴⁵ In particular, he referred to the Trial Chamber's site visit, conducted from 12 to 16 November 2007, which purportedly retraced the route taken by him and his family when they fled from Kanombe to Gisenyi Prefecture on 11 April 1994. The Trial Chamber did not expressly refer to or discuss the site visit or the specifics of travel between Kanombe and Kesho Hill on 8 April 1994.⁴⁶

19. Mr. Zigiranyirazo submits that the Trial Chamber did not maintain a detailed record of the site visit as required.⁴⁷ He contends that the Trial Chamber's failure to keep a record of the site visit "dramatically affects" its conclusions on the events at Kesho Hill and the Kiyovu Roadblock, as a proper record would have corroborated the evidence of his Defence witnesses and demonstrated the impossibility of travel during the period covered by his alibi.⁴⁸ Accordingly, he proposes to supplement the trial record on appeal with material illustrating the route and time taken by the Trial Chamber on the site visit in travelling between the Kigali area and Gisenyi Prefecture as well as letters from the Registry demonstrating that the Trial Chamber did not maintain a record of the site visit.⁴⁹ Mr. Zigiranyirazo acknowledges that this information was available at trial.⁵⁰ However, he emphasizes that, while the Trial Chamber saw all the evidence, the Appeals Chamber is not in a position to assess it since it was not recorded and thus it should be admitted.⁵¹

20. The Prosecution responds that Rule 115 of the Rules cannot be used to supplement a deficient record.⁵² It further submits that, in any event, the Trial Chamber fully considered the substance of the material, which Mr. Zigiranyirazo seeks to admit, in the form of its observations during the site visit, the detailed submissions of the Defence in its closing brief on the distances and times, as well as evidence of the route and difficulty of travel from various alibi witnesses.⁵³ The Prosecution further argues that the evidence should not be admitted since it is simply for purposes of corroboration.⁵⁴ In addition, it contends that estimations made several years after the events and the site visit are not sufficiently probative of whether Mr. Zigiranyirazo could have travelled between the Kigali area and Gisenyi Prefecture at the relevant times.⁵⁵

⁴⁵ Zigiranyirazo Appeal Brief, para. 116, citing *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Defence Closing Brief (Rule 86(a)), 30 April 2008, paras. 157-167, 229, 230, 237, 249, 350, 851-854 ("Zigiranyirazo Closing Brief").

⁴⁶ The Trial Judgement contains only one reference to the site visit in the procedural history. See Trial Judgement, Annex I: Procedural History, para. 34.

⁴⁷ Motion, paras. 57-60, 62.

⁴⁸ Motion, paras. 63, 64, 70.

⁴⁹ Motion, paras. 51-53, 60; Reply, paras. 30, 31.

⁵⁰ Motion, para. 55.

⁵¹ Motion, paras. 55, 65-69, 71; Reply, paras. 21-29, 32-33.

⁵² Response, paras. 28-31.

⁵³ Response, paras. 32-41, 48, 49.

⁵⁴ Response, paras. 42, 44, 49.

⁵⁵ Response, paras. 43, 45.

21. The Appeals Chamber has previously stated that detailed records of Trial Chambers' site visits should normally be maintained.⁵⁶ The Trial Chamber failed to keep such a record in this case and it did not note any of its observations of the site visit in the Trial Judgement. This amounts to an error of law. As part of the site visit, the Trial Chamber retraced some of the possible routes available to Mr. Zigiranyirazo during the relevant events, providing important context, in his view, for the assessment of his alibi.⁵⁷ Indeed, it follows from Mr. Zigiranyirazo's submissions at trial and on appeal that the distances and travel times between Kanombe and Kesho Hill and Rubaya and Kiyovu are highly relevant.⁵⁸

22. It is clear that the evidence concerning the distances and travel times along these routes were available at trial and in fact were before the Trial Chamber, which experienced the journey first-hand. Prior to closing arguments, Mr. Zigiranyirazo should have been aware through the exercise of due diligence that a record of the site visit had not been maintained.⁵⁹ The absence of records, however, did not prevent him from fully addressing issues arising from the site visit in his Closing Brief based on the site visit and other evidence from Defence witnesses.⁶⁰ Furthermore, the Appeals Chamber observes that several Defence witnesses gave estimates of how long this journey took during the relevant events.⁶¹ Moreover, other than the site visit, corroboration of this evidence could have been tendered in another form through either expert testimony or a Defence investigator who followed the same route and made the requisite calculations.

23. Nonetheless, the Appeals Chamber considers that the admission of additional evidence would be appropriate where the absence of the record of the site visit prevented it from properly assessing the relevant grounds of appeal related to Mr. Zigiranyirazo's alibi. This, however, is not the case in the particular circumstances of this appeal. In this respect, the Appeals Chamber observes that Mr. Zigiranyirazo provides detailed submissions in his Appeal Brief concerning the itinerary and approximate times taken by the Trial Chamber to travel the various segments of the

⁵⁶ *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 50.

⁵⁷ Zigiranyirazo Appeal Brief, paras. 98, 99.

⁵⁸ See *supra* n. 45.

⁵⁹ In this respect, the Appeals Chamber notes that, prior to the site visit, Mr. Zigiranyirazo proposed that a record be taken by the Registry, which would then be admitted as an exhibit. See *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-I, Defence Submissions in Respect of Sites to Be Visited on the Prosecution Motion for a View of the Locus In Quo, 25 October 2006, para. 15 ("Lessons can be take from the Rwamakuba site visits, approximate information obtained from Lead Counsel Mr David Hooper. [...] d. A note was kept by Registry staff of what was visited, when and where. That was later put in as a record or exhibit. [...]").

⁶⁰ See *supra* n. 45. See also Zigiranyirazo Closing Brief, para. 229 ("Kesho was too far, the war was too close and the road conditions were too bad for him to travel to Kesho and back by road in the available time. (*We all remember the site visit route*).") (emphasis added).

⁶¹ Zigiranyirazo Appeal Brief, para. 105 ("The route was described in the unchallenged evidence of numerous Defence Witnesses: Dr. Bararengana, Agnes Kampundu, Gloria Mukampungu, Aimé Ntuye, Marguerite Mukobwajana, Bernadette Niyonezeze, and Domatilla Zigiranyirazo.") (internal citations omitted).

journey.⁶² In its Response Brief, the Prosecution does not dispute the description of the site visit provided by Mr. Zigiranyirazo's Counsel;⁶³ rather, it contends that it is irrelevant to the question of Mr. Zigiranyirazo's ability to travel at the given time.⁶⁴ Bearing this in mind, the Appeals Chamber is in a position to adequately review Mr. Zigiranyirazo's claims based on the details of the site visit provided in his Appeal Brief.

24. In this context, the Appeals Chamber is not convinced that denying the admission of the proposed additional material that is related to the site visit would result in a miscarriage of justice. This material includes letters from the Registry confirming that a record of the site visit was not maintained, which is apparent from a review of the record and the Trial Judgement. In addition, it consists of statements and maps generated by Mr. Zigiranyirazo's legal assistants recounting the Trial Chamber's itinerary and time of travel. As noted above, this information is already recounted in Mr. Zigiranyirazo's Appeal Brief.

25. In sum, the record is sufficiently clear to allow appellate review of whether the Trial Chamber's assessment of Mr. Zigiranyirazo's alibi was reasonable in light of the evidence at trial and observations from the site visit, as argued in his submissions. This will be determined in the merits of his appeal.

26. Accordingly, the Appeals Chamber denies the admission of the material related to the site visit.

3. Defence Witness RDP46

27. As part of his defence to his presence at Kesho Hill on the morning of 8 April 1994, Mr. Zigiranyirazo presented evidence that he was not observed at Kesho Hill during the attack, in particular from Witness RDP46.⁶⁵ In assessing Witness RDP46's testimony, the Trial Chamber noted that he was currently serving a 25-year sentence for killing a person during the genocide.⁶⁶ The Trial Chamber further noted that in 1996 he confessed to having committed crimes at Kesho Hill and other places, was sentenced to 12 years in prison, and had been released in 2003 by Presidential Decree.⁶⁷ The Trial Chamber concluded: "[i]n light of his confessed participation in the Kesho Hill attacks as a member of the *Interahamwe*, the Chamber is not convinced by Witness

⁶² Zigiranyirazo Appeal Brief, para. 98.

⁶³ Prosecution Response Brief, paras. 70-85.

⁶⁴ Prosecution Response Brief, paras. 81-84.

⁶⁵ Trial Judgement, paras. 288-300.

⁶⁶ Trial Judgement, para. 321.

⁶⁷ Trial Judgement, para. 321.

RDP46's self-serving testimony that he only watched the killings from the rooftop of his vehicle."⁶⁸ It therefore did not find him to be a credible witness.⁶⁹

28. Mr. Zigiranyirazo submits that Witness RDP46's conviction for murder was the primary reason that the Trial Chamber rejected his testimony.⁷⁰ He seeks to admit additional evidence demonstrating that the witness was acquitted of this murder in review proceedings by a decision of 29 November 2007.⁷¹ According to Mr. Zigiranyirazo, the witness's credibility cannot therefore be discounted on this basis, and as such the Trial Chamber's findings on the witness's credibility were erroneous.⁷² As a consequence, Mr. Zigiranyirazo contends that Witness RDP46's testimony demonstrates that he was not present at Kesho Hill on the morning of 8 April 1994.⁷³

29. Mr. Zigiranyirazo submits that Witness RDP46's acquittal occurred after the witness appeared at the end of the evidentiary phase of his case when there were no longer Defence investigators in the field.⁷⁴ After learning that the Trial Chamber based its credibility findings on this issue in the Trial Judgement, Mr. Zigiranyirazo's counsel contacted his investigator to see if there was any change in the witness's conviction status, which was the first opportunity he had to learn of the acquittal.⁷⁵

30. The Prosecution responds that evidence of Witness RDP46's acquittal was available at trial for more than a year before the Trial Judgement was rendered.⁷⁶ It further submits that, as this conviction was at issue during his examination, Mr. Zigiranyirazo has not demonstrated diligence.⁷⁷ Finally, the Prosecution argues that the refusal to admit this evidence would not result in a miscarriage of justice as there were other reasons for the Trial Chamber's decision to discredit the witness and because his testimony as a whole had limited probative value.⁷⁸

31. The Appeals Chamber is not convinced that Mr. Zigiranyirazo exercised due diligence in obtaining the evidence related to Witness RDP46's acquittal. The material was available at trial.

⁶⁸ Trial Judgement, para. 321.

⁶⁹ Trial Judgement, para. 321.

⁷⁰ Motion, para. 73, *citing* Trial Judgement, para. 321; Reply, para. 38.

⁷¹ Motion, para. 72.

⁷² Motion, para. 74.

⁷³ Motion, paras. 75-78; Reply, paras. 39-41. Mr. Zigiranyirazo also submits that the witness's testimony shows that Prosecution Witness AKO was not present at Kesho Hill. *See* Motion, para. 79.

⁷⁴ Motion, paras. 82-84; Reply, para. 35.

⁷⁵ Motion, paras. 85-87; Reply, para. 37.

⁷⁶ Response, para. 50.

⁷⁷ Response, paras. 50-53.

⁷⁸ Response, paras. 54-58.

Furthermore, the matter was also clearly important to Mr. Zigiranyirazo given that the Defence raised the issue of his conviction for murder at the outset of his examination-in-chief.⁷⁹

32. In any case, by contrast to Mr. Zigiranyirazo's contention, the findings of the Trial Chamber do not indicate that the Trial Chamber discredited Witness RDP46's testimony about Kesho Hill based on his conviction and sentence of 25 years of imprisonment for murder. Instead, the Trial Chamber focused on "his confessed participation in the Kesho Hill attacks as a member of the *Interahamwe*."⁸⁰ Consequently, the Appeals Chamber is not persuaded that had the proposed evidence been adduced at trial, it would have had an impact on the verdict. Its exclusion on appeal will not therefore result in a miscarriage of justice.

33. Accordingly, the Appeals Chamber denies the admission of the additional evidence related to Witness RDP46.

4. Defence Witness BNZ60

34. On 14 March 2007, the Trial Chamber denied Mr. Zigiranyirazo's motion to hear Witness BNZ60, a proposed alibi witness, by video-link from Belgium.⁸¹ It reasoned "without delving into consideration of the importance of the testimony" that Mr. Zigiranyirazo had not substantiated the witness's inability to travel to Arusha before the end of the trial.⁸² The Trial Chamber further requested the Belgian authorities to cooperate with the Tribunal's Witness and Victims Support Section so that the Tribunal could take necessary measures to bring the witness to Arusha.⁸³ On 9 November 2007, the Trial Chamber again denied a request to hear Witness BNZ60 by video-link.⁸⁴ This time, the Trial Chamber reasoned "without delving into consideration of the availability or unwillingness of the witness to come to Arusha" that Witness BNZ60's evidence was repetitive and

⁷⁹ T. 27 March 2007 pp. 59-64.

⁸⁰ Trial Judgement, para. 321 ("*In light of his confessed participation in the Kesho Hill attacks as a member of the Interahamwe, the Chamber is not convinced by Witness RDP46's self-serving testimony that he only watched the killings from the rooftop of his vehicle.*") (emphasis added).

⁸¹ *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for a Hearing by Video-Link for Witness BNZ60, 14 March 2007, para. 5 ("Video-Link Decision of 14 March 2007"). See also Zigiranyirazo Appeal Brief, para. 224.

⁸² Video-Link Decision of 14 March 2007, para. 4 ("The Chamber finds that the Defence has not demonstrated the inability or unwillingness of the witness to attend the proceedings in person. In the current situation, without delving into consideration of the importance of the testimony, the Defence has not demonstrated that the witness' travel documents will not be available before the end of the trial, but instead claims that, for reasons not made clear to the Chamber, Witness BNZ60 does not have travel documents at this moment. The Defence has not filed any documents in support of its Motion, and the Chamber does not have any reason to believe that the witness is reluctant to testify or that traveling to Arusha to testify at the Tribunal will jeopardize her immigration status.")

⁸³ Video-Link Decision of 14 March 2007, p. 3.

⁸⁴ *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for a Hearing by Video-Link for Protected Witness BNZ60 and Mr Gaspard Musabyimana, 9 November 2007, p. 4 ("Video-Link Decision of 9 November 2007").

cumulative of the evidence on Mr. Zigiranyirazo's activities and whereabouts given by eight other witnesses.⁸⁵

35. Mr. Zigiranyirazo submits that one of the reasons that the Trial Chamber rejected his alibi in relation to the Kesho Hill events was the gap in his evidence at midday on 8 April 1994.⁸⁶ He contends that the evidence of Witness BNZ60 places him at Kanombe during that period and thus convincingly shows that he remained there the entire day.⁸⁷ He acknowledges that this evidence was available at trial, but emphasizes that, in view of her immigration status, which prevented her travel to Arusha, he exercised the necessary diligence in trying to present it through his various motions to hear the evidence by video-link.⁸⁸

36. Mr. Zigiranyirazo also refers to the submissions in his appeal in which he argues that the Trial Chamber erred in denying his applications to permit video-link testimony from Witness BNZ60.⁸⁹ In particular, he disputes the Trial Chamber's characterization of Witness BNZ60's anticipated testimony as cumulative.⁹⁰ Mr. Zigiranyirazo points to the witness's will-say statement, which reflects that she saw him on 8 April 1994.⁹¹ Mr. Zigiranyirazo argues that, if heard, Witness BNZ60's evidence would have "altered the finding [...] that he had no alibi for the crucial period between 8 a.m. and 3:30 – 4:00 p.m."⁹² He submits that, after the Trial Chamber denied his request in March 2007, the Registry recommended on 26 June 2007 that the witness be heard by video-link.⁹³ Consequently, Mr. Zigiranyirazo argues that the Trial Chamber abused its discretion and denied him full answer and defence on the charges related to Kesho Hill.⁹⁴

37. The Prosecution responds that the Trial Chamber properly denied Mr. Zigiranyirazo's application to hear Witness BNZ60's testimony because it was cumulative of other evidence and thus the denial of its admission on appeal does not result in a miscarriage of justice.⁹⁵

38. The Appeals Chamber is satisfied that Mr. Zigiranyirazo exercised due diligence in his attempts to hear Witness BNZ60 at trial. It remains to be considered whether this evidence could have been a decisive factor in reaching the decision at trial.

⁸⁵ Video-Link Decision of 9 November 2007, para. 8.

⁸⁶ Motion, para. 102.

⁸⁷ Motion, paras. 93, 94, 102-105; Reply, paras. 46-52.

⁸⁸ Motion, paras. 95-100; Reply, paras. 43-45.

⁸⁹ Motion, para. 101; *Zigiranyirazo Notice of Appeal*, para. 6(f); *Zigiranyirazo Appeal Brief*, paras. 224-231.

⁹⁰ *Zigiranyirazo Appeal Brief*, paras. 225-227.

⁹¹ *Zigiranyirazo Appeal Brief*, paras. 226, 227.

⁹² *Zigiranyirazo Appeal Brief*, para. 229. *See also* Motion, paras. 93, 94, 102-105.

⁹³ Motion, para. 97; *Zigiranyirazo Appeal Brief*, para. 225, citing *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, *Observations du Greffier relatives à la comparution du témoin BNZ60 dans l'affaire Zigiranyirazo*, 26 June 2007, RPP 6798-6789.

⁹⁴ *Zigiranyirazo Appeal Brief*, para. 230.

⁹⁵ Response, paras. 59-70.

39. It follows from the Trial Judgement that, indeed, nine witnesses testified in varying detail about Mr. Zigiranyirazo's presence at Kanombe on 8 April 1994.⁹⁶ Other than in respect of evidence given by Gloria Mukampunga, the Trial Chamber did "not discount" this evidence.⁹⁷ Instead, it considered that the evidence of the other eight witnesses "[was] too vague and [did] not place [Mr. Zigiranyirazo] at Kanombe at the specific times he was seen at Kesho Hill."⁹⁸ A review of the statement of Witness BNZ60 as well as her will-say statements annexed to the Zigiranyirazo Appeal Brief indicates that she would have also attested to seeing Mr. Zigiranyirazo at Kanombe on 8 April 1994.⁹⁹ However, nothing in either the statements or Mr. Zigiranyirazo's submissions suggests that her prospective evidence would have provided any greater detail than the other eight witnesses considered by the Trial Chamber. Consequently, the Appeals Chamber is not satisfied that her evidence could have been a decisive factor in reaching the decision at trial. The Appeals Chamber will determine on the merits of the appeal whether the Trial Chamber properly assessed the evidence of the remaining alibi witnesses.

40. Accordingly, the Appeals Chamber denies the admission of the additional evidence from Witness BNZ60.

5. General Gratien Kabiligi

41. The Trial Chamber found that Mr. Zigiranyirazo aided and abetted the killing of Tutsi civilians at the Kiyovu Roadblock,¹⁰⁰ which was erected near his home in the Kiyovu neighbourhood of Kigali.¹⁰¹ The Trial Chamber based these findings on his actions at the roadblock on 12 and 17 April 1994.¹⁰² In making these findings, the Trial Chamber relied on the testimony of Prosecution Witness BCW, which it considered "detailed," "consistent," and "corroborated by Prosecution Witness ATO and Defence Witness [Stanislas] Harelimana."¹⁰³

⁹⁶ Trial Judgement, paras. 301, 323-327.

⁹⁷ Trial Judgement, para. 328.

⁹⁸ Trial Judgement, para. 328.

⁹⁹ Motion, Exhibit D (confidential statement of Witness BNZ60, dated 3 March 2009), para. 12 (*"J'ai vu Protais Zigiranyirazo le 8 avril. Il montait prier souvent. Je le croisais dans l'escalier. Vers la mi-journée du 8 avril, M Zigiranyirazo est allé avec Jean-Luc Habyarimana et d'autres voir les corps qui étaient à l'Hôpital militaire"*). See also Zigiranyirazo Appeal Brief, paras. 226, 227, quoting Will-Say of Witness BNZ60 ("She saw Protais Zigiranyirazo on 8 April. He often came up to pray."); Additional Will-Say of Witness BNZ60 ("In order to clarify her first will-say statement where she says that she saw Protais Zigiranyirazo on 8 April, they were seeing her as he was going up to the Chapel to try to encourage the children."). The statements are attached to the Zigiranyirazo Appeal Brief in a confidential annex. They were also submitted respectively in connection with Zigiranyirazo's two requests to hear Witness BNZ60 by video-link. See Zigiranyirazo Appeal Brief, paras. 226-228.

¹⁰⁰ Trial Judgement, para. 427.

¹⁰¹ Trial Judgement, paras. 243, 251.

¹⁰² Trial Judgement, paras. 251, 413.

¹⁰³ Trial Judgement, paras. 243, 244, 251, 413.

42. Mr. Zigiranyirazo notes that Witness ATO testified that General Gratien Kabiligi was also at the Kiyovu Roadblock on 7 and 12 April 1994, which new evidence makes impossible.¹⁰⁴ In particular, he seeks to admit several adjudicated facts related to consideration of Kabiligi's alibi in the *Bagosora et al.* Trial Judgement, demonstrating that there was no evidence that he was in Rwanda at this time.¹⁰⁵ In view of this, Mr. Zigiranyirazo submits that Witness ATO was not credible and that the Trial Chamber erred in relying on him.¹⁰⁶

43. Mr. Zigiranyirazo submits that he requested the Prosecution to disclose evidence related to General Kabiligi's alibi on 28 May 2007 to which it did not respond.¹⁰⁷ Further, he points to correspondence where Kabiligi refused to meet with the Zigiranyirazo Defence team.¹⁰⁸ Mr. Zigiranyirazo contends that the Prosecution is responsible for any delay as it refused to disclose this exculpatory material.¹⁰⁹

44. The Prosecution responds that this argument should be summarily dismissed because Mr. Zigiranyirazo did not elaborate on this ground of appeal in his Appeal Brief.¹¹⁰ In its view, Mr. Zigiranyirazo is inappropriately circumventing the Appeals Chamber decision which denied him an extension of the 30,000-word limit.¹¹¹ The Prosecution further submits that the relevant evidence was available at trial. It emphasises that Kabiligi's refusal to testify on Zigiranyirazo's behalf did not relieve him of his burden to demonstrate that he had exercised all available means to bring the relevant evidence of Kabiligi's whereabouts before the Trial Chamber.¹¹² It further disputes that it violated its obligation to disclose exculpatory evidence.¹¹³ The Prosecution further emphasizes that this evidence is not related to a material issue underpinning his conviction.¹¹⁴

45. As a preliminary matter, the Appeals Chamber reiterates that a request to admit additional evidence pursuant to Rule 115 of the Rules is not the proper vehicle for advancing substantive arguments which should be properly addressed in the briefs. However, in this case, Mr. Zigiranyirazo's Notice of Appeal sufficiently elaborates the arguments challenging Witness ATO's credibility, and his appeal on this point is entirely contingent on the admission of additional evidence. Consequently, the Appeals Chamber will address this argument on its merits.

¹⁰⁴ Motion, paras. 106-117.

¹⁰⁵ Motion, paras. 107, 108, 111, 112.

¹⁰⁶ Motion, paras. 115-117.

¹⁰⁷ Motion, para. 123.

¹⁰⁸ Motion, para. 126.

¹⁰⁹ Motion, paras. 127-130; Reply, para. 55

¹¹⁰ Response, paras. 5, 71.

¹¹¹ Response, paras. 6, 71.

¹¹² Response, paras. 73-75.

¹¹³ Response, para. 76.

¹¹⁴ Response, paras. 78-87.

46. It is clear that evidence related to General Kabiligi's alibi was available at trial given its admission in a separate proceeding before the Tribunal prior to the hearing of Witness ATO. As discussed in more detail below, the Appeals Chamber does not consider that this evidence is exculpatory in relation to Mr. Zigiranyirazo's conviction based on the events at Kiyovu Roadblock. In view of this, the Appeals Chamber considers that the proffered evidence did not trigger the Prosecution's disclosure obligations under Rule 68 of the Rules, and it is not convinced that Mr. Zigiranyirazo exercised the requisite diligence in discovering this publicly available material.

47. A review of the Trial Chamber's findings concerning the Kiyovu Roadblock reveals that the Trial Chamber relied on Witness ATO only as corroboration for establishing that a roadblock existed at the intersection near Mr. Zigiranyirazo's house.¹¹⁵ While it recounted Witness ATO's evidence concerning the activities of Mr. Zigiranyirazo and General Kabiligi at the roadblock,¹¹⁶ it did not discuss this uncorroborated evidence or give any credit to it in its deliberations.¹¹⁷ Furthermore, the Appeals Chamber notes that the witness's identification of General Kabiligi is based on hearsay from an unidentified source.¹¹⁸ Consequently, any conflicting evidence about General Kabiligi's whereabouts during the relevant time period would not undermine the reasonableness of the Trial Chamber's overall findings on the events at the Kiyovu Roadblock. Mr. Zigiranyirazo has therefore not established that the exclusion of the proposed evidence on appeal would amount to a miscarriage of justice.

48. Accordingly, the Appeals Chamber denies the admission of the additional evidence related to Kabiligi's whereabouts in April 1994.

C. CONCLUSION

49. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion. The Appeals Chamber emphasises that the present conclusion pertains merely to the admissibility of the proffered material and is in no way indicative of the Appeals Chamber's considerations in relation to the merits of Mr. Zigiranyirazo's appeal.

¹¹⁵ Trial Judgement, paras. 238, 240, 242, 243.

¹¹⁶ Trial Judgement, paras. 216, 217.

¹¹⁷ Trial Judgement, para. 234 ("The Chamber further recalls its finding that it will only accept Witness ATO's testimony to the extent that it is corroborated by other credible evidence."). The Appeals Chamber reiterates that "it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony." See, e.g., *Muvunyi* Appeal Judgement, para. 128.

¹¹⁸ T. 26 January 2006 p. 8 ("Q. Witness, do you know the army the soldiers that loaded the guns in your vehicle belonged to? Would you recognise those soldiers? A. No, I did not know to which group they belonged. All I knew at that time, because I talked to those policemen, they told me that there was a certain Gratien Kabiligi, or somebody else.").

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

Done this 16th day of September 2009
At The Hague,
The Netherlands.




Judge Theodor Meron
Presiding

[Seal of the Tribunal]