



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

3589/H

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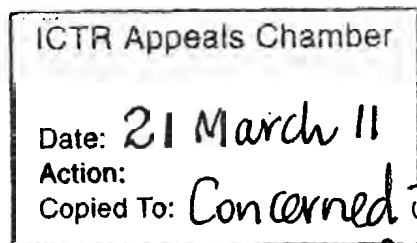
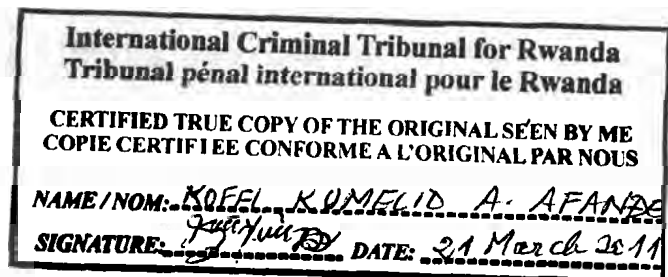
ICTR-98-41-A
21st March 2011
{3589/H – 3576/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 21 March 2011



Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA

v.

Parties Judicial Archives,
LOs, P&G
[Signature]

THE PROSECUTOR

Case No. ICTR-98-41-A

**DECISION ON ANATOLE NSENGIYUMVA'S MOTIONS FOR THE
ADMISSION OF ADDITIONAL EVIDENCE**

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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 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of two motions for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) filed by Anatole Nsengiyumva (“Nsengiyumva”) on 29 July 2010.¹ The Prosecution responded to the motions on 18 and 30 August 2010, respectively.² Nsengiyumva filed his replies on 2 and 14 September 2010, respectively.³

A. Background

2. On 18 December 2008, Trial Chamber I of the Tribunal (“Trial Chamber”) rendered its Judgement in the *Bagosora et al.* case. The Trial Chamber found Nsengiyumva guilty of genocide, crimes against humanity (murder, extermination, persecution, and other inhumane acts), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) for ordering killings in Gisenyi town, including the killing of Alphonse Kabiligi, at Nyundo Parish, and at Mudende University, as well as for aiding and abetting killings in Bisesero.⁴ The Trial Chamber sentenced Nsengiyumva to life imprisonment.⁵

3. Nsengiyumva filed a notice of appeal on 13 March 2009, challenging his convictions and sentence.⁶ On 1 February 2010, he filed the third amended version of his notice of appeal, as well as

¹ Nsengiyumva’s Confidential Motion on Additional Evidence in Relation to Witness DO Pursuant to Rule 115 of the Rules of Procedure and Evidence, confidential, 29 July 2010 (“First Motion for Additional Evidence”), *as corrected by* Corrigendum to Nsengiyumva’s Confidential Motion on Additional Evidence in Relation to Witness DO Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 August 2010; Nsengiyumva’s Urgent Motion on Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (Witness Ignace Bagilishema), 29 July 2010 (“Second Motion for Additional Evidence”).

² Prosecution Response to Nsengiyumva’s Confidential Motion on Additional Evidence in Relation to Witness DO Pursuant to Rule 115 of the Rules of Procedure and Evidence, 18 August 2010 (“Response to First Motion”); Prosecutor’s [*sic*] Response to “Nsengiyumva’s Urgent Motion on Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (Witness Ignace Bagilishema)”, 30 August 2010 (“Response to Second Motion”).

³ Nsengiyumva’s Reply to Prosecutor’s Response to Nsengiyumva’s Confidential Motion on Additional Evidence in Relation to Witness DO Pursuant to Rule 115 of the Rules of Procedure and Evidence, 2 September 2010 (“Reply Relating to First Motion”); Nsengiyumva’s Reply to Prosecutor’s Response to Nsengiyumva’s Urgent Motion on Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (Witness Ignace Bagilishema), 14 September 2010 (“Reply Relating to Second Motion”).

⁴ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 (“Trial Judgement”), paras. 2161, 2189, 2197, 2216, 2227, 2248, 2258.

⁵ Trial Judgement, para. 2279.

⁶ Nsengiyumva’s Notice of Appeal, 13 March 2009.

his appeal brief.⁷ As part of his appeal, Nsengiyumva challenges the credibility and reliability of Prosecution Witness DO's evidence on which the Trial Chamber relied in making its findings concerning the Gisenyi town killings.⁸ Nsengiyumva also challenges the finding that he aided and abetted killings in Bisesero.⁹ The Prosecution responded to Nsengiyumva's appeal on 15 March 2010.¹⁰ Nsengiyumva's reply brief was filed on 29 June 2010.¹¹

4. In his First Motion for Additional Evidence, Nsengiyumva requests the admission into evidence of documents relating to Witness DO pursuant to Rule 115 of the Rules.¹² He also requests leave to call Witness DO to testify on appeal in relation to issues arising from the documents sought to be admitted.¹³ In his Second Motion for Additional Evidence, Nsengiyumva requests leave to call Ignace Bagilishema ("Bagilishema") as a witness pursuant to Rule 115 of the Rules on the basis that his testimony would demonstrate that the Trial Chamber erred in finding Nsengiyumva guilty of the killings perpetrated in Bisesero.¹⁴ The Prosecution responded that both motions lack merit and should be dismissed.¹⁵

B. Applicable Law

5. Rule 115 of the Rules provides for the admission of additional evidence on appeal where a party is in possession of material that was not before the Trial Chamber and which represents additional evidence of a fact or issue litigated at trial.¹⁶ This must be done no later than 30 days from the date of filing of the brief in reply unless good cause is shown for a delay.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. Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial

⁷ Nsengiyumva's Third Amended Notice of Appeal Pursuant to Appeals Chamber Decision of 28 January 2010, 1 February 2010 ("Notice of Appeal"); Nsengiyumva's Appeal Brief, confidential version filed 1 February 2010, public redacted version filed 2 February 2010 ("Appeal Brief").

⁸ Notice of Appeal, para. 23; Appeal Brief, paras. 65, 66, 82-100.

⁹ Notice of Appeal, para. 27; Appeal Brief, paras. 185-223.

¹⁰ Prosecutor's Brief in Response to Anatole Nsengiyumva's Appeal, 15 March 2010.

¹¹ Brief in Reply to Respondent's Response Brief in Anatole Nsengiyumva's Appeal, 29 June 2010, *as corrected by* Corrigendum to Brief in Reply to Respondent's Response Brief in Anatole Nsengiyumva's Appeal, 4 August 2010.

¹² First Motion for Additional Evidence, paras. 1, 2, 8.

¹³ First Motion for Additional Evidence, para. 3, p. 13.

¹⁴ Second Motion for Additional Evidence, paras. 2, 11, 19, p. 6.

¹⁵ Response to First Motion, paras. 2, 64; Response to Second Motion, paras. 2, 21.

¹⁶ See, e.g., *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal, 27 September 2010 ("*Renzaho* Decision"), para. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-A, Decision on Rukundo's Motion for the Admission of Additional Evidence on Appeal, 4 June 2010 ("*Rukundo* Decision"), para. 5; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Zigiranyirazo's Motion for Admission of Additional Evidence on Appeal, 16 September 2009 ("*Zigiranyirazo* Decision"), para. 5.

¹⁷ Rule 115(A) of the Rules.

in any form, or discoverable through the exercise of due diligence. The applicant must also show that the additional evidence is relevant and credible.¹⁸

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 [...] Tribunal to bring evidence [...] before the Trial Chamber.”¹⁹ The applicant is therefore expected to apprise the Trial Chamber of all difficulties that he encounters in obtaining the evidence in question.²⁰ 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.²¹

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 party can establish that the exclusion of it *would* amount to a miscarriage of justice.²² That is, it must be demonstrated that, had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.²³

8. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber’s verdict. A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²⁴

9. Finally, the Appeals Chamber has repeatedly recognised that the significance and potential impact of the tendered material is not to be assessed in isolation, but in the context of the evidence presented at trial.²⁵

¹⁸ Rule 115(B) of the Rules. *See also Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić’s Second Motion to Admit Additional Evidence on Appeal, 29 April 2010 (“*Šainović et al.* Decision”), para. 7.

¹⁹ *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 citations omitted). *See also Renzaho* Decision, para. 4; *Rukundo* Decision, para. 6; *Zigiranyirazo* Decision, para. 6.

²⁰ *See, e.g., Renzaho* Decision, para. 4; *Rukundo* Appeal Decision, para. 6; *Šainović et al.* Decision, para. 6.

²¹ *See, e.g., Renzaho* Decision, para. 4; *Rukundo* Decision, para. 6; *Zigiranyirazo* Decision, para. 6.

²² *See, e.g., Renzaho* Decision, para. 5; *Rukundo* Decision, para. 7; *Zigiranyirazo* Decision, para. 7.

²³ *See, e.g., Renzaho* Decision, para. 5; *Rukundo* Decision, para. 7; *Zigiranyirazo* Decision, para. 7.

²⁴ *See, e.g., Renzaho* Decision, para. 6; *Rukundo* Decision, para. 8; *Šainović et al.* Decision, para. 10.

²⁵ *See, e.g., Renzaho* Decision, para. 7; *Rukundo* Decision, para. 9; *Šainović et al.* Decision, para. 11.

C. First Motion for Additional Evidence

10. Nsengiyumva's convictions were based, in part, on his role in the killings of Tutsi civilians and Hutus viewed as sympathetic to the Rwandan Patriotic Front in Gisenyi town on 7 April 1994.²⁶ Based primarily on the testimony of Witness DO, the Trial Chamber found that on 7 April 1994 civilian attackers, supported by soldiers from the Gisenyi military camp, conducted targeted killings in Gisenyi town.²⁷ In particular, it found that among those killed were Kajanja and Mukabutare.²⁸

1. Submissions

11. Nsengiyumva seeks the admission, pursuant to Rule 115 of the Rules, of:

- i) Witness DO's testimony "during his trial before the *Gacaca* courts in Gisenyi in Rwanda as recorded in the relevant transcripts and Judgment";²⁹
- ii) excerpts of the transcripts of Witness DO's testimony before the Tribunal in the *Ndindiliyimana et al.* case;³⁰ and
- iii) written records of five previous statements of Witness DO given to Rwandan authorities.³¹

He also requests leave to call Witness DO to testify on appeal on issues arising from the materials sought to be admitted.³²

12. As regards the availability of these materials, Nsengiyumva points out that the *Gacaca* appeal judgement sought to be admitted was delivered on 30 April 2009, well after the delivery of the Trial Judgement in this case, and that he obtained copies of the *Gacaca* Documents only in September and October 2009.³³ He concedes that the *Ndindiliyimana et al.* Transcripts were

²⁶ Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248.

²⁷ Trial Judgement, paras. 1061-1064, 2140, 2141.

²⁸ Trial Judgement, para. 2140.

²⁹ First Motion for Additional Evidence, para. 2. *See ibid.*, Annexes A(1) (Kinyarwanda transcripts of *Gacaca* proceedings that took place on 19 March 2009, 23 and 30 April 2009, including the judgement of a *Gacaca* appeal court delivered in Rubavu on 30 April 2009), A(2) (unofficial English translation of the above-mentioned documents provided by Nsengiyumva) (collectively "*Gacaca* Documents").

³⁰ First Motion for Additional Evidence, para. 2, Annex D (*The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56, T. 16 May 2006 pp. 4-7, 11-13, 31-34) ("*Ndindiliyimana et al.* Transcripts"). Witness DO testified in the *Ndindiliyimana et al.* case under the same pseudonym on 11, 14, 15, 16, and 17 May 2006.

³¹ First Motion for Additional Evidence, Annexes C(1) (*Pro Justitia* statement dated 1998), C(2) (*Pro Justitia* statement dated 25 March 1997), C(3) (*Pro Justitia* statement dated 22 April 1997), C4 (Guilty plea dated 24 June 1998), C(5) (Transcripts of Testimony before *Chambre du Conseil* of 14 December 1998) (collectively "Witness DO's Prior Statements"). The Appeals Chamber notes that the First Motion for Additional Evidence is unclear as to whether Nsengiyumva seeks the admission of Witness DO's Prior Statements pursuant to Rule 115 of the Rules. However, the Appeals Chamber understands from Nsengiyumva's submissions at paragraphs 37 through 46 of his First Motion for Additional Evidence, as well as the prayer on page 13, that he also requests admission of these statements. The Appeals Chamber will examine his First Motion for Additional Evidence accordingly. However, it notes that the *Pro Justitia* statement dated 25 March 1997 was already admitted into the record as Exhibit P398. Nsengiyumva's request to have this piece of evidence admitted pursuant to Rule 115 is therefore moot.

³² First Motion for Additional Evidence, para. 3, p. 13.

³³ First Motion for Additional Evidence, para. 10.

available at trial, but submits that he acted with due diligence in seeking to recall Witness DO to be cross-examined upon the *Ndindiliyimana et al.* Transcripts when they were disclosed to him.³⁴

13. Nsengiyumva contends that the materials sought to be admitted contradict Witness DO's testimony before the Trial Chamber and raise doubt about his credibility, notably as to whether Witness DO was a direct observer of the killings perpetrated in Gisenyi town, as was found by the Trial Chamber.³⁵ He asserts that there are material differences between the narratives given by Witness DO in the *Gacaca* courts, in the *Ndindiliyimana et al.* case, in Witness DO's Prior Statements, and in the present case, regarding (i) the circumstances in which Witness DO met Lieutenant Bizumuremyi on 7 April 1994 and how the witness came to start driving the group of killers;³⁶ (ii) the circumstances of Mukabutare's killing, in particular whether the witness drove Mukabutare from her house to the Gisenyi military camp, his knowledge of Mukabutare's residence, and where she was killed;³⁷ (iii) the presence of an individual named Pfunda amongst the group of killers, the role of Pfunda in the 7 April 1994 killings, and how Witness DO was led to the victims;³⁸ (iv) the circumstances of Kajanja's killing;³⁹ and (v) the number of killings Witness DO witnessed and his knowledge of the victims.⁴⁰

14. Nsengiyumva submits that the cumulative effect of Witness DO's diverse and contradictory statements shows that the witness is seeking to shift blame to the military and "make it clear that his claims of the involvement of soldiers in his crimes [are] far from consistent."⁴¹ He argues that, had the Trial Chamber evaluated Witness DO's credibility in light of the totality of these materials, its conclusions regarding the Gisenyi town killings would have been different.⁴²

15. The Prosecution responds that the *Ndindiliyimana et al.* Transcripts and Witness DO's Prior Statements were available at trial.⁴³ It submits that, while the *Gacaca* appeal judgement was not itself available at trial, the information contained therein was since it relates to the same issues raised in the *Ndindiliyimana et al.* Transcripts and Witness DO's Prior Statements.⁴⁴ It also

³⁴ First Motion for Additional Evidence, paras. 26-32. *See also* Reply Relating to First Motion, paras. 7, 8, 10.

³⁵ First Motion for Additional Evidence, paras. 43-45.

³⁶ First Motion for Additional Evidence, paras. 14-17, 39, 40. The Appeals Chamber follows the spelling of "Bizumuremyi" adopted by the Trial Chamber. *See* Trial Judgement, fn. 594.

³⁷ First Motion for Additional Evidence, paras. 18-20, 33-35, 38-40, 43.

³⁸ First Motion for Additional Evidence, paras. 21-25.

³⁹ First Motion for Additional Evidence, paras. 38, 42, 43.

⁴⁰ First Motion for Additional Evidence, paras. 25, 38, 41.

⁴¹ First Motion for Additional Evidence, para. 45. *See also ibid.*, paras. 35, 36, 44.

⁴² First Motion for Additional Evidence, paras. 35, 36, 46.

⁴³ Response to First Motion, paras. 8, 28.

⁴⁴ Response to First Motion, paras. 52-56.

contends that Nsengiyumva did not act with due diligence as he failed to make a prompt application for the recall of Witness DO for further cross-examination on the alleged inconsistencies.⁴⁵

16. The Prosecution also contends that, save for his general claim that the alleged inconsistencies raise issues about Witness DO's general reliability, Nsengiyumva fails to demonstrate the relevance of the evidence sought to be admitted to any material issue at trial.⁴⁶ In its view, Nsengiyumva fails to show that the alleged inconsistencies relate to the facts underpinning his convictions.⁴⁷ The Prosecution further contends that Nsengiyumva fails to show how the Trial Chamber's approach to Witness DO's evidence would have been different had the alleged inconsistencies been put before it.⁴⁸ It argues, *inter alia*, that the Trial Chamber was alive to the fact that Witness DO's evidence was to be approached with caution and noted a number of inconsistencies between his testimony in Rwanda and in this case.⁴⁹ Moreover, the Prosecution submits that the Trial Chamber was aware of the alleged inconsistencies between Witness DO's testimony in this case and in the *Ndindiliyimana et al.* case, as Nsengiyumva gave detailed descriptions of those inconsistencies in his oral motion to recall Witness DO.⁵⁰ The Prosecution finally asserts that, contrary to Nsengiyumva's claim, the materials Nsengiyumva seeks to have admitted confirm that the witness was a direct observer of the killings and consistently implicated soldiers.⁵¹

17. In reply, Nsengiyumva refutes that the *Gacaca* Documents were available at trial in some other form.⁵² He also submits that the inconsistencies he points out in relation to the evidence of Witness DO relate to the role of the military in leading and organising the killings, and to Witness DO's credibility regarding his personal involvement in the Gisenyi town killings.⁵³ Nsengiyumva reiterates that, if this additional evidence had been available at trial, the Trial Chamber would not have relied on Witness DO's evidence.⁵⁴

⁴⁵ Response to First Motion, para. 57. *See also ibid.*, paras. 9-12, 28-30.

⁴⁶ Response to First Motion, paras. 15-17, 32, 58.

⁴⁷ Response to First Motion, paras. 32, 58. With respect to the killing of Mukabutare in particular, the Prosecution argues that this killing was only illustrative of the identity of some of the Tutsi victims and that alleged inconsistencies in this regard do not undermine the conclusion that the military and militias were involved in the genocide in Gisenyi town. *See ibid.*, paras. 16, 36.

⁴⁸ Response to First Motion, paras. 18-26, 33-50, 59-63.

⁴⁹ Response to First Motion, paras. 23, 24, 40, 45, 46.

⁵⁰ Response to First Motion, para. 23. *See also ibid.*, para. 45, referring to the alleged inconsistencies between Witness DO's testimony in this case and Witness DO's Prior Statements regarding Bizumuremyi.

⁵¹ Response to First Motion, paras. 50, 60.

⁵² Reply Relating to First Motion, paras. 5, 6.

⁵³ Reply Relating to First Motion, paras. 13-27, 34.

⁵⁴ Reply Relating to First Motion, paras. 28-31.

2. Discussion

18. The Appeals Chamber observes that there are inconsistencies between Witness DO's testimony in this case and his testimony in the *Ndindiliyimana et al.* trial, Witness DO's Prior Statements, and the *Gacaca* Documents. These inconsistencies relate to how Witness DO met Bizumuremyi and came to drive the group of killers on 7 April 1994, as well as the circumstances of the killings.⁵⁵ The Appeals Chamber considers that these inconsistencies relate to the issue of the credibility and reliability of Witness DO's testimony in this case, an issue which was raised at trial and considered at length by the Trial Chamber.⁵⁶ As such, the Appeals Chamber considers that the evidence sought to be admitted is relevant to a material issue at trial. The Appeals Chamber also considers that the documents sought to be admitted bear sufficient indicia of credibility to be considered admissible as additional evidence.

19. Turning to the issue of availability, the Appeals Chamber observes that the question of whether Nsengiyumva exercised due diligence in seeking to recall Witness DO based on the *Ndindiliyimana et al.* Transcripts and Witness DO's Prior Statements is at issue in Nsengiyumva's appeal against the Trial Judgement.⁵⁷ Because the Appeals Chamber finds it premature to rule on this specific issue at this juncture of the appeal proceedings, it will leave aside the question of availability and apply the lowest threshold for admission under Rule 115 of the Rules, namely whether the additional evidence *could* have been a decisive factor in reaching the decision at trial.

20. The Appeals Chamber notes that the Trial Chamber expressly stated that it viewed Witness DO's testimony with caution, pointing out that the witness was Nsengiyumva's alleged accomplice, that his testimony prompted motions from the Defence to order perjury investigations, and that in one instance he did not provide a correct account, while in another he had provided contradictory evidence.⁵⁸ The Trial Judgement reflects that the Trial Chamber was aware of discrepancies in the narratives of the 7 April 1994 events that Witness DO gave to Tribunal investigators, in the course of his trial in Rwanda, and in the *Bagosora et al.* case.⁵⁹ The Trial Chamber identified, in particular,

⁵⁵ Regarding the circumstances upon which Witness DO came to drive the group of killers on 7 April 1994, *compare* First Motion for Additional Evidence, Annexes A(2) and D *with* Witness DO, T. 30 June 2003 pp. 15, 16, 24, 42, 43, T. 1 July 2003 pp. 10, 11, T. 14 October 2005 pp. 16, 18-21, 37-39. Regarding Witness DO's involvement in Kajanja's killing, *compare* First Motion for Additional Evidence, Annexes C(1) through C(5) *with* Witness DO, T. 30 June 2003 pp. 24, 29-31, T. 1 July 2003 pp. 50, 64, 65, T. 2 July 2003 p. 14, T. 17 October 2005 pp. 19, 29-31 (closed session). Regarding the circumstances of Mukabutere's killing, *compare* First Motion for Additional Evidence, Annexes A(2), C(1) through C(5), D *with* Witness DO, T. 30 June 2003 pp. 42-45. Regarding the individuals participating in the killings and by whom Witness DO was led to the victims, *compare* First Motion for Additional Evidence, Annex A(2) *with* First Motion for Additional Evidence, Annex D *with* Witness DO, T. 30 June 2003 pp. 26, 30, 33, T. 1 July 2003, pp. 49, 50, T. 17 October 2005 pp. 9, 10.

⁵⁶ *See, e.g.*, Trial Judgement, paras. 1055-1058, 1061, 1062.

⁵⁷ Notice of Appeal, paras. 23, 40 (p. 23); Appeal Brief, paras. 239, 240.

⁵⁸ Trial Judgement, para. 1055.

⁵⁹ Trial Judgement, para. 1056.

discrepancies in Witness DO's accounts of the circumstances in which he happened to start driving the group of killers,⁶⁰ which led it to reject this aspect of the witness's evidence.⁶¹ Given that this portion of Witness DO's evidence was already rejected, any further evidence relating to how Witness DO met Bizumuremyi and came to drive the killers could not have had any impact on the Trial Chamber's conclusions.

21. The Trial Chamber further noted that "Witness DO's testimony regarding his participation in the killings was, if not contradictory, confusing", and observed that the witness's evidence varied as to the timing of events.⁶² It specifically pointed out that Witness DO's testimony with respect to Kajanja's killing was inconsistent.⁶³ The Trial Chamber also expressly referred to Nsengiyumva's argument that Witness DO's accounts of the killings were inconsistent, recalling that Nsengiyumva had been allowed to testify about alleged inconsistencies in the witness's evidence.⁶⁴

22. These findings clearly demonstrate that the Trial Chamber was fully aware of the existence of discrepancies in Witness DO's accounts of the killings. The Trial Chamber accepted that these discrepancies likely resulted from a passage of time or Witness DO's interest in distancing himself from the crimes.⁶⁵ It stated that it had no doubt that Witness DO was a direct observer of the killings, and accordingly relied on the main features of his testimony, such as the participation of the military in killings of Tutsi civilians.⁶⁶ The additional evidence presented by Nsengiyumva could not have had any impact on these aspects of the Trial Chamber's findings.⁶⁷

⁶⁰ See Trial Judgement, para. 1056.

⁶¹ Trial Judgement, paras. 1056-1058. The Trial Chamber had also heard Nsengiyumva's oral submissions relating to discrepancies in Witness DO's different versions of the circumstances in which he met Bizumuremyi. See Nsengiyumva, T. 18 January 2007 pp. 16, 17 (closed session).

⁶² Trial Judgement, para. 1061.

⁶³ Trial Judgement, fn. 1180.

⁶⁴ Trial Judgement, para. 1061, fn. 1182. The Appeals Chamber notes in this regard that Nsengiyumva discussed the inconsistencies pertaining to the circumstances of Mukabutare's killing in the course of his testimony. See Nsengiyumva, T. 15 January 2007 pp. 6-10 (closed session); Nsengiyumva, T. 18 January 2007 pp. 10-17 (closed session). See also Trial Judgement, para. 1061, fn. 1182. The Trial Chamber expressly referred to Nsengiyumva's argument that Witness DO's accounts of the killings were inconsistent. See Trial Judgement, para. 1061.

⁶⁵ Trial Judgement, para. 1061.

⁶⁶ See Trial Judgement, paras. 1062, 1063.

⁶⁷ The Appeals Chamber observes, *inter alia*, that in the *Ndindiliyimana et al.* trial, Witness DO explained that some of his previous statements concerning the killings in Gisenyi town were untrue because, at the time he gave them, he was afraid he would receive a heavier sentence in his trial in Rwanda if he told the truth, which supports rather than undermines the Trial Chamber's reasoning. See First Motion for Additional Evidence, Annex D pp. 33, 34: "I acted in such a way because I could not tell the whole truth about what we did in Rwanda. That was during a difficult period. The victims were still very angry and we were frightened to be sentenced to very lengthy prison sentences, and that is why we decided not [to] tell the truth, in order to receive a lighter sentence", referring to Witness DO's statement in First Motion for Additional Evidence, Annex C(2). It also notes that the Trial Chamber found that Witness DO was a direct observer of the killings, based, in part, on the fact that Witness DO was convicted in Rwanda for the same incidents about which he testified. See Trial Judgement, para. 1062. The *Gacaca* Documents reflect that the *Gacaca* appeal court affirmed Witness DO's conviction on appeal, which further supports the Trial Chamber's reasoning. See First Motion for Additional Evidence, Annex A(2).

23. In light of the foregoing, the Appeals Chamber considers that the materials sought to be admitted do not reveal any significant inconsistencies in Witness DO's evidence beyond those with which the Trial Chamber was already seized. Accordingly, the Appeals Chamber finds that none of the proposed additional documentary evidence appended to Nsengiyumva's First Motion for Additional Evidence could have been a decisive factor in reaching the decision at trial. The materials thus fail to meet the lowest threshold for admission on appeal pursuant to Rule 115 of the Rules and Nsengiyumva's request to have the evidence admitted as additional evidence on appeal is therefore denied.

24. Consequently, the Appeals Chamber dismisses as moot Nsengiyumva's request to call Witness DO to testify.

D. Second Motion for Additional Evidence

25. Nsengiyumva was also convicted for sending militiamen from Gisenyi prefecture to participate in an operation to kill Tutsis in the Bisesero area of Kibuye prefecture during the second half of June 1994.⁶⁸ The Trial Chamber found that, by making resources available to the local authorities in Kibuye prefecture for this purpose, Nsengiyumva aided and abetted the killing of Tutsi refugees in Bisesero.⁶⁹ In making this finding, the Trial Chamber relied primarily on the testimony of Prosecution Witnesses KJ and ABQ and on correspondence between government and military officials.⁷⁰

1. Submissions

26. Nsengiyumva requests leave to call Bagilishema as a witness to testify about (i) the contents of the letter Bagilishema signed on 24 June 1994 in his capacity as *Bourgmestre* of Mabanza commune in Kibuye prefecture, which was admitted into the record as Exhibit P397 ("Bagilishema Letter"); and (ii) the origin of the *Interahamwe* who went to Bisesero through Bagilishema's commune in June 1994 and their conduct while in Kibuye prefecture.⁷¹

27. Nsengiyumva submits that, while he could possibly have called Bagilishema to testify at trial, he did not do so because he could not foresee the necessity of it.⁷² He argues that the indictment against him did not allege that he had sent *Interahamwe* to Bisesero or that he had

⁶⁸ Trial Judgement, paras. 1824, 2155, 2161, 2189, 2197, 2216, 2248.

⁶⁹ Trial Judgement, paras. 2157, 2161, 2189, 2197, 2216, 2248.

⁷⁰ Trial Judgement, paras. 1819-1824.

⁷¹ Second Motion for Additional Evidence, paras. 2, 14-16, p. 6; Reply Relating to Second Motion, para. 1

⁷² Second Motion for Additional Evidence, paras. 6, 18; Reply Relating to Second Motion, para. 5.

committed any offence in this regard.⁷³ He also asserts that he could not foresee that the Bagilishema Letter would form part of the Prosecution's case.⁷⁴ In this respect, he points out that the Prosecution only disclosed the Bagilishema Letter during the testimony of Defence Witness Édouard Karemera, and argues that his understanding was that the documents used in cross-examination of Witness Karemera "were essentially for purposes of testing [Witness Karemera's] credibility and not for building the Prosecution case which had long been closed."⁷⁵

28. Nsengiyumva further submits that, in convicting him for the alleged killings in Bisesero, the Trial Chamber "placed a high value" on the documentary evidence, including the Bagilishema Letter.⁷⁶ Nsengiyumva submits that, had Bagilishema testified, he would have contradicted the correspondence relied upon by the Trial Chamber and clearly demonstrated that Nsengiyumva had nothing to do with the events in Bisesero and did not send any militia/*Interahamwe* there.⁷⁷ Nsengiyumva asserts that there appears to be uncertainty in the Trial Judgement as to whether the *Interahamwe* involved in the Bisesero killings originated from Gisenyi town (Rubavu commune) or Gisenyi prefecture.⁷⁸ He contends that Bagilishema's testimony would resolve this uncertainty in his favour since Bagilishema would confirm that the *Interahamwe* referred to in the Bagilishema Letter did not originate from Gisenyi town.⁷⁹ Nsengiyumva argues that, if there is credible evidence that the *Interahamwe* in question did not originate from Rubavu commune, there would be no link between the testimonies of Witnesses KJ and ABQ and therefore he could not be convicted for these events.⁸⁰

29. The Prosecution responds that the Second Motion for Additional Evidence should be dismissed on a preliminary basis since it does not provide, in any comprehensive form, the evidence sought to be admitted under Rule 115 of the Rules.⁸¹ It also submits that the proposed evidence does not qualify for admission as additional evidence.⁸² In this regard, the Prosecution argues that it is an abuse of process for Nsengiyumva to seek to admit Bagilishema's testimony as additional evidence since he admits he could have called Bagilishema at trial.⁸³ It contends that Nsengiyumva

⁷³ Second Motion for Additional Evidence, para. 7; Reply Relating to Second Motion, para. 5.

⁷⁴ Second Motion for Additional Evidence, paras. 8, 9; Reply Relating to Second Motion, para. 5.

⁷⁵ Second Motion for Additional Evidence, para. 10.

⁷⁶ Second Motion for Additional Evidence, paras. 12, 13.

⁷⁷ Second Motion for Additional Evidence, para. 19.

⁷⁸ Second Motion for Additional Evidence, para. 15. *See also* Reply Relating to Second Motion, para. 10.

⁷⁹ Second Motion for Additional Evidence, paras. 14-16.

⁸⁰ Second Motion for Additional Evidence, para. 16, *referring to* Appeal Brief, para. 193. Nsengiyumva argues that the Trial Chamber's finding that "Witness KJ's testimony [did] not purport to reflect the commune of origin of each militiaman coming from Gisenyi" is speculation. *See* Second Motion for Additional Evidence, para. 15, *citing* Trial Judgement, para. 1823.

⁸¹ Response to Second Motion, para. 2, *referring to* Practice Direction on Formal Requirements for Appeals from Judgement, dated 4 July 2005 ("Practice Direction"), para. 7(e).

⁸² Response to Second Motion, para. 2.

⁸³ Response to Second Motion, para. 8.

had adequate notice of the charge relating to the Bisesero events and that he fails to show that he acted with due diligence in seeking to adduce the evidence at trial.⁸⁴ The Prosecution further submits that Nsengiyumva fails to establish the relevance of the exact origin of the *Interahamwe* referred to in the Bagilishema Letter to the findings of the Trial Chamber.⁸⁵ In its view, Nsengiyumva's contention as to the content of Bagilishema's testimony is pure speculation.⁸⁶ Finally, the Prosecution submits that the supposed evidence that the *Interahamwe* referred to in the Bagilishema Letter did not originate from Rubavu commune neither could nor would have had an impact on the verdict since the Trial Chamber did not rely on the Bagilishema Letter and ultimately found that the *Interahamwe* sent by Nsengiyumva originated from Gisenyi *prefecture*.⁸⁷

30. In reply, Nsengiyumva contends that the "proposed evidence is clear and specific."⁸⁸ He asserts that he has made clear that Bagilishema will confirm that the *Interahamwe* referred to in the Bagilishema Letter did not originate from Gisenyi town.⁸⁹ Nsengiyumva also submits that the origin of the *Interahamwe* is central to the Trial Chamber's finding that the *Interahamwe* involved in the Bisesero killings were sent by him.⁹⁰ He argues that the Trial Chamber did rely on the Bagilishema Letter as part of the "correspondence between government and military officials"⁹¹ and that the weight placed on the Bagilishema Letter in the Trial Chamber's findings is not necessarily a determinant factor as to the relevance and materiality of the proposed evidence.⁹²

2. Discussion

31. The Appeals Chamber recalls that "it has the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal

⁸⁴ Response to Second Motion, paras. 9-11. The Prosecution asserts that Nsengiyumva could have called Bagilishema at the time the Bagilishema Letter was admitted as exhibit. It also argues that as Nsengiyumva failed to properly pursue his contention of lack of notice at trial, he "cannot therefore now claim that the Indictment did not properly indicate the charges against him in relation to the Bisesero events." In addition, the Prosecution submits that the Bagilishema Letter was properly admitted without prior disclosure and that the Trial Chamber did not use it to prove the Prosecution's case but only to contradict Defence evidence. *See idem*.

⁸⁵ Response to Second Motion, para. 14.

⁸⁶ Response to Second Motion, paras. 15, 18. The Prosecution also claims that since Nsengiyumva did not provide in any detailed form the evidence that is sought to be admitted, its relevance and credibility cannot be assessed. *See ibid.*, para. 15.

⁸⁷ Response to Second Motion, paras. 17-20. The Prosecution points out that Witness ABQ testified that the recruitment efforts brought people from each of the communes in Gisenyi and refers to the Trial Chamber's finding that Witness KJ, while mentioning communes which did not border Rubavu commune, did not purport to reflect the commune of origin of each militiaman coming from Gisenyi. *See ibid.*, paras. 19, 20.

⁸⁸ Reply Relating to Second Motion, para. 8.

⁸⁹ Reply Relating to Second Motion, para. 8.

⁹⁰ Reply Relating to Second Motion, para. 7. Nsengiyumva argues that the Trial Chamber proceeded on the assumption that the *Interahamwe* allegedly involved in the killings in Bisesero were the persons from Gisenyi town trained by Nsengiyumva whom Witness ABQ testified about. *See ibid.*, para. 9. In Nsengiyumva's view, the Trial Chamber "speculatively add[ed] Rubavu commune in the analysis of KJ's testimony." *See ibid.*, para. 10.

⁹¹ Reply Relating to Second Motion, para. 11, *referring to* Trial Judgement, para. 1820.

⁹² Reply Relating to Second Motion, para. 12.

proceedings, and especially Rule 115's power to admit additional evidence".⁹³ However, the purpose of Rule 115 of the Rules is to deal "with the situation 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**."⁹⁴ The Appeals Chamber considers that Rule 115 of the Rules does not permit a party to merely request a particular person to be summoned as a witness to give evidence at the appellate stage.⁹⁵ A party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.⁹⁶ Where a party seeks to call a witness at the appellate stage, it needs to provide a statement or other documentation of the potential witness's proposed evidence, which the Appeals Chamber may admit as additional evidence pursuant to Rule 115 of the Rules and on the basis of which it may determine whether calling the witness to testify on appeal is necessary.⁹⁷

32. In the present case, Nsengiyumva has failed to provide the Appeals Chamber with any statement from Bagilishema or any documentation that may be admissible as additional evidence or that would prompt the Appeals Chamber to call the witness to testify. In these circumstances, the Appeals Chamber considers that Nsengiyumva's Second Motion for Additional Evidence should be dismissed.

⁹³ Decision on Théoneste Bagosora's Motion for Admission of Additional Evidence, 7 February 2011 ("*Bagosora et al.* Decision of 7 February 2011"), para. 8, *citing* *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001 ("*Kupreškić et al.* Decision of 8 May 2001"), para. 5.

⁹⁴ *Bagosora et al.* Decision of 7 February 2011, para. 8, *citing* *Kupreškić et al.* Decision of 8 May 2001, para. 5.

⁹⁵ *Bagosora et al.* Decision of 7 February 2011, para. 8 and references cited therein.

⁹⁶ *Bagosora et al.* Decision of 7 February 2011, para. 8 and references cited therein. *See also* Practice Direction, para. 7(e), which provides that a motion under Rule 115 should contain an appendix with copies of the evidence the party is applying to present.

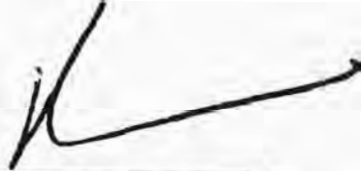
⁹⁷ *Bagosora et al.* Decision of 7 February 2011, para. 8 and references cited therein.

E. Disposition

33. For the foregoing reasons, the Appeals Chamber **DISMISSES** Nsengiyumva's First and Second Motions for Additional Evidence.

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

Done this twenty-first day of March 2011,
At The Hague,
The Netherlands.



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]