ICTR-96-10-A and ICTR-96.17-A
8 APRIL 2004
(3385/H - 3378/H)

3385/H

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

Registrar : **Mr. Adama Dieng**

Date: **8 April 2004**

THE PROSECUTOR

v.

Elizaphan NTAKIRUTIMANA and Gérard NTAKIRUTIMANA

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

DECISION ON REQUEST FOR ADMISSION OF ADDITIONAL EVIDENCE

ICTR Appeals Chamber
Date: 8-iv-04
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Counsel for the Prosecution

Ms Melanie Werrett
Mr James Stewart

Counsel for the Accused

Mr David Jacobs
Mr Ramsey Clark

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Urgent Defence Motion for Admission of Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence," filed on 17 October 2003 ("Motion"). The Appeals Chamber hereby decides this Motion on the basis of the written submissions of the parties.

A. The Motion

2. In his Motion, Gérard Ntakirutimana (the "Appellant") requests an order from the Appeals Chamber for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"). The Appellant seeks to have admitted as additional evidence the transcripts of the public and in camera testimony of Witness OO, who testified (under the pseudonym KJ) in the case of Eliézer Niyitegeka,[1] and requests an order permitting him to file an addendum to his brief on Appeal ("Appellant's Brief").[2]

3. The Prosecution, in its response filed on 31 October 2003, agrees with the Appellant on the admission of the transcripts and does not object to an order permitting the Appellant to file an addendum to his Appellant's Brief.[3] The Prosecution contends, however, that the transcripts do not constitute additional evidence but rather that they are "judicial proceedings of the Tribunal relevant to issues on appeal that may be properly placed onto the appellate record for proper determination of the appeal".[4]

B. The Applicable Law

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

> (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.

[1] Case No. ICTR-96-14-A, presently before the Appeals Chamber at the pre-appeal stage. The witness testified on 1 and 2 November 2001 in *Ntakirutimana* and on 15 and 16 October 2002 in *Niyitegeka*.
[2] Appellant's Brief, filed 28 July 2003.
[3] Prosecution Response to Urgent Defence Motion for Admission of Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, filed confidentially on 31 October 2003.
[4] *Ibid.*, para. 5.

(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.

5. For evidence to be admitted pursuant to Rule 115(B), the Appellant must establish that (i) the evidence was not available at trial in any form and could not have been discovered though the exercise of due diligence, and (ii) that the evidence is relevant to a material issue, credible, and such that it could have had an impact on the verdict, *i.e.* could have shown that the conviction was unsafe.[5] Where the evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party must show also that exclusion of the additional evidence would lead to a miscarriage of justice. The additional evidence must be considered in the context of the evidence which was given at the trial and not in isolation.

6. The Appeals Chamber notes that Rule 115(B) was amended on 27 May 2003, approximately three months after the Trial Chamber rendered its Judgement in this case and over four months before the Appellant filed this Motion.[6] Under Rule 6(C) of the Rules, an amendment "shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case." The Appellant does not contend that the amendment to Rule 115(B) prejudices him, and indeed the standard incorporated by the amended Rule 115(B) merely codifies the case law applying the prior version of Rule 115(B).[7] The Appeals Chamber therefore concludes that the amended Rule 115(B) applies to this Motion.

C. Timeliness of the motion

7. Rule 115(A) of the Rules, as amended in May 2003 at the International Tribunal's 13th plenary session, requires parties to file motions to admit additional evidence not later than seventy-

[5] *Prosecutor v. Krstić*, "Decision on Applications for Admission of Additional Evidence on Appeal", Case No. IT-98-33-A, 5 August 2003, pp. 3-4.
[6] Prior to the amendment, Rule 115(B) provided that "[t]he Appeals Chamber shall authorize the presentation of such evidence if it considers that the interests of justice so require."
[7] See, *e. g.*, *Rutaganda v. Prosecutor*, No. ICTR-96-3-A, Decision on the Consolidated Evidence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, 19 February 2003, p. 5; *Musema v. Prosecutor*, No. ICTR-96-13-A, Décision sur la «Confidential Motion (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001, and (iii) to File a Supplemental Ground of Appeal» et ordonnance portant calendrier, 28 September 2001, pp. 4-6; see also *Prosecutor v. Kupreškić*, No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 68.

five days from the date of the Trial Chamber Judgement, unless good cause is shown for further delay. Prior to its amendment, Rule 115 motions could be filed as late as fifteen days before the hearing of the appeal.[8] In the present case, the Judgement was delivered on 21 February 2003. The Appellant's motion was filed on 17 October 2003, nearly eight months after delivery of the Trial Judgement.

8. As the time period stipulated in the new Rule 115(A) had already expired before the rule was amended, the Appeals Chamber considers that the Appellant would be prejudiced if his Motion were treated as subject to the new due date. Consequently, the Appeals Chamber holds that the due date in the old Rule 115(A) continues to govern this case, as envisioned by Rule 6(C) of the Rules. The Motion is therefore timely.

D. Discussion

9. Witness OO testified in *Niyitegeka* on 15 and 16 October 2002, while the Trial Chamber was deliberating in this case but before the Judgement was issued. Normally, the Appeals Chamber would decide whether this evidence was "available at trial" within the meaning of Rule 115(B) of the Rules. However, in the circumstances of this case, it is unnecessary to address this issue. For the reasons given below, even if the transcript of Witness OO's testimony in the *Niyitegeka* case is deemed to have been unavailable at trial, the Appellant has not shown that the evidence could have had an impact on the verdict of the Trial Chamber in this case.

10. The Appellant argues that the testimony of the witness in *Niyitegeka* differs from his testimony in *Ntakirutimana* on a number of points. He maintains that the inconsistencies call into question the overall credibility of Witness OO and therefore the Trial Chamber's findings based on that testimony, which concern the activities of the Appellant on 15 and 16 April 1994.[9] The Appeals Chamber notes that were the additional evidence to lessen the overall credibility of the witness, the findings of the Trial Chamber that the Appellant played a prominent role in some attacks in Bisesero during the period of April to June 1994 could also be affected.[10]

(a) The Nature of the Witness's Detention

11. The first inconsistency raised by the Appellant relates to the witness's testimony as to the nature of his detention in Rwanda since 1994 and his knowledge of any pending charges against him. According to the Appellant, the witness claimed in *Niyitegeka* that he was held as a protected

[8] See Rule 115(A) of the Rules of Procedure and Evidence (as amended 6 July 2002).
[9] See Appellant's Brief, paras. 83 to 112.
[10] Trial Judgement, para. 720.

witness, whereas he testified in this case that he was a detainee awaiting trial.[11] In the submission of the Appellant, this inconsistency affects the credibility of the witness and is material in showing that the Trial Chamber erred at paragraph 173 of the Trial Judgement.[12]

12. When appearing in the present case, the witness confirmed that he had been detained since December 1994, and testified that he is accused of having kept people in his home who subsequently died and of giving a pistol to a young man who was a civilian, and that he had yet to stand trial. Cross-examination was minimal on these matters.[13]

13. By contrast, cross-examination in *Niyitegeka* on the nature of his "detention" and reasons for his arrest was extensive. In summary, the witness's evidence in *Niyitegeka* was that he had been first arrested by communal authorities in December 1994, released after one week, and subsequently arrested and detained by military authorities in February 1995. He was held under "house arrest" by the military authorities at a military camp, is unaware of any formal charges against him, has not been indicted, and is awaiting trial. Although not detained in a cell *per se,* the witness is unable to leave the military camp where he is held and can only move within the camp with permission of the guards.[14]

14. Having reviewed the witness's testimony in both cases, the Appeals Chamber does not find that the witness's testimony in *Niyitegeka* is materially inconsistent with his limited evidence in *Ntakirutimana* regarding his status in Rwanda since 1994. In *Niyitegeka*, the witness presented substantial details during extensive cross-examination about his "detention" since December 1994, distinguishing first between his detention at the hands of the communal authorities in December 1994 and by the military authorities in February 1995. By comparison, his evidence in the present case is sparse and dealt with superficially. He confirms only that he has been held since December 1994 and is still being held. Absent any further details, his general and limited evidence in this case does not depart from that in *Niyitegeka* as concerns the duration of detention.

15. Regarding the Appellant's argument that the witness testified in *Niyitegeka* that he was a witness and not a detainee, the Appeals Chamber notes that, placed in context, the mention of being

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[11] Appellant's Brief, para. 64.
[12] Trial Judgement, para. 173 reads: "The Chamber found Witness OO to be a credible witness. In April 1994, he was a gendarme with the rank of sergeant at the Kibuye town camp of the gendarmerie. At the time of his testimony, and since 1994, the witness was, according to his account, in detention awaiting trial (not "in prison", as the Defence states). The witness testified: 'I am accused of having kept people in my home who subsequently died. I am also accused of giving a pistol to a young man who was a civilian.' There is no evidence to contradict Witness OO's account in this regard. Given the presumption of innocence enjoyed by a detained person awaiting trial, the Chamber will not draw any adverse inference against Witness OO on account of his status as a detainee." (Footnotes omitted.)
[13] T. 1 November 2001, pp. 187-191.
[14] *Niyitegeka* T. 15 October 2002, pp. 52-60, 66-67, 74-79.

a "witness" does not suggest that he was a protected witness *per se*, but generally a witness to certain events. Indeed, the witness stated in *Niyitegeka* that he was "still considered as a suspect."[15] The remaining passages of the witness's *Niyitegeka* testimony cited by the Appellant likewise reveal no inconsistencies with the witness's position in *Ntakirutimana* that he was detained awaiting trial.[16] The argument that the Prosecution conceded that the witness contradicted his testimony in this case that he was detained awaiting trial is likewise without merit: the Prosecution's submissions in this case state that "the witness did not maintain that he was a purely protected witness, he did not deny that his original arrest was based on his status as a suspect and he acknowledged that he may, yet face criminal prosecution."[17]

16. Finally, the Appellant submits that whereas in *Niyitegeka* the witness emphatically denied being accused of anything, he indicated in *Ntakirutimana* that he is accused of having kept people in his home who subsequently died and of giving a pistol to a young man who was a civilian.[18]

17. From a review of the relevant excerpts in *Niyitegeka*, the Appeals Chamber notes that the witness does affirm that he has no knowledge of formal charges against him and that he has not been indicted. Such statements, expressed in terms of formal procedure, indictment and case files, are not inconsistent with the witness's general awareness in *Ntakirutimana* that he is "accused" of particular activity. In this situation, the witness appears to use the word "accused" to mean "suspected" rather than "formally charged." Given that the remainder of the witness's evidence regarding his status is generally coherent and consistent, in particular as regards being a suspect who has yet to stand trial, the fact that he asserted in *Niyitegeka* that he knew of no formal charges against him could not have affected the Trial Chamber's finding of credibility.

(b) The Witness's Motives

18. The Appellant submits that in *Niyitegeka* the witness demonstrated a sophisticated belief that he would be rewarded for "cooperation" with the International Tribunal and refers to the statement of the witness that "I know that if you testify before a Tribunal truthfully it amounts to a mitigating circumstance."[19] Although not expressly specified in the Motion, this could support the Appellant's argument in his Appellant's Brief that the witness had clear motives to provide

[15] *Niyitegeka* T., 15 October 2002, p. 54.
[16] The Appellant refers to pages 53, 54, 57, 59, 66, 67, 79 and 86 of the witness's testimony in *Niyitegeka* on 15 October 2002.
[17] Prosecution's Consolidated Response Brief, para. 5.63.
[18] Motion, para. 29.
[19] *Niyitegeka* T. 15 October 2002, p. 79.

evidence favourable to the Prosecution, and that the Trial Chamber erred by misapprehending this issue in its Judgement.[20]

19. The witness did indeed acknowledge in *Niyitegeka* that there may be some benefit in testifying truthfully before the International Tribunal. However, he denied being motivated by such a possibility and noted that, despite having testified on two previous occasions before the International Tribunal, he is still in custody.[21] In light of the witness's explanation, and absent any showing by the Appellant of its untrustworthiness, the Appeals Chamber finds that this aspect of the witness's testimony in *Niyitegeka* could not have affected the Trial Chamber's decision in the present case.

(c) Conflicting Versions of Sequence of Events

20. The Appellant argues in his Motion that the evidence of the witness in *Niyitegeka* contradicts the findings of the Trial Chamber that the Appellant visited the Kibuye Gendarmerie camp on 15 and 16 April 1994 where he met 2nd Lieutenant Ndagijimana and that the Appellant travelled from the camp with 2nd Lieutenant Ndagijimana and Lieutenant Masengesho to an attack at Mugonero.[22]

21. The crux of the Appellant's contention is that the witness's evidence in *Niyitegeka* and *Ntakirutimana* is inconsistent as to the sequence of events, in particular as regards the dates on which he saw the Appellant and Niyitegeka at the Kibuye Gendarmerie camp on their way to attacks at Mugonero and Mubuga respectively. The question for the Appeals Chamber thus is whether the evidence of the witness in *Niyitegeka* about Niyitegeka's visit some ten days after 6 April, but before 18 April, could have affected the Trial Chamber's findings regarding the acts and movements of the Appellant on 15 and 16 April 1994.

22. In assessing the merits of the Appellant's submissions, the Appeals Chamber has reviewed the relevant parts of the witness's testimony in both cases regarding events on 15 and 16 April 1994. The witness's evidence in *Niyitegeka* and *Ntakirutimana* demonstrates that the visits of Niyitegeka and the Appellant could not have occurred on the same day, be it either 15 or 16 April. However, this in itself could not have affected the Trial Chamber's findings in the present case.

23. In the instant case, the witness maintained that the Appellant visited the Kibuye Gendarmerie camp on 16 April 1994. He was subjected to extensive cross-examination on the event

[20] Appellant's Brief, paras. 84-86.
[21] T., 15 October 2002, pp. 79-81.
[22] Motion, paras. 19-22.

and remained consistent throughout. By contrast, the evidence of the witness in *Niyitegeka* is vague and no clear date is specified by the witness regarding the day on which Niyitegeka visited the camp and took part in the attack at Mubuga. Likewise, the Trial Chamber finding in *Niyitegeka* is that the visit occurred "around 16 April". The lack of detail in the testimony of the witness in *Niyitegeka* is in contrast to the witness's specific evidence in this case.

24. The Appeals Chamber is therefore of the opinion that the witness's evidence in *Niyitegeka* is not such that it could have affected the verdict in this case.

25. Finally, the Appeals Chamber notes that the Prosecution has sought to rely on parts of Witness OO's *Niyitegeka* transcripts in its submissions on appeal in this case.[23] Given that the transcripts do not form part of the record in this case, and in light of the present decision not to admit them as additional evidence, the Appeals Chamber will not consider any references to the *Niyitegeka* transcripts in the determination of the appeals in this case.

E. Disposition

26. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appellant's motion for the admission of additional evidence and for permission to file an addendum to his Appellant's Brief and **DECLARES** that references to transcripts from *Prosecutor v. Niyitegeka* that do not form part of the record in *Prosecutor v. Ntakirutimana* will not be considered in the decision of the appeals in the *Ntakirutimana* case.

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

Theodor Meron
Presiding Judge

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

[Seal of the International Tribunal]

[23] Prosecution's Consolidated Response Brief, paras. 5.59, 5.63 (citing *Niyitegeka* T. 15 October 2002, pp. 53-90, and *Niyitegeka* Judgement, para. 73).

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To: *A:*	**OTP, Trial Attorney in charge of case** ☑ Ms Melanie Werrett ☑ Mr James Stewart **REGISTY** ☑ Ms Félicité Talon ☑ Mr Sankara Menon **APPEALS JUDGES** ☑ President/ Président Theodor Meron ☑ Judge/Juge Mohamed Shahabuddeen ☑ Judge/Juge Mehmet Güney ☑ Judge/Judge Inés Mónica Weinberg de Roca ☑ Judge/Judge Wolfgang Schomburg ☑ Mr John Hocking ☑ Ms Catherine Marchi-Uhel ☑ Mr Jamie Williamson ☑ Mr Roman Boed ☑ Associate Legal Officers **TRANSLATION SECTION** ☑ Mr Charles Zama ☐ For Information ☑ For Translation **DEFENSE** ☑ Accused / accusés: **Mr Elizaphan Ntakirutimana &Gérard Ntakirutimana** ☑ Lead Counsel of Elizaphan Ntakirutimana / *Conseil Principal*: **Mr Ramsey Clark** ☑ Lead Counsel of Gérard Ntakirutimana / *Conseil Principal*: **Mr David Jacobs**
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REGISTY
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☑ Accused / accusés: **Mr Elizaphan Ntakirutimana &Gérard Ntakirutimana**

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