



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1093/H

OK

ICTR-00-55C-A

23rd April 2014

{1092/H – 1081/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge William H. Sekule
Judge Mehmet Güney
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: Mr. Bongani Majola

Decision of: 23 April 2014

ICTR Appeals Chamber
23 APR 2014 <i>OK</i>
Date: <i>Jurica R.</i>
Action: <i>Chambers, defence</i>
Copied To: <i>OTR-ALAB & TRAS</i>

ILDÉPHONSE NIZEYIMANA

v.

THE PROSECUTOR

Case No. ICTR-00-55C-A

**DECISION ON APPELLANT'S *CONFIDENTIAL* MOTION FOR FRESH EVIDENCE
AND COROLLARY RELIEF**

Office of the Prosecutor

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International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS	
NAME / NOM: <i>ROSETTE MUZIGO-MORRISON</i>	
SIGNATURE: <i>[Signature]</i>	DATE: <i>23/4/14</i>

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 “Tribunal”, respectively) is seized of a motion filed by Mr. Ildéphonse Nizeyimana on 16 October 2013, seeking admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and corollary relief.¹

A. Procedural Background

2. On 19 June 2012, Trial Chamber III of the Tribunal (“Trial Chamber”) convicted Mr. Nizeyimana of genocide, extermination and murder as crimes against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.² The written Trial Judgement was filed in English on 22 June 2012.³ The Trial Chamber sentenced Mr. Nizeyimana to life imprisonment.⁴

3. Both Mr. Nizeyimana and the Prosecution have appealed against the Trial Judgement.⁵ As part of his appeal, Mr. Nizeyimana submits that the Trial Chamber violated his right to present material evidence by refusing his requests to: (i) cross-examine Prosecution Witness ZAV on his United States of America (“United States”) immigration records and his prior oral statement to members of the Prosecution, whom Mr. Nizeyimana was not allowed to call as witnesses; (ii) cross-examine Prosecution Witnesses BZC, BXF, and ZBJ on prior inconsistent statements obtained from Canadian immigration authorities subsequent to their testimony; and (iii) transcribe the refugee status hearings of Witnesses ZBJ and BXF.⁶

4. On 16 October 2013, Mr. Nizeyimana filed his Motion, to which the Prosecution responded on 6 November 2013.⁷ Mr. Nizeyimana filed his reply on 11 November 2013.⁸

¹ Appellant’s *Confidential* Motion for Fresh Evidence and Corollary Relief, 16 October 2013 (“Motion”).

² T. 19 June 2012 pp. 10, 11.

³ *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012 (“Trial Judgement”).

⁴ Trial Judgement, para. 1599.

⁵ See Ildéphonse Nizeyimana’s Notice of Appeal, 23 July 2012; Ildéphonse Nizeyimana’s Amended Notice of Appeal, 14 May 2013 (“Nizeyimana Notice of Appeal”); Ildéphonse Nizeyimana’s *Confidential* Brief on Appeal, 5 August 2013 (“Nizeyimana Appeal Brief”); Prosecutor’s Notice of Appeal, 29 June 2012; Prosecutor’s Appellant’s Brief, 12 September 2012.

⁶ Nizeyimana Notice of Appeal, paras. 58, 59, 83; Nizeyimana Appeal Brief, paras. 227-271, 364-383; Ildéphonse Nizeyimana’s *Confidential* Brief in Reply, 1 October 2013, paras. 55, 56, 70-74.

⁷ Prosecutor’s Response to “Appellant’s *Confidential* Motion for Fresh Evidence and Corollary Relief”, 6 November 2013 (“Response”).

B. Applicable Law

1. Admission of Additional Evidence Pursuant Rule 115 of the Rules

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.⁹ According to Rule 115(A) of the Rules, a motion for admission of 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 in any form, or discoverable through the exercise of due diligence. The applicant must also show that the additional evidence is relevant and credible.¹⁰

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 [of the Tribunal] and the Rules [...] to bring evidence [...] before the Trial Chamber”.¹¹ The applicant is therefore expected to apprise the Trial Chamber of all difficulties that he encountered in obtaining the evidence in question.¹² Once it has been determined that the additional evidence meets these conditions, the

⁸ Reply to Prosecution Response to Appellant’s *Confidential* Motion for Fresh Evidence and Corollary Relief, 11 November 2013 (“Reply”).

⁹ See, e.g., *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Decision on Karemera’s and Ngirumpatse’s Motions Under Rules 68 and 115 of the Rules, 6 February 2014 (“*Karemera and Ngirumpatse* Decision of 6 February 2014”), para. 7; *Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Decision on Grégoire Ndahimana’s Motion for Admission of Additional Evidence on Appeal, 2 May 2013 (“*Ndahimana* Decision of 2 May 2013”), para. 6; *Augustin Bizimungu et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Decision on Augustin Bizimungu’s Rule 92bis Motion and on His Rule 115 Motion for Admission of Additional Evidence, 11 June 2012 (“*Bizimungu* Decision of 11 June 2012”), para. 8; *Ildéphonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildéphonse Hategekimana’s Motion for the Admission of Additional Evidence on Appeal, 9 December 2011 (“*Hategekimana* Decision of 9 December 2011”), para. 7; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva’s Motions for the Admission of Additional Evidence, 21 March 2011 (“*Nsengiyumva* Decision of 21 March 2011”), para. 5; *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 of 4 June 2010”), para. 5. See also Practice Direction on Formal Requirements for Appeals From Judgement, 4 July 2005 (“Practice Direction on Formal Requirements”), para. 7(e), requiring that a motion under Rule 115 of the Rules should contain an appendix with copies of the evidence which the party is requesting to present.

¹⁰ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 7; *Ndahimana* Decision of 2 May 2013, para. 6; *Bizimungu* Decision of 11 June 2012, para. 8; *Hategekimana* Decision of 9 December 2011, para. 7; *Nsengiyumva* Decision of 21 March 2011, para. 5; *Rukundo* Decision of 4 June 2010, para. 5.

¹¹ *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, quoting *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 47. See also, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 8; *Bizimungu* Decision of 11 June 2012, para. 9; *Hategekimana* Decision of 9 December 2011, para. 8; *Nsengiyumva* Decision of 21 March 2011, para. 6; *Rukundo* Decision of 4 June 2010, para. 6.

¹² See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 8; *Bizimungu* Decision of 11 June 2012, para. 9; *Hategekimana* Decision of 9 December 2011, para. 8; *Nsengiyumva* Decision of 21 March 2011, para. 6; *Rukundo* Decision of 4 June 2010, para. 6.

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.¹³

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 allow it to be admitted on appeal provided the moving party establishes that its exclusion *would* amount to a miscarriage of justice.¹⁴ That is, it must be demonstrated that, had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.¹⁵

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 is relevant, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's verdict. Where this burden is not met, the tendered material may be rejected without detailed consideration.¹⁶

9. Finally, the Appeals Chamber has repeatedly recognized 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.¹⁷

2. Witnesses at the Appellate Stage

10. The Appeals Chamber recalls that "it has the authority to summon a witness, in appropriate circumstances, to testify before the [Appeals] Chamber so as to facilitate the effective conduct of appeal proceedings, and especially Rule 115's power to admit additional evidence".¹⁸ However, the purpose of Rule 115 is to deal "with the situation where a party *is in possession of material* that was

¹³ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 8; *Ndahimana* Decision of 2 May 2013, para. 6; *Bizimungu* Decision of 11 June 2012, para. 9; *Hategekimana* Decision of 9 December 2011, para. 8; *Nsengiyumva* Decision of 21 March 2011, para. 6.

¹⁴ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 9; *Ndahimana* Decision of 2 May 2013, para. 7; *Bizimungu* Decision of 11 June 2012, para. 10; *Hategekimana* Decision of 9 December 2011, para. 9; *Nsengiyumva* Decision of 21 March 2011, para. 7; *Rukundo* Decision of 4 June 2010, para. 7.

¹⁵ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 9; *Ndahimana* Decision of 2 May 2013, para. 7; *Bizimungu* Decision of 11 June 2012, para. 10; *Hategekimana* Decision of 9 December 2011, para. 9; *Nsengiyumva* Decision of 21 March 2012, para. 7; *Rukundo* Decision of 4 June 2010, para. 7.

¹⁶ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 10; *Ndahimana* Decision of 2 May 2013, para. 8; *Bizimungu* Decision of 11 June 2012, para. 11; *Hategekimana* Decision of 9 December 2011, para. 10; *Nsengiyumva* Decision of 21 March 2011, para. 8; *Rukundo* Decision of 4 June 2010, para. 8.

¹⁷ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 11; *Ndahimana* Decision of 2 May 2013, para. 9; *Bizimungu* Decision of 11 June 2012, para. 12; *Hategekimana* Decision of 9 December 2011, para. 11; *Nsengiyumva* Decision of 21 March 2011, para. 9; *Rukundo* Decision of 4 June 2010, para. 9.

¹⁸ *Ndahimana* Decision of 2 May 2013, para. 20; *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11bis, Decision on Bernard Munyagishari's First and Second Motions for Admission of Additional Evidence, 25 February 2013 ("*Munyagishari* Decision of 25 February 2013"), para. 42; *Nsengiyumva* Decision of 21 March 2011, para. 31.

not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.”¹⁹ 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.²⁰ As repeatedly held, a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.²¹ The Appeals Chamber determines whether calling a witness to testify on appeal is necessary on the basis of 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.²²

C. Discussion

11. In his Motion, Mr. Nizeyimana requests: (i) the recall of Prosecution Witness ZAV for cross-examination on the notes from an interview with the Prosecution on 27 and 28 November 2009 (“27-28 November 2009 Interview Note”) and for this testimony to be considered part of the record on appeal; (ii) the admission of the 27-28 November 2009 Interview Note into the record on appeal; (iii) leave to call two members of the Prosecution team as additional witnesses to prove the existence of the 27-28 November 2009 Interview Note and for this to be part of the record on appeal; (iv) disclosure of the Prosecution team members’ individual interview notes of the meeting with Witness ZAV within three days; or in the alternative (v) that Witness ZAV’s testimony be stricken from the record pursuant to Rules 5 and 107 of the Rules.²³ Mr. Nizeyimana also requests the recall of Witness ZAV for cross-examination on his United States immigration file, for this testimony to be considered part of the record on appeal, and the Appeals Chamber to order the United States to disclose the complete immigration file for these purposes, or in the alternative, that Witness ZAV’s testimony be stricken from the record pursuant to Article 20(4)(e) of the Statute and Rule 75 of the Rules.²⁴

¹⁹ *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 (emphasis added). See also *Nsengiyumva* Decision of 21 March 2011, para. 31; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Théoneste Bagosora’s Motion for Admission of Additional Evidence, 7 February 2011 (“*Bagosora* Decision of 7 February 2011”), para. 8.

²⁰ See *Nsengiyumva* Decision of 21 March 2011, para. 31; *Bagosora* Decision of 7 February 2011, para. 8; *Kupreškić et al.* Decision of 8 May 2001, para. 5.

²¹ See, e.g., *Nsengiyumva* Decision of 21 March 2011, para. 31; *Bagosora* Decision of 7 February 2011, para. 8. See also Practice Direction on Formal Requirements, 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.

²² *Ndahimana* Decision of 2 May 2013, para. 20; *Munyagishari* Decision of 25 February 2013, para. 42; *Nsengiyumva* Decision of 21 March 2011, para. 31.

²³ Motion, paras. 3, 31. See also Motion, paras. 13, 16-30. Nizeyimana refers to Ground 17 of his Appeal Brief. Motion, para. 19. In support of this request, Mr. Nizeyimana annexed to this Motion a copy of the 27-28 November 2009 statement. Motion, Appendix A.

²⁴ Motion, paras. 3, 40. See also Motion, paras. 14-18, 32-39.

12. Mr. Nizeyimana further requests: (i) the recall of Prosecution Witnesses BXF, BZC, and ZBJ to testify on their statements to the Canadian immigration authorities and for these testimonies to be considered part of the record on appeal; (ii) that the Appeals Chamber order a transcription of the refugee status hearing of Witnesses BXF and ZBJ; (iii) that the Witnesses and Victims Support Section of the Tribunal (“WVSS”), and not the Prosecution, be in charge of all contact with the witnesses; (iv) that the failure of any one of the three witnesses to appear to testify should lead the Appeals Chamber to strike the testimonies of all three witnesses; or in the alternative (v) that the testimonies of Witnesses BXF, BZC, and ZBJ be stricken from the record pursuant to Rules 5 and 107 of the Rules.²⁵

13. Mr. Nizeyimana further requests that the parties be allowed to submit supplementary briefs following any such hearings.²⁶

14. The Prosecution opposes the Motion in its entirety and argues that it should be summarily dismissed.²⁷ It submits that procedural and substantive deficiencies render it “unintelligible” as a Rule 115 motion, that Mr. Nizeyimana repeats arguments unsuccessfully raised at trial and in his appeal, making no argument regarding the availability of the evidence at trial or how it could impact the verdict on appeal, and that Mr. Nizeyimana fails to identify material that he can “legitimately” seek to admit under Rule 115 of the Rules or that could justify the recall of witnesses to testify on appeal.²⁸ The Prosecution argues that Mr. Nizeyimana ignores the threshold test for admissibility of additional evidence on appeal,²⁹ and thereby abuses Rule 115 of the Rules and the appeals process, as the issues raised in his Motion should properly be considered in Mr. Nizeyimana’s appeal.³⁰ The Prosecution avers that Mr. Nizeyimana fails to demonstrate that the exclusion of any of the documentation or witness testimony *would* amount to a miscarriage of justice.³¹

15. In reply, Mr. Nizeyimana emphasizes that he does not seek to re-litigate his arguments, but seeks to introduce additional evidence which was erroneously excluded by the Trial Chamber.³² He contends that he seeks to admit the testimony from the new cross-examination of Witnesses ZAV, BXF, BZC, and ZBJ as evidence on appeal, and that the testimonies of members of the Prosecution team as witnesses, as well as Witness ZAV’s United States immigration file, will simply

²⁵ Motion, paras. 3, 46, 54. *See also* Motion, paras. 42-53.

²⁶ Motion, paras. 41, 55.

²⁷ Response, paras. 1, 5, 6, 27.

²⁸ Response, paras. 5, 7, 12-14, 24-27.

²⁹ Response, paras. 7-9, 11.

³⁰ Response, paras. 8, 11.

³¹ Response, para. 14.

³² Reply, paras. 4-7, 9, 13-15.

corroborate the existence and substance of the 27-28 November 2009 Interview Note, as a “simple corollary to the curtailment of Witness ZAV’s cross-examination”.³³

1. Prosecution Witness ZAV

(a) 27-28 November 2009 Interview Note

16. Mr. Nizeyimana submits that Witness ZAV’s uncorroborated testimony resulted in his conviction for the murder of Remy Rwekaza and that his cross-examination of Witness ZAV was “severely hindered” by the fact that he was denied the means to impeach the witness with his prior contradictory oral statement to the Prosecution during the November 2009 interview.³⁴ With regards to the availability of the 27-28 November 2009 Interview Note, Mr. Nizeyimana submits that the Prosecution disclosed to him “detailed interview notes on Prosecution letterhead” in relation to Witness ZAV, recorded during a meeting that the Prosecution had with Witness ZAV in November 2009.³⁵ He argues that the 27-28 November 2009 Interview Note contradicted “much of” Witness ZAV’s testimony relating to the killing of Rwekaza.³⁶

17. Mr. Nizeyimana underscores that during the cross-examination of Witness ZAV, the Trial Chamber ruled that the 27-28 November 2009 Interview Note was not a statement under Rule 66 of the Rules and did not allow him to cross-examine the witness based upon the 27-28 November 2009 Interview Note, or to show the document to the witness.³⁷ He contends that the 27-28 November 2009 Interview Note clearly constituted a statement under Rule 66(A)(ii) of the Rules and asserts that the fact that the statement was not signed does not limit his right to use it in a cross-examination.³⁸

18. Mr. Nizeyimana avers that because Witness ZAV denied the contents of the statement while admitting to meeting with Prosecution investigators, he was entitled to call the Prosecution investigators to “prove the contents of the statement”.³⁹ He therefore argues that the Trial Chamber erred in its decision ordering him to remove two members of the Prosecution team, who were

³³ Reply, paras. 10-12.

³⁴ Motion, paras. 13, 25, 30.

³⁵ Motion, para. 20.

³⁶ Motion, para. 20, *referring to* Nizeyimana Appeal Brief, Annex E (Draft Statement ZAV Disclosed 18 February 2010). Nizeyimana submits that in his testimony, Witness ZAV “unequivocally” stated that Nizeyimana did not get out of his car, whereas in the Interview Note he stated that Nizeyimana was standing on the side of the road “to make sure soldiers killed us. I could see him standing there, it was a short distance.” Motion, para. 20, *citing* Witness ZAV, T. 23 February 2011 pp. 61, 62, 65 (closed session).

³⁷ Motion, para. 22, *citing* Witness ZAV, T. 23 February 2011 pp. 64, 70 (closed session).

³⁸ Motion, paras. 23, 24, *referring to* Nizeyimana Appeal Brief, paras. 252-254.

³⁹ Motion, paras. 21, 25.

present at the meeting with Witness ZAV, from his witness list.⁴⁰ Mr. Nizeyimana asserts that in questioning the members of the Prosecution team, he could have demonstrated that the 27-28 November 2009 Interview Note and contemporaneous individual interview notes made during the same meeting were statements pursuant to Rule 66(A) of the Rules, which should have been the subject of disclosure and cross-examination, and requests the Appeals Chamber to order the disclosure of any contemporaneous interview notes.⁴¹

19. The Prosecution responds that it provided the 27-28 November 2009 Interview Note to Mr. Nizeyimana, who made use of it at trial,⁴² and that it is therefore already part of the record which the Trial Chamber considered in its assessment of Witness ZAV's overall credibility.⁴³ It asserts that Witness ZAV provided a contemporaneous signed statement subsequent to the November 2009 interview, which was also available during his cross-examination.⁴⁴

20. The Appeals Chamber observes that there are inconsistencies between Witness ZAV's in-court testimony and the 27-28 November 2009 Interview Note, relating to Nizeyimana's location at the time of the attack and killing.⁴⁵ The Appeals Chamber notes that the inconsistency relates to the issue of the credibility and reliability of Witness ZAV's testimony in this case, an issue which was raised at trial and considered by the Trial Chamber.⁴⁶ 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 finds that the 27-28 November 2009 Interview Note bears sufficient indicia of credibility to be considered as admissible as additional evidence on appeal, as it was prepared and disclosed by the Prosecution.⁴⁷

21. The Appeals Chamber notes that the Trial Chamber found that the 27-28 November 2009 Interview Note was "not properly a statement" given that it was not acknowledged or signed by the witness,⁴⁸ and that the Prosecution subsequently disclosed a signed statement emanating from the

⁴⁰ Motion, paras. 13, 25, referring to *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Nizeyimana Pre Defence Brief, 28 March 2011, p. 50 (Witnesses 45 and 46); *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Prosecutor's Urgent Motion Concerning Deficiencies of the Pre-Trial Defence Brief, 12 April 2011, paras. 20, 21.

⁴¹ Motion, paras. 13, 26-28.

⁴² Response, para. 15.

⁴³ Response, paras. 15, 18, 19.

⁴⁴ Response, para. 15.

⁴⁵ Regarding whether Nizeyimana was in his car or on the side of the road during the incident, compare Motion, Appendix A with Witness ZAV, T. 23 February 2011 p. 65 (closed session).

⁴⁶ See Trial Judgement, para. 750.

⁴⁷ Witness ZAV, T. 23 February 2011 pp. 62, 63 (closed session). See also Nizeyimana Appeal Brief, para. 250, fn. 311; Nizeyimana Appeal Brief, Annex E; Prosecution Response Brief, paras. 128, 130, Motion, para. 20. During the testimony of Witness ZAV it emerged that, subsequently, on 26 July 2010, the Prosecution disclosed a written statement signed by the witness emanating from two meetings held in November 2009 and July 2010. Witness ZAV, T. 23 February 2011 pp. 63, 66 (closed session).

⁴⁸ Witness ZAV, T. 23 February 2011 pp. 64-70 (closed session).

November 2009 meeting with the witness.⁴⁹ Furthermore, the Appeals Chamber recalls that Nizeyimana opted not to seek the admission of the 27-28 November 2009 Interview Note as an exhibit or to pursue the matter in the face of a Prosecution objection.⁵⁰ The Appeals Chamber therefore finds that Mr. Nizeyimana has not demonstrated that, for the purposes of Rule 115 of the Rules, the 27-28 November 2009 Interview Note was not available at trial. The document can therefore be admitted as additional evidence on appeal only if Mr. Nizeyimana establishes that its exclusion *would* amount to a miscarriage of justice or *would* have had an impact on the verdict, had it been before the Trial Chamber.

22. In this regard, the Appeals Chamber observes that the 27-28 November 2009 Interview Note was disclosed to Mr. Nizeyimana, that he questioned Witness ZAV on the 27-28 November 2009 Interview Note during cross-examination, and that consequently the alleged discrepancies are reflected in the transcripts and in the Trial Judgement, including the witness's reluctance to respond to this line of questioning.⁵¹ Therefore, the inconsistency in the 27-28 November 2009 Interview Note, which is reflected in the trial record, was duly considered by the Trial Chamber in its deliberations on the verdict concerning the killing of Rwekaza and the attack on Witness ZAV. In these circumstances, Mr. Nizeyimana has not demonstrated that had the additional evidence been adduced at trial, it would have had an impact on the verdict.⁵² The Appeals Chamber therefore finds that the exclusion of the 27-28 November 2009 Interview Note will not result in a miscarriage of justice and therefore denies the request for its admission as additional evidence on appeal.

23. Given the foregoing, the Appeals Chamber finds that Mr. Nizeyimana's further requests for the recall of Witness ZAV, the summoning of Prosecution team members as witnesses based on the 27-28 November 2009 Interview Note, and the disclosure of the Prosecution members' individual, contemporaneous interview notes of the November 2009 meeting with Witness ZAV, are rendered moot. The Appeals Chamber therefore dismisses Mr. Nizeyimana's submissions in this regard.

24. The Appeals Chamber further finds that the question as to whether to strike Witness ZAV's testimony from the record is not properly raised in a motion for additional evidence as Rule 115 of the Rules does not provide for such a remedy, but is rather a matter for the appeal from judgement. In view of this, and noting that Mr. Nizeyimana challenges Witness ZAV's credibility on the basis of the 27-28 November 2009 Interview Note in his appeal, the Appeals Chamber will address

⁴⁹ Witness ZAV, T. 23 February 2011 pp. 63, 70, 71 (closed session).

⁵⁰ Witness ZAV, T. 23 February 2011 pp. 64, 70, 71 (closed session) ("Mr. Philpot: In this circumstance we will file neither at this stage").

⁵¹ Witness ZAV, T. 23 February 2011 pp. 64-70 (closed session); Trial Judgement, para. 750.

⁵² See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 9; *Ndahimana* Decision of 2 May 2013, para. 7; *Bizimungu* Decision of 11 June 2012, para. 10; *Hategekimana* Decision of 9 December 2011, para. 9; *Nsengiyumva* Decision of 21 March 2012, para. 7; *Rukundo* Decision of 4 June 2010, para. 7.

Mr. Nizeyimana's related submissions in his Appeal Brief,⁵³ as appropriate, in the Appeal Judgement. His present submissions in this regard are therefore dismissed.

(b) Statement to United States Immigration Authorities

25. Mr. Nizeyimana avers that he was denied access to Witness ZAV's United States immigration file, on which he was prevented from cross-examining the witness.⁵⁴ Mr. Nizeyimana submits that during cross-examination, Witness ZAV admitted that he did not mention Mr. Nizeyimana in his United States refugee status application, and that Witness ZAV was reluctant to discuss this application.⁵⁵ Mr. Nizeyimana argues that the Trial Chamber foreclosed his possibility of obtaining the immigration records by rejecting his motion requesting the variance of protective measures for Witness ZAV, in order to obtain the United States Government's cooperation, in violation of Article 20(4)(e) of the Statute and Rule 75 of the Rules.⁵⁶ He asserts that the Trial Chamber was equally deprived of key evidence to consider when evaluating Witness ZAV's credibility.⁵⁷ Mr. Nizeyimana maintains that this evidence could carry "significant weight in impeaching" the witness and consequently could affect the verdict.⁵⁸

26. Mr. Nizeyimana underscores that he was unable to fully exercise his right to cross-examine Witness ZAV on his immigration file, given the lack of access to the relevant material.⁵⁹ Mr. Nizeyimana requests the Appeals Chamber to reverse the Trial Decision of 28 October 2011 and Witness ZAV's protection order.⁶⁰ If the United States refuses to communicate the immigration file or the witness refuses to testify, Mr. Nizeyimana requests Witness ZAV's testimony to be stricken from the trial record.⁶¹

27. The Prosecution responds that Mr. Nizeyimana abuses Rule 115 of the Rules in attempting to admit on appeal Witness ZAV's immigration file, which he does not possess and apparently has

⁵³ See Nizeyimana Appeal Brief, Ground 17.

⁵⁴ Motion, para. 14. Nizeyimana refers to Ground 16 of his Appeal Brief. Motion, para. 32.

⁵⁵ Motion, para. 33, *citing* Witness ZAV, T. 23 January 2011 pp. 42-50 (closed session); T. 23 February 2011 pp. 59, 60 (closed session). The Appeals Chamber considers that Mr. Nizeyimana erroneously refers to the transcriptions of 23 January 2011 and intended to refer to the transcriptions of 23 February 2011, which was the date on which Witness ZAV testified.

⁵⁶ Motion, paras. 34, 35, 37, *referring to The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion for Variance of Protective Measures of Witness ZAV, confidential version, 28 October 2011 ("Trial Decision of 28 October 2011"), paras. 4, 6-8.

⁵⁷ Motion, paras. 16, 35. *See also* Motion, para. 34.

⁵⁸ Motion, para. 36.

⁵⁹ Motion, para. 36.

⁶⁰ Motion, para. 38.

⁶¹ Motion, para. 39.

never seen.⁶² It asserts that Mr. Nizeyimana did not use all the means at his disposal to obtain the documents, including by appealing the Trial Decision of 28 October 2011.⁶³

28. The Appeals Chamber emphasizes that the admission of material under Rule 115 of the Rules requires that the party is in possession of the material that was not before the Trial Chamber and which represents additional evidence of a fact or issue litigated at trial.⁶⁴ As Mr. Nizeyimana has indicated that he is not in possession of Witness ZAV's United States immigration file, he fails to satisfy the formal requirements applicable to a motion seeking the admission of additional evidence on appeal. Furthermore, the Appeals Chamber considers that this Decision relating to admission of additional evidence is not the proper forum for adjudicating alleged errors relating to the Trial Decision of 28 October 2011 or for obtaining state cooperation. In view of this, and noting that Mr. Nizeyimana challenges the Trial Decision of 28 October 2011 in his appeal, the Appeals Chamber will address Mr. Nizeyimana's related submissions in his Appeal Brief,⁶⁵ as appropriate, in the Appeal Judgement. Accordingly, Mr. Nizeyimana's requests in his Motion for the Appeals Chamber to reverse the Trial Decision of 28 October 2011, to order the disclosure of the immigration file, and to strike Witness ZAV's testimony from the record are summarily dismissed. Given the foregoing, the Appeals Chamber finds that Mr. Nizeyimana's request to recall Witness ZAV is moot and dismisses it.

2. Witnesses BXF, BZC, and ZBJ

29. Mr. Nizeyimana submits that his conviction for the Matabaro killings is based solely on the testimony of Witnesses BXF, BZC, and ZBJ, and that his cross-examination of these witnesses was "incomplete" as he was not in possession of contradictory prior statements from their Canadian immigration files.⁶⁶ Mr. Nizeyimana argues that following the close of trial and the commencement of deliberations, Canadian authorities disclosed to him immigration documents relating to Witnesses BXF, BZC, and ZBJ, which revealed "major differences" between their testimonies at trial and their immigration applications.⁶⁷ Mr. Nizeyimana "immediately" filed a motion seeking

⁶² Response, paras. 9, 20.

⁶³ Response, para. 20.

⁶⁴ See, e.g., *Karemera and Ngirumpatse* Decision of 6 February 2014, para. 7; *Ndahimana* Decision of 2 May 2013, para. 6; *Bizimungu* Decision of 11 June 2012, para. 8; *Hategekimana* Decision of 9 December 2011, para. 7; *Nsengiyumva* Decision of 21 March 2011, para. 5; *Rukundo* Decision of 4 June 2010, para. 5. See also Practice Direction on Formal Requirements, para. 7(e), requiring that a motion under Rule 115 of the Rules should contain an appendix with copies of the evidence which the party is requesting to present.

⁶⁵ See Nizeyimana Appeal Brief, Ground 16. The Appeals Chamber notes in this regard that Mr. Nizeyimana did not seek leave to appeal the Trial Decision of 28 October 2011 during trial.

⁶⁶ Motion, para. 42. Mr. Nizeyimana refers to Ground 29 of his Appeal Brief. Motion, para. 47 and *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-PT, Confidential Nizeyimana Defence Motion to Recall Witnesses BXF, BZC and ZBJ, 16 February 2012 ("Recall Motion of 16 February 2012"), paras. 6-23.

⁶⁷ Motion, para. 49, referring to Recall Motion of 16 February 2012, paras. 35-38, 42(e)(f), 48-50, 39-41, 42(a)-(d), 47-50. Notably, Mr. Nizeyimana contends that Witness ZBJ testified in court that she hid under a bed all night and heard

recall of these witnesses, which the Trial Chamber denied,⁶⁸ a decision which Mr. Nizeyimana argues was “abusive” and a miscarriage of justice.⁶⁹

30. Mr. Nizeyimana notes that not all of the contradictions pertain to the Matabaro killings, but asserts that the flexibility of the witnesses to adapt different versions of the event is relevant to their overall credibility.⁷⁰ He maintains that this “highly relevant and probative evidence” could affect the verdict and that the Trial Chamber’s denial of the Recall Motion of 16 February 2012 resulted in the documents being unavailable at trial.⁷¹ If the witnesses refuse to testify on appeal, Mr. Nizeyimana requests that their testimony be stricken from the record pursuant to Rule 5 of the Rules.⁷²

31. The Prosecution responds that Mr. Nizeyimana did not append the immigration records he seeks to admit as additional evidence, of which he is in possession, in violation of paragraph 7(e) of the Practice Direction on Formal Requirements.⁷³ It asserts that Mr. Nizeyimana’s submissions are an impermissible attempt to circumvent the requirements to appeal interlocutory decisions.⁷⁴

32. The Appeals Chamber recalls that it has the authority to summon a witness, but 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.⁷⁵ Mr. Nizeyimana must provide the Appeals Chamber with the evidence sought to be admitted.⁷⁶ The Appeals Chamber notes, however, that Mr. Nizeyimana does not seek the admission of, and has not provided the Appeals Chamber with any statement from Witnesses BXF, BZC, or ZBJ, or any documentation that may be admissible as additional evidence and the contents of which would prompt the Appeals Chamber to recall the witnesses to testify in person regarding their Canadian immigration statements.⁷⁷ Accordingly, the Appeals Chamber finds that Mr. Nizeyimana’s request for an order to recall Witnesses BXF, BZC, and ZBJ pursuant to Rule 115 of the Rules cannot be granted. As a result, the Appeals Chamber

gunshots, whereas her Canadian immigration documents stated that she was an eye-witness to the entire scene, spent that night in the forest, and did not mention Nizeyimana. Motion, para. 49, *citing* Witness ZBJ, T. 25 February 2011 p. 9 and Recall Motion of 16 February 2012, para. 35.

⁶⁸ Motion, paras. 49, 50, *referring to* Recall Motion of 16 February 2012, paras. 32-59 and *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Confidential Decision on Nizeyimana Defence Motion to Recall Witnesses BXF, BZC and ZBJ, 7 May 2012.

⁶⁹ Motion, para. 50.

⁷⁰ Motion, para. 51.

⁷¹ Motion, para. 52.

⁷² Motion, para. 53.

⁷³ Response, para. 10. *See also* Response, para. 22.

⁷⁴ Response, para. 23.

⁷⁵ *See Nsengiyumva* Decision of 21 March 2011, para. 31; *Bagosora* Decision of 7 February 2011, para. 8.

⁷⁶ *See, e.g., Nsengiyumva* Decision of 21 March 2011, para. 31; *Bagosora* Decision of 7 February 2011, para. 8. *See also* Practice Direction on Formal Requirements, 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.

⁷⁷ *See* Reply, para. 6. Nizeyimana explains that he did not append the immigration records of Witnesses ZAV, BXF, BZC, and ZBJ to the Motion because he is not seeking their admission.

finds that Mr. Nizeyimana's requests that only WVSS is to be in contact with the witnesses and not the Prosecution, and for a transcription of the refugee status hearing of Witnesses BXF and ZBJ, are moot and the Appeals Chamber dismisses them. In any case, the Appeals Chamber notes that Mr. Nizeyimana raises the issue of transcription of the refugee hearing in his appeal.⁷⁸ As such, the Appeals Chamber will address Mr. Nizeyimana's related submissions, as appropriate, in the Appeal Judgement.

33. Furthermore, the Appeals Chamber considers that this Decision relating to admission of additional evidence is not the proper forum for adjudicating whether to strike Witnesses BXF's, BZC's, and ZBJ's testimonies from the record as Rule 115 of the Rules does not provide for such a remedy. In view of this, and noting that Mr. Nizeyimana challenges the credibility of Witnesses BXF, BZC, and ZBJ in his appeal, the Appeals Chamber will address Mr. Nizeyimana's related submissions in his Appeal Brief,⁷⁹ as appropriate, in the Appeal Judgement. His present submissions in this regard are accordingly dismissed.

D. Conclusion

34. The Appeals Chamber emphasizes that its conclusions set out in this Decision pertain strictly to the issues raised in the Motion, and are accordingly in no way indicative of the Appeals Chamber's eventual assessment of the merits of Mr. Nizeyimana's appeal.

E. Disposition


35. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion in its entirety.

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

Done this 23rd day of April 2014,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Theodor Meron
Presiding

⁷⁸ See Nizeyimana Appeal Brief, Ground 29.

⁷⁹ See Nizeyimana Appeal Brief, Grounds 29, 31, 32.



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		Case No / no. de l'affaire:	ICTR-00-55C-A		
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		I acknowledge receipt of the documents listed below. <i>J'accuse réception des documents mentionnés ci-dessous.</i>			
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Decision on Appellant's Confidential Motion for Fresh Evidence and Corollary Relief			23.04.2014	1092/H –1081/H	