



ICTR-01-63-A  
28-09-2009  
(899/A - 891/A)  
Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

899/A  
A

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 28 September 2009

**SIMÉON NCHAMIHIGO**

v.

**THE PROSECUTOR**

*Case No. ICTR-2001-63-A*

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**DECISION ON SIMÉON NCHAMIHIGO'S SECOND MOTION FOR LEAVE  
TO PRESENT ADDITIONAL EVIDENCE ON APPEAL**

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**The Appellant:**

Mr. Denis Turcotte, Lead Counsel  
Ms. Nathalie Leblanc, Co-Counsel

**Office of the Prosecutor**

Mr. Hassan Bubacar Jallow  
Mr. Alex Obote-Odora  
Ms. Dior Fall

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 seized of a motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), filed by Siméon Nchamihigo on 14 August 2009.<sup>1</sup> The Prosecution responded to this motion on 10 September 2009<sup>2</sup>, and Mr. Nchamihigo replied on 18 September 2009.<sup>3</sup>

## I. PRELIMINARY ISSUE

2. The Appeals Chamber considers *proprio motu* that *Pièce B* annexed to the Motion has the potential to reveal protected information. Accordingly, this document should be placed under seal.

## II. BACKGROUND

3. On 24 September 2008,<sup>4</sup> Trial Chamber III of the Tribunal (“Trial Chamber”) convicted Mr. Nchamihigo in relation to events in Cyangugu prefecture in April 1994 of four counts of genocide, murder as a crime against humanity, extermination as a crime against humanity, and other inhumane acts as a crime against humanity, and imposed a single sentence of imprisonment for the remainder of his life.<sup>5</sup> Mr. Nchamihigo has appealed his convictions and sentence.<sup>6</sup> The hearing of the appeal in this case is scheduled for 29 September 2009.<sup>7</sup>

<sup>1</sup> *Seconde requête de l'appelant demandant la permission de présenter des moyens de preuve supplémentaires*, 14 August 2009 (“Motion”). Nchamihigo also filed, on the same day, another motion for leave to admit additional evidence on appeal: *Requête de l'appelant demandant la permission de présenter devant la chambre d'appel des moyens de preuve supplémentaires (Article 115 du RPP)*, confidential and public redacted versions filed on 14 August 2009.

<sup>2</sup> Prosecution’s Response to “*Seconde requête de l'appelant demandant la permission de présenter des moyens de preuve supplémentaires*” (Rule 115), 10 September 2009 (“Response”). See also Order Concerning Prosecution’s Response and Appellant’s Reply to Siméon Nchamihigo’s Motions to Admit Additional Evidence, 2 September 2009.

<sup>3</sup> *Réplique de l'Appelant à la Prosecution’s Response to “Seconde requête de l'appelant demandant la permission de présenter des moyens de preuve supplémentaires”*, 18 September 2009 (“Reply”).

<sup>4</sup> The written version of the trial judgement was filed on 12 November 2008: *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-T, Judgement and Sentence, 12 November 2008 (“Trial Judgement”).

<sup>5</sup> Trial Judgement, paras. 381, 396.

<sup>6</sup> *Acte d'appel de la défense révisé*, 11 May 2009; *Mémoire d'appel de la défense*, 20 May 2009.

<sup>7</sup> Scheduling Order, 22 July 2009.

### III. SUBMISSIONS OF THE PARTIES

4. In his Motion, Mr. Nchamihigo seeks “the admission of the additional evidence contained in” the following three documents:<sup>8</sup> (1) a report titled “Report on Massacres Perpetrated in Gatara Commune” by Jean Magera dated 15 September 1994 (“Magera’s Report”);<sup>9</sup> (2) an order releasing *Sous-Préfet* Kamonyo from prison (“Release Order”);<sup>10</sup> and (3) the *Ntimugura et al. v. The Prosecutor* judgement from the Cyangugu Court of Appeal of 24 July 2002 (“*Ntimugura et al. Judgement*”).<sup>11</sup> He asserts that he exercised diligence in seeking the admission of these documents at trial,<sup>12</sup> but that the Trial Chamber denied his requests.<sup>13</sup> He submits that he is not challenging the decision of the Trial Chamber in relation to the admission of these documents; however, he asserts that the exclusion of these documents would result in a miscarriage of justice.<sup>14</sup>

5. Mr. Nchamihigo argues that Magera’s Report and the Release Order relate to his Ground of Appeal 31 and raise reasonable doubt about his presence at the scene of the massacres that occurred at Hanika parish.<sup>15</sup> He contends that Magera’s Report shows that the attack on Hanika parish occurred 11 April 1994; his name was not mentioned as one of the attackers; and the attackers did not state that they received orders from him.<sup>16</sup> With respect to the Release Order, he argues that “the acquittal of [*Sous-Préfet* Kamonyo] by the Rwandan authorities raises doubt as to the credibility of Witness BRN”, as he testified that *Sous-Préfet* Kamonyo was one of the principal accomplices in the attack. He points out that Witness BRN was the only witness to the events.<sup>17</sup>

6. With respect to *Ntimugura et al. Judgement*, Mr. Nchamihigo argues that it relates to his Ground of Appeal 21 and “raises doubt as to [his] presence [...] at the scene of the incident of the death of Father Boneza and the order which [he] allegedly issued”.<sup>18</sup> He points out that he was not identified in the *Ntimugura et al. Judgement* as one of the killers or instigators in that event.<sup>19</sup> In particular, he points to the summary of the testimony of Sister Bernadette Kabayundo who was in

<sup>8</sup> Motion, paras. 3, 9-21, p. 5 and *Pièces* A, B, and C annexed to the Motion.

<sup>9</sup> *Pièce* A annexed to the Motion. According to its front page, this report was addressed to the “Chairman of MDR at The National Level”.

<sup>10</sup> *Pièce* B annexed to the Motion. This document is a stamped form in Kinyarwanda, dated 04/05/06, on which *inter alia* the following data were filled in: “Kamonyo Emmanuel”; “*Prison Mkun ya Cyangugu*”.

<sup>11</sup> *Pièce* C annexed to the Motion. Document in French titled: “*Arrêt de la Cour d’appel de Cyangugu du 24 juillet 2002. Ntimugura Laurent et Consorts C/ Ministère Public et Ministère Public C/ Ntimugura Laurent et Consorts*”.

<sup>12</sup> Motion, para. 10.

<sup>13</sup> Motion, paras. 10, 11, referring to T. 19 September 2007 pp. 52, 56.

<sup>14</sup> Motion, paras. 11, 12.

<sup>15</sup> Motion, paras. 3, 16.

<sup>16</sup> Motion, para. 14.

<sup>17</sup> Motion, para. 15.

<sup>18</sup> Motion, para. 19.

<sup>19</sup> Motion, paras. 17-19.

the vehicle with Father Boneza when they were being pursued by assailants just prior to Father Boneza's killing and who, according to him, was an eye witness to the murder of Father Boneza.<sup>20</sup> He claims that it can be concluded from Sister Kabayundo's testimony that he was not present and that she did not hear any mention of him or of the order he allegedly issued.<sup>21</sup>

7. The Prosecution responds that the Motion should be dismissed in its entirety.<sup>22</sup> In support of this, it submits that the evidence was available at trial and that Mr. Nchamihigo is simply attempting to re-litigate issues that were before the Trial Chamber and that he is thus attempting to remedy failings at trial.<sup>23</sup> In this respect, the Prosecution points to the fact that Mr. Nchamihigo has not appealed the Trial Chamber's denial of Mr. Nchamihigo's request to have the documents admitted at trial, and did not attempt to use them in cross-examining the relevant witnesses at trial.<sup>24</sup>

8. Furthermore, the Prosecution asserts that the documents are irrelevant, lack credibility, and would not have been a decisive factor in reaching the decision at trial.<sup>25</sup> With regard to Magera's Report, it points out that the background and origin of the report is not clear and that it does not, as Mr. Nchamihigo submits, contradict the evidence of Witness BRN regarding the events at Hanika parish and that, in any event, the Trial Chamber took into account other evidence to the same effect as that contained in the report.<sup>26</sup> In relation to the Release Order, the Prosecution points to the fact that it does not specify whether it related to charges for the events at Hanika parish and that Mr. Nchamihigo could have cross-examined Witness BRN on the issue at trial but chose not to do so.<sup>27</sup> The Prosecution asserts that the *Ntimugura et al.* Judgement focuses on the roles of the two accused in that case and therefore is of limited relevance in relation to Mr. Nchamihigo's role particularly because the evidence of Sister Kabayundo did not explicitly name all the killers of Father Boneza.<sup>28</sup>

9. Replying to the Prosecution's argument that the evidence was available at trial and that Mr. Nchamihigo is attempting to re-litigate issues that were before the Trial Chamber, Mr. Nchamihigo argues that it is in the interest of justice to admit Magera's Report, the Release Order, and the *Ntimugura et al.* Judgement and that their exclusion would amount to a miscarriage of justice.<sup>29</sup> In support of this claim, he submits that contrary to the Prosecution's assertion, the Trial Chamber

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<sup>20</sup> Motion, para. 20.

<sup>21</sup> Motion, para. 20.

<sup>22</sup> Response, paras. 1-36.

<sup>23</sup> Response, paras. 3-13.

<sup>24</sup> Response, paras. 10-12.

<sup>25</sup> Response, paras. 14-35.

<sup>26</sup> Response, paras. 15-26.

<sup>27</sup> Response, paras. 27-29.

<sup>28</sup> Response, paras. 30-35.

<sup>29</sup> Reply, paras. 2-6.

made no decision regarding the admissibility of Magera's Report.<sup>30</sup> He further submits that in deciding that the documents were of no probative value unless the Prosecution had used them in cross-examination, the Trial Chamber erroneously made their admission dependent on the Prosecution's strategy.<sup>31</sup> He further replies that, contrary to the Prosecution's assertion, the documents are relevant and credible as they corroborate Mr. Nchamihigo's testimony at trial and they raise doubt as to the credibility of Prosecution witnesses.<sup>32</sup>

#### IV. DISCUSSION

10. Rule 115 of the Rules provides a mechanism 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 relates to a fact or issue litigated at trial.<sup>33</sup> According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible.

11. When determining the availability of evidence at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."<sup>34</sup> 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.

12. 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

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<sup>30</sup> Reply, para. 3.

<sup>31</sup> Reply, para. 5.

<sup>32</sup> Reply, paras. 8-14.

<sup>33</sup> *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, para. 5 ("Zigiranyirazo Rule 115 Decision"); *Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Decision on Simon Bikindi's Motions to Admit Additional Evidence Pursuant to Rule 115 of the Rules, 16 September 2009, para. 3 ("*Bikindi* Rule 115 Decision").

<sup>34</sup> *Muvunyi* Rule 115 Decision, para. 6, citing *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 5, quoting *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted).

party can establish that the exclusion of it *would* amount to a miscarriage of justice.<sup>35</sup> That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.<sup>36</sup>

13. Mr. Nchamihigo acknowledges that he was not only in possession of these documents at trial but that he sought their admission.<sup>37</sup> The Trial Chamber denied his requests in relation to Magera's Report and the Release Order on the basis that "all the relevant information in them had already been adduced into evidence"<sup>38</sup> and in relation to the *Ntimugura et al.* Judgement on the basis that "the value of this testimony to your client is that his name [does not appear] in the document [and] it's not necessary for the document to be tendered to prove that".<sup>39</sup> It is thus clear that the material sought for admission was available at trial, and the Appeals Chamber is satisfied that Mr. Nchamihigo exercised due diligence in his attempts to have this evidence admitted at trial.

14. However, the Appeals Chamber observes that Mr. Nchamihigo has not appealed the Trial Chamber's denial of his requests to admit this material either in his Notice of Appeal or Appeal Brief.<sup>40</sup> As such, the Appeals Chamber finds that Mr. Nchamihigo has failed to exercise due diligence in relation to these documents.<sup>41</sup> It remains to be considered whether denial of the admission of this evidence *would* result in a miscarriage of justice.

15. With respect to Magera's Report, the Appeals Chamber notes that no background is provided showing whether this report was the result of investigations or simply based on Jean Magera's observations at the time, which prevents the Appeals Chamber from determining whether it is an exhaustive report. Furthermore, the Appeals Chamber is not convinced that it calls into question the Trial Chamber's finding that the attack on Hanika parish occurred on 12 April 1994 or

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<sup>35</sup> *Muvunyi* Rule 115 Decision, para. 7, citing *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6 (citing cases).

<sup>36</sup> *Muvunyi* Rule 115 Decision, para. 7, citing *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6.

<sup>37</sup> Motion, para. 10.

<sup>38</sup> T. 19 September 2007 p. 56.

<sup>39</sup> T. 19 September 2007 p. 52.

<sup>40</sup> *See Acte d'appel de la défense révisé*, 11 May 2009; *Mémoire d'appel de la défense*, 20 May 2009.

<sup>41</sup> The Appeals Chamber notes the *Zigiranyirazo* Rule 115 Decision in which Zigiranyirazo sought to admit the evidence of a witness whom he had already sought permission to examine by video-link at trial. The Trial Chamber in that case had denied the request and the witness was therefore not heard at trial. The Appeals Chamber in the *Zigiranyirazo* Rule 115 Decision considered that Zigiranyirazo had exercised due diligence in attempting to adduce the evidence at trial and accordingly the Appeals Chamber applied the "could" standard rather than the "would" standard in deciding the *Zigiranyirazo* Rule 115 motion (*see Zigiranyirazo* Rule 115 Decision, paras. 34-38). However, the Appeals Chamber considers that the present case is distinguishable from that case because in the *Zigiranyirazo* Rule 115 Decision, Zigiranyirazo also appealed the Trial Chamber's decision in his appeal on the merits, whereas in the present case Nchamihigo did not. The Appeals Chamber was given the opportunity to assess whether the Trial Chamber erred in its decision not to order a video link at trial because the Trial Chamber's decision in *Zigiranyirazo* was appealed. In this case, the Appeals Chamber has not been asked to consider whether the Trial Chamber's decisions were correct.

that Mr. Nchamihigo was involved in the attack.<sup>42</sup> Magera's Report states that the attack started on 11 April 1994 and "this unwinded so until 13 April 1994".<sup>43</sup> Therefore, this statement is consistent with the Trial Chamber's finding that an attack was first launched on 11 April 1994, followed by other attacks over the following days.<sup>44</sup>

16. With respect to the absence of Mr. Nchamihigo's name from Magera's Report, the Appeals Chamber notes that portions of the report are both physically illegible and marked as illegible in the version of the report provided. Therefore, it is not possible to conclude with certainty that Mr. Nchamihigo's name did not appear in the original report. Magera's Report also acknowledges that Magera did not know all the leaders involved.<sup>45</sup> In any event, the Appeals Chamber observes that the evidence that Mr. Nchamihigo's name does not appear in Magera's Report was already before the Trial Chamber in the form of Mr. Nchamihigo's testimony to that effect.<sup>46</sup> In view of these considerations, the Appeals Chamber finds that Mr. Nchamihigo has not demonstrated that the admission of Magera's Report at trial would have had an impact on the Trial Chamber's findings on Mr. Nchamihigo's criminal responsibility in relation to Hanika parish.

17. In relation to the Release Order of *Sous-Préfet* Kamonyo, Mr. Nchamihigo has not demonstrated that its admission would have had an impact on the Trial Chamber's findings with respect to Witness BRN's credibility and thus on Mr. Nchamihigo's conviction in relation to Hanika parish. First, the Release Order provides no background, and in particular does not state for which offences *Sous-Préfet* Kamonyo was charged and released, and therefore, it has not been established that the Order relates to the Hanika parish events. As a result, it cannot serve as proof that *Sous-Préfet* Kamonyo was acquitted in relation to the Hanika parish attack. Consequently, it does not contradict Witness BRN's testimony that *Sous-Préfet* Kamonyo was an accomplice to the Hanika parish events<sup>47</sup> and thus does not undermine Witness BRN's credibility. Furthermore, the evidence that *Sous-Préfet* Kamonyo had been acquitted and released was before the Trial Chamber through Mr. Nchamihigo's testimony.<sup>48</sup>

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<sup>42</sup> Trial Judgement, paras. 266, 370.

<sup>43</sup> Motion, Annex A, p. 1.

<sup>44</sup> Trial Judgement, paras. 266, 370.

<sup>45</sup> Motion, Annex A, p. 5.

<sup>46</sup> T. 19 September 2007 pp. 52, 53. The Appeals Chamber observes that the Trial Chamber did not consider this evidence in the Trial Judgement (*see* Trial Judgement, paras. 250-266) but notes that Mr. Nchamihigo has not challenged the absence of consideration of this evidence in his appeal. *See Acte d'appel révisé de la défense*, 11 May 2009; *Mémoire d'appel de la défense*, 20 May 2009.

<sup>47</sup> *See* Trial Judgement, paras. 250-252.

<sup>48</sup> T. 19 September 2007 p. 53. Although the Trial Chamber did not make specific reference to it in its consideration of Witness BRN's credibility (*see* Trial Judgement, paras. 259-261), the Appeals Chamber notes that Mr. Nchamihigo has

18. Finally, Mr. Nchamihigo has not demonstrated that the fact that his name does not appear in the *Ntimugura et al.* Judgement would have had an impact on the Trial Chamber's findings regarding Mr. Nchamihigo's responsibility for the killing of Father Boneza. In this respect, the Appeals Chamber notes that although Sister Kabayundo was an eye witness to the killing of Father Boneza, she testified that given the state she was in at the time of the attack on Father Boneza, although she could identify Léon Habimana and Benjamin Munganyiki, she could not confirm all the attackers involved.<sup>49</sup> Furthermore, the fact that Mr. Nchamihigo's name does not appear in the judgement of a separate trial involving different accused is of very limited probative value.<sup>50</sup> In any event, the Appeals Chamber observes that the evidence that Mr. Nchamihigo's name did not appear in the *Ntimugura et al.* Judgement was before the Trial Chamber through Mr. Nchamihigo's testimony.<sup>51</sup>

19. Accordingly, the Appeals Chamber finds that the denial of the admission of the proposed additional evidence on appeal will not result in a miscarriage of justice.

20. The Appeals Chamber emphasises that the present conclusion pertains merely to the admissibility of the proffered material on appeal and is in no way indicative of the Appeals Chamber's considerations in relation to the merits of Mr. Nchamihigo's appeal.

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not challenged this in his appeal. See *Acte d'appel révisé de la défense*, 11 May 2009; *Mémoire d'appel de la défense*, 20 May 2009.

<sup>49</sup> Motion, Annex C, 12<sup>th</sup> feuillet.

<sup>50</sup> Cf. *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 13; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 176.

<sup>51</sup> T. 19 September 2007 p. 51. Although the Trial Chamber did not consider his evidence in this respect in the Trial Judgement (see Trial Judgement, paras. 142-144), the Appeals Chamber Mr. Nchamihigo has not challenged this on appeal. See *Acte d'appel révisé de la défense*, 11 May 2009; *Mémoire d'appel de la défense*, 20 May 2009.



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## V. DISPOSITION


For the foregoing reasons, the Appeals Chamber

**DISMISSES** Mr. Nchamihigo's Motion in its entirety;

**DIRECTS** the Registry to place *Pièce B* annexed to the Motion under seal.

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

Done this 28<sup>th</sup> day of September 2009,  
in Arusha,  
Tanzania.

  
\_\_\_\_\_  
Judge Patrick Robinson  
Presiding





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