788/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-01-72-A
16th September 2009
{788/H – 778/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: 16 September 2009

ICTR Appeals Chamber
Date: 16th September 2009
Action: R. Thiandi
Copied To: Concerned Judges, SLO's, LO's, ALO's, Parties, CMS, LSS.

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

Counsel for the Appellant:

Mr. Andreas O'Shea

Office of the Prosecutor:

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

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: NDEFI KUMELIO A. AFANDE
SIGNATURE: DATE: 16 Sept. 2009

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 three motions to admit additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), filed by Simon Bikindi on 9 June 2009.[1] The Prosecution responded to these motions on 9 July 2009,[2] and Mr. Bikindi replied on 22 July 2009.[3] The Appeals Chamber is also seized of a request for admission of additional evidence filed by Mr. Bikindi on 9 July 2009.[4] The Prosecution responded on 29 July 2009,[5] and Mr. Bikindi replied on 12 August 2009.[6]

I. BACKGROUND

2. Mr. Bikindi is a composer and singer who worked for the Rwandan Ministry of Youth and Association Movements in 1994.[7] On 2 December 2008, Trial Chamber III convicted Mr. Bikindi of one count of direct and public incitement to commit genocide based on his exhortations to kill Tutsis which he made via a public address system on the Kivumu-Kayove road in Gisenyi Prefecture in late June 1994.[8] It sentenced him to 15 years of imprisonment.[9] Mr. Bikindi has

[1] Defence Motion to Admit Additional Evidence on Bikindi's Presence in Germany, 9 June 2009 ("First Motion"); Defence Motion to Take Judicial Notice and/or Admit Additional Evidence, 9 June 2009 ("Second Motion"); Defence Motion to Admit Additional Evidence on Sentencing, 9 June 2009 ("Third Motion").
[2] Prosecutor's Response to "Defence Motion to Admit Additional Evidence on Bikindi's Presence in Germany", 9 July 2009 ("Response to First Motion"); Prosecutor's Response to "Defence Motion to Take Judicial Notice and/or Admit Additional Evidence", 9 July 2009 ("Response to Second Motion"); Prosecutor's Response to "Defence Motion to Admit Additional Evidence on Sentencing", 9 July 2009 ("Response to Third Motion").
[3] Defence Reply Re the Admission of Additional Evidence on Bikindi's Presence in Germany, 22 July 2009 ("Reply to First Motion"); Defence Reply Re the Taking of Judicial Notice and/or Admission of Additional Evidence, 22 July 2009 ("Reply to Second Motion"); Defence Reply Re the Admission of Additional Evidence on Bikindi's Sentence, 22 July 2009 ("Reply to Third Motion").
[4] Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu, 9 July 2009 ("Fourth Motion"); *Corrigendum* to Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu, 10 July 2009 ("Corrigendum to Fourth Motion"). Mr. Bikindi previously filed a Defence Motion to Admit Additional Evidence on Events in Kivumu on 9 June 2009. On 10 June 2009, he filed a "Confidential *Corrigendum* to Defence Motion to Admit Additional Evidence on Events in Kivumu". The Appeals Chamber rejected both motions as invalid, and ordered that Mr. Bikindi file a confidential consolidated motion within 10 days of receipt of the Order. *See* Order on the Appellant's Motions to Admit Additional Evidence on Events in Kivumu, 30 June 2009, p. 4.
[5] Prosecutor's Response to "Confidential Defense [sic] Motion to Admit Additional Evidence on Events in Kivumu", 29 July 2009 ("Response to Fourth Motion").
[6] Defence Appellant's Reply Re Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu, 12 August 2009 ("Reply to Fourth Motion").
[7] *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgement, 2 December 2008 ("Trial Judgement"), para. 4.
[8] Trial Judgement, paras. 426, 441.
[9] Trial Judgement, para. 460.

appealed his conviction and sentence,[10] and the Prosecution has appealed his sentence.[11] The hearing of the appeals in this case is scheduled for 30 September 2009.[12]

II. APPLICABLE LAW

3. 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 court of first instance and which is additional evidence of a fact or issue litigated at trial.[13] Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial.

4. When determining the availability of evidence at trial, the Appeals Chamber considers whether the party proposing to tender 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 [...] to bring evidence [...] before the Trial Chamber."[14] 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 the proposed additional evidence could have been a decisive factor in reaching the decision at trial.[15]

5. Where the proffered 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 its exclusion *would* amount to a miscarriage of justice.[16] That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.[17]

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[10] Notice of Appeal, 31 December 2008 ("Bikindi's Notice of Appeal"); Defence Appellant's Brief, 16 March 2009; Corrigendum to Defence Appellant's Brief, 19 March 2009 ("Bikindi's Appellant's Brief"); Defence Appellant's Reply Brief, 11 May 2009. *See also* Prosecutor's Respondent's Brief, 27 April 2004.

[11] Prosecutor's Notice of Appeal, 31 December 2008; Prosecutor's Appellant's Brief, 28 January 2009. *See also* Defense [sic] Respondent's Brief, 20 February 2009. The Prosecution did not file a reply.

[12] Scheduling Order, 20 July 2009. p. 2 ("Scheduling Order").

[13] *The Prosecutor v. François Karera*, Case No. ICTR-01-74-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 29 October 2008, para. 8 ("*Karera* Decision"), *citing The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Request to Admit Additional Evidence, 3 October 2008, para. 5 ("*Hategekimana* Decision"); *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 12 January 2007, para. 5.

[14] *Karera* Decision, para. 8, *quoting Hategekimana* Decision, para. 5; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 5 ("*Nahimana et al.* Rule 115 Decision").

[15] *Karera* Decision, para. 8, *citing Hategekimana* Decision, para. 5.

[16] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on a Request to Admit Additional Evidence, 27 April 2007, para. 7 ("*Muvunyi* Decision"); *Nahimana et al.* Rule 115 Decision, para. 6.

[17] *Hategekimana* Decision, para. 6, *citing Muvunyi* Decision, para. 7; *Nahimana et al.* Rule 115 Decision, para. 6.

III. DISCUSSION

A. The First Motion

6. The Trial Chamber found, based on the evidence of Prosecution Witnesses AKJ and AKK, that Mr. Bikindi attended an MRND political rally at a football field in Kivumu in Gisenyi Prefecture "in 1993".[18] In recounting Witness AKJ's testimony, the Trial Chamber noted that he placed the event around 15 May 1993.[19] Witness AKK did not recall the specific date in 1993.[20] The Trial Chamber did not convict Mr. Bikindi based on this event. However, other aspects of the evidence of Witnesses AKJ and AKK did underpin his conviction for direct and public incitement to commit genocide based on his exhortations to kill Tutsis over a public address system while traveling on the Kivumu-Kayove road in Gisenyi Prefecture in late June 1994.[21]

7. Mr. Bikindi seeks leave to call four witnesses and himself, and to admit various items (including contemporaneous newspaper articles, letters, and diary entries) provided by people who saw Mr. Bikindi and his dance troupe on tour in Germany between 2 and 28 June 1993.[22] Specifically, he contends that this evidence undermines the overall credibility and reliability of the testimony of Witnesses AKK and AKJ that he attended the rally in Kivumu,[23] including testimony from Witness AKJ which placed this event on 15 June 1993.[24] Accordingly, Mr. Bikindi argues that the additional evidence seriously undermines the overall credibility of Witnesses AKK and AKJ and demonstrates that the Trial Chamber erred in accepting other aspects of their accounts in convicting him.[25]

8. Mr. Bikindi submits that this evidence was unavailable at trial given his Defence team's limited resources in investigating numerous allegations.[26] In this respect, he notes that a previous mission to Germany was unsuccessful in obtaining this evidence.[27] Mr. Bikindi acknowledges that he gave evidence concerning this trip during his testimony, but states that during his testimony he mistakenly referred to the year as "1983", rather than 1993. He thus submits that he should be

[18] Trial Judgement, paras. 141, 183.
[19] Trial Judgement, para. 135.
[20] *See* Trial Judgement, para. 137.
[21] *See* Trial Judgement, paras. 267-281, 285. *See also* paras. 426, 441.
[22] First Motion, paras. 13, 14, Annexures A to C. *See also* paras. 14(d) (wherein Mr. Bikindi refers to materials in "Annexure D". However, these materials are in fact contained in Annexure C), 23-27.
[23] First Motion, paras. 13, 15-22, 31, 32, 35; Reply to First Motion, paras. 22-25.
[24] First Motion, paras. 13, 16 (*citing* T. 21 September 2006 p. 15); Reply to First Motion, para. 23.
[25] First Motion, paras. 17-22.
[26] First Motion, paras. 28-35; Reply to First Motion, paras. 15-21.
[27] First Motion, para. 33.

allowed to correct this error.[28] In the alternative, he highlights the ineffective assistance of his Counsel in conducting investigations at the pre-trial stage.[29]

9. The Prosecution opposes the motion in its entirety[30] on the basis that Mr. Bikindi fails to satisfy the threshold test of admissibility under Rule 115 of the Rules.[31]

10. Mr. Bikindi has not convinced the Appeals Chamber that this material was unavailable at trial. The allocation of investigative resources is a matter of trial strategy which rests squarely within the discretion of Counsel: it cannot provide the basis for claiming that material was "not available" for the purposes of Rule 115 of the Rules. Furthermore, the Appeals Chamber observes that Mr. Bikindi concedes that he in fact testified about this trip during his testimony. Moreover, although he mistakenly placed it in the year 1983 rather than 1993, the exercise of due diligence during the examination or a careful review of the transcripts afterwards would have identified this error. It therefore could have been corrected during trial.[32] Finally, the Appeals Chamber is not convinced by Mr. Bikindi's claim that ineffective assistance of counsel explains the failings in earlier investigations. In this respect, the Appeals Chamber notes that Mr. Bikindi changed Lead Counsel during the course of the trial. His suggestion that a further investigative mission would not have been approved is simply speculation.[33]

11. The Appeals Chamber turns to the question of whether the exclusion of this evidence on appeal would result in a miscarriage of justice. The crux of Mr. Bikindi's submissions is that Witness AKJ placed him at the rally in Kivumu in June 1993, which is impossible in light of the additional evidence. A close review of Witness AKJ's testimony indicates that there is a measure of confusion concerning the date provided for the rally. During the examination-in-chief, the witness stated that he could only recall the year as 1993.[34] In cross-examination, the witness clarified that he could recall the month, but not the exact date.[35] The English version of the transcripts indicates that Witness AKJ initially stated that the rally occurred in May, but then later affirmed the month as

[28] First Motion, paras. 31-33.
[29] First Motion, paras. 34, 35.
[30] Response to the First Motion, paras. 3, 6-21.
[31] Response to the First Motion, paras. 3, 6, 8-13, 17.
[32] A review of Mr. Bikindi's Defence Closing Brief makes no mention of this aspect of his testimony in connection with the evidence related to his participation in rallies. *See The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Defence Closing Brief, 25 April 2008, paras. 103, 162, 261-279.
[33] First Motion, para. 33.
[34] T. 20 September 2006 p. 47 ("Q. Can you tell the Chamber when -- the first time you saw him, when was that? Can you recall the date? A. I remember the year, but I do not remember the exact date or day. Q. Can you tell us what year that was? A. The very first time I saw him was in 1993.").
[35] T. 21 September 2006 p. 15 ("I have told you that I do not remember the date, the only thing I can remember is the month.").

June.[36] Comments from the Bench at the time suggest that it understood the witness's testimony as placing the event in May,[37] which is also how his evidence is described in the Trial Judgement.[38] The French version of the transcripts, however, clearly reflects that the witness consistently stated that the rally occurred in June.[39]

12. It follows from the Trial Judgement, however, that the Trial Chamber was clearly aware of problems surrounding the date provided by Witness AKJ. Mr. Bikindi's submissions fail to appreciate that, ultimately, the Trial Chamber did not accept the specific date of either May or June mentioned during the witness's testimony, and its findings instead referred only generally to the event happening in 1993.[40] The Appeals Chamber observes that "it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony."[41] Given Witness AKJ's initial uncertainty as to when the event happened in 1993, this approach is reasonable, specifically bearing in mind the Trial Chamber's view that Mr. Bikindi's participation in the rally was corroborated by Witness AKK, who did not provide a date.

13. The Appeals Chamber therefore considers that, at most, the proposed additional evidence would raise questions about the reliability of Witness AKJ's suggestion that the rally occurred in June 1993, which the Trial Chamber already did not accept. In this context, any conflicting

[36] *Cf.* T. 21 September 2006 p. 15 ("Q. Witness, could you please kindly tell the Court at about what date – approximately, date, day and month – could you please tell the Court at about what date that 1993 rally at Kivumu football field took place? A. Thank you. The rally [was] held in the month of May 1993, but I do not remember the exact date, but it must have been, in any case, around the 15th of May, but I cannot give you the exact date. All I know is that it was around the 15th of May. Thank you. Q. If I were to put it to you that it probably was on the 6th of June 1993, what would you say to that? A. What did you say, Counsel? Well, what I have said is that the rally took place in 1993 in the month of June, but I do not remember the exact date."), *with* T. 21 September 2006 p. 17 ("Q. Well, Witness, it is your testimony that you first saw Bikindi in 1993 in the month of May; is that correct? A. No. No, it was in the month of June; it was in the month of June. Q. In 1993? A. Yes. Q. Could you confirm – or, could you make it clear – clarify, was it in May or June 1993, not 1994? A. It is my testimony that it was in the month of June.").

[37] T. 21 September 2006 p. 19 ("MADAM PRESIDENT: Counsel, this has been a very misleading cross-examination. The witness statement and yesterday's testimony have been coincident, and this afternoon when you started with your cross-examination the witness confirmed the date of May 1993 – said it was in June. He could not specify which day of May. [...] JUDGE ARREY: It's May, May, that is his examination-in-chief of yesterday, and your cross-examination.").

[38] Trial Judgement, para. 135.

[39] T. 21 September 2006 p. 17 ("*Q. [...] Pouvez-vous, Monsieur le Témoin, indiquer au Tribunal la date approximative, le jour ou le mois, et le mois approximatif — je ne veux pas vous forcer — de cette réunion de 1993 au terrain de football de Kivumu? R. Je vous remercie. Cette réunion a eu lieu en 1993. C'était au mois de juin, je ne peux pas me rappeler la date exacte. En tout état de cause, c'était autour du 15. Je ne suis pas en mesure de vous donner le jour exact, mais je sais bien que c'était autour du 15. Je vous remercie. Q. Et si je vous suggérais que c'était peut-être le 6 juin 1993, qu'est-ce que vous répondriez? R. Que dites-vous ? Moi, je vous ai dit que cette réunion a eu lieu en 93. C'était au mois de juin, mais je ne me souviens pas la date... de la date exacte.*"); pp. 19, 20 ("*Q. Alors, Monsieur le Témoin, je souhaiterais que vous... Vous avez dit que la première fois que vous avez vu Bikindi, c'était en 1993, au mois de mai; est-ce que je me trompe que vous avez dit au mois de mai? R. Non, non, c'est au mois de juin. Q. 1993? R. Oui. Q. Je voudrais que vous confirmiez que c'était en juin... en mai ou en juin 1993. En juin ou mai 93? R. J'ai dit au mois de juin.*").

[40] Trial Judgement, paras. 141, 183. The date mentioned in the heading for the relevant section of the Trial Judgement, "Meeting in Kivumu, 1993", is also telling, in particular when compared to others which provide a more specific date. *See* Trial Judgement, p. 33.

evidence concerning Mr. Bikindi's whereabouts in June 1993 would not itself undermine the overall credibility of Witnesses AKJ and AKK, particularly in relation to the other aspects of their accounts underpinning his conviction. Mr. Bikindi has therefore not demonstrated that, had the additional evidence been adduced at trial, it would have had an impact on the verdict.

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

B. The Second Motion

15. On 27 May 2008, the Trial Chamber denied Mr. Bikindi's request to take judicial notice of certain facts related to the composition and activities of *Opération Turquoise*, a United Nations sanctioned humanitarian operation.[42] The Trial Chamber reasoned that Mr. Bikindi should have raised this matter earlier during the proceedings, rather than five months after the close of the Defence case, in particular as the documents had been publicly available for several years.[43] Mr. Bikindi has challenged this decision in his appeal.[44]

16. Mr. Bikindi now requests the Appeals Chamber to take judicial notice of the same facts relating to *Opération Turquoise*.[45] He submits that these facts, as well as the underlying documents, demonstrate that "United Nations armed personnel" were operating in the area, which he submits calls into question the likelihood that he incited the killing of Tutsis on the Kivumu-Kayove road in late June 1994.[46] Alternatively, he seeks admission of the underlying United Nations documents under Rule 115 of the Rules in support of his appeal against conviction,[47] but does so only because the Prosecution claims that it is necessary.[48] In his view, this material is subject to the general rules of admission of evidence or the taking of judicial notice,[49] and is not "additional evidence" within the meaning of Rule 115 of the Rules.[50]

17. The Prosecution opposes the Second Motion in its entirety.[51] It submits that Mr. Bikindi impermissibly makes a blanket request to take judicial notice of the contents of the reports, and that

[41] *See, e.g., Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008, para. 128; *Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, para. 101.
[42] *The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-T, Decision on Requests for Judicial Notice Pursuant to Rule 94 of the Rules, 27 May 2008, paras. 2, 7 ("*Bikindi* Judicial Notice Decision").
[43] *Bikindi* Judicial Notice Decision, para. 7.
[44] Bikindi's Notice of Appeal, paras. 14, 15; Bikindi's Appellant's Brief, para. 43.
[45] *Cf.* Second Motion, para. 21 *with Bikindi* Judicial Notice Decision, para. 2.
[46] Reply to Second Motion, paras. 2, 4-8.
[47] Second Motion, paras. 1, 3, 25, 33. *See also* paras. 26-31.
[48] Second Motion, para. 5.
[49] Second Motion, para. 5.
[50] Second Motion, para. 5, *citing* Bikindi's Appellant's Reply, paras. 3, 4.
[51] Response to the Second Motion, paras. 2, 3, 10-18.

the five proffered facts are irrelevant and do not impact on the impugned verdict.[52] It further argues that Mr. Bikindi attempts to use Rule 115 of the Rules to remedy his failure to appeal a decision of the Trial Chamber which dismissed his request to have judicial notice taken of two of the same United Nations reports, and five facts which were substantially the same as those he now proffers.[53]

18. As Mr. Bikindi has challenged the Trial Chamber's decision denying his request to take judicial notice in his appeal, the Appeals Chamber will consider this matter and, if necessary, the relevant facts and underlying material, some of which already form part of the trial record, in its consideration of the merits of the case.[54] It is therefore not necessary to consider this matter under Rule 115 of the Rules.

C. The Third Motion

19. In his Third Motion, Mr. Bikindi seeks leave to admit extracts of legislation from various domestic jurisdictions and two Rwandan judgements[55] which relate to his appeal against sentencing.[56] The Appeals Chamber notes that both parties agree that the Third Motion should be considered moot on the basis that the material does not fall within the scope of Rule 115 of the Rules.[57] The Appeals Chamber agrees that Rule 115 of the Rules does not apply to case law or legislation used for the purpose of illustrating sentencing practices in national jurisdictions.[58] The Appeals Chamber will consider this material when determining the merits of the case.

D. The Fourth Motion

20. The Trial Chamber found that Mr. Bikindi traveled the main road between Kivumu and Kayove in Gisenyi Prefecture towards the end of June 1994 and publicly exhorted the killing of Tutsis based on the evidence of Witnesses AKJ and AKK. Witness AKK testified that this incident occurred before the killing of Father Gatore and Kalisa.[59] The Trial Chamber also reviewed extensive Defence evidence concerning the death of Father Gatore, which placed it in April 1994, and concluded that this evidence raised doubt as to whether he was killed in June 1994.[60]

[52] Response to the Second Motion, para. 2.
[53] Response to the Second Motion, paras. 12, 13.
[54] *See* Motion of 9 April 2008, Annexure A; Bikindi's Appellant's Brief, paras. 41-48; Bikindi's Appellant's Reply, paras. 27-31.
[55] Third Motion, para. 14. The proffered legislation and jurisprudence are contained in Annexures A-E.
[56] Third Motion, paras. 15-22; Reply to Third Motion, paras. 12-16.
[57] Third Motion, paras. 3, 15; Response to Third Motion, para. 3; Reply to Third Motion, paras. 2, 5.
[58] This material is already before the Appeals Chamber. *See* Corrigendum to Defense [sic] Appellant's Brief, Annexures A-E; Defense [sic] Respondent's Brief, para. 54, Annexures A and B.
[59] Trial Judgement, paras. 272, 273.
[60] Trial Judgement, paras. 333, 334.

Nonetheless, the Trial Chamber was not persuaded that this doubt called into question Witness AKK's credibility concerning his related observations of Mr. Bikindi at the end of June 1994.[61]

21. Mr. Bikindi seeks leave to present additional testimonial and documentary evidence which further confirms that Father Gatore and Kalisa were killed in April 1994 and not June 1994 as stated by Witness AKK.[62] He also requests the Appeals Chamber to admit material related to *Gacaca* proceedings in Rwanda which further corroborates April 1994 as the date of killings of Father Gatore and Kalisa. According to Mr. Bikindi, this material indicates that no witness, including Witnesses AKK and AKJ, has implicated Mr. Bikindi in the genocide in Kivumu, and that Faustin Bagango, the former *Bourgmestre* of Nyamyumba Commune, was responsible for the killings of Father Gatore and Kalisa and inciting genocide in the area.[63] In addition, he seeks leave to present evidence that Witness AKK did not attend a particular school in 1992, as he stated during his testimony.[64] He also presents an affidavit from his investigator related to the distances along the road from Kayove to Kivumu.[65] Finally, Mr. Bikindi submits two affidavits from himself related to the ineffective assistance of his co-counsel in failing to raise these matters during cross-examination.[66]

22. Mr. Bikindi contends that this evidence undermines the credibility and reliability of the main witnesses underpinning his conviction, in particular bearing in mind the confusion concerning the dates.[67] He submits that it illustrates his claim of ineffective assistance of counsel during cross-examination.[68]

23. With respect to availability at trial, Mr. Bikindi contends that he could only raise his claim of ineffective assistance of counsel on appeal.[69] He further submits that he had to limit his evidence of Father Gatore's killing at trial in order to keep his witness list to a reasonable length.[70] According to him, given the Trial Chamber's "illogical approach" to Witness AKK's evidence on this incident, it only then became necessary to further clarify the truth surrounding it.[71] In addition, he contends that he only learned the significance of Kalisa's death at trial and therefore did not have the opportunity to properly investigate the circumstances surrounding it.[72] He adds that the records of

[61] Trial Judgement, paras. 272, 334.
[62] Fourth Motion, paras. 14, 17-21, 27; Reply to Fourth Motion, paras. 6-9, 11-21.
[63] Fourth Motion, paras. 14, 24-26, 28-31; Reply to Fourth Motion, paras. 6, 9, 12-14.
[64] Fourth Motion, paras. 14, 23; Reply to Fourth Motion, para. 19.
[65] Fourth Motion, para. 14; Reply to Fourth Motion, para. 18.
[66] Fourth Motion, paras. 14, 22.
[67] Fourth Motion, para. 19; Corrigendum to Fourth Motion, para. 38; Reply to Fourth Motion, paras. 6-8, 11-14, 21, 22.
[68] Fourth Motion, para. 39.
[69] Fourth Motion, paras. 34, 36.
[70] Fourth Motion, para. 34.
[71] Fourth Motion, para. 34.
[72] Fourth Motion, para. 34.

the *Gacaca* proceedings could only be discovered subsequent to his trial and that in the course of this research he also obtained attestations from various *Gacaca* participants.[73]

24. The Prosecution opposes the Fourth Motion in its entirety.[74] It submits that Mr. Bikindi is attempting to use Rule 115 of the Rules to raise issues which were already addressed at trial and adduce evidence similar to that which was previously put before the Trial Chamber.[75] It further contends that the proffered material does not qualify for admission under Rule 115 of the Rules.[76]

25. The Appeals Chamber is not satisfied that Mr. Bikindi exercised due diligence in obtaining and presenting this material at trial. As stated above, the allocation of defence resources cannot justify a delay in bringing evidence before the Tribunal.[77] While it is true that the records of the *Gacaca* proceedings which occurred after Mr. Bikindi's trial were not available, Mr. Bikindi has not justified why the underlying evidence could not have been obtained at trial. Mr. Bikindi has also failed to demonstrate why he could not have raised his concerns with respect to the ineffective assistance of counsel at trial, in particular bearing in mind that he obtained a new Lead Counsel during the course of the proceedings. Finally, Mr. Bikindi made no submissions related to the availability of the evidence concerning Witness AKK's schooling or the distances between Kayove and Kivumu.

26. The Appeals Chamber is equally not convinced that the exclusion of this material on appeal would result in a miscarriage of justice. The Trial Chamber already accepted that the Defence evidence at trial raised doubt as to whether Father Gatore was killed in June 1994, as was stated by Witness AKK.[78] The Trial Chamber also noted that Father Gatore's killing was linked with that of Kalisa.[79] Consequently, the Appeals Chamber does not consider that additional evidence that these killings occurred in April 1994 or with respect to who was responsible for them would have had an impact on the verdict. The main question is whether the Trial Chamber properly assessed the evidence of Witness AKK in light of this conclusion, which will be addressed on its merits in the Appeal Judgement.

27. Mr. Bikindi has also not demonstrated that the additional evidence relating to the *Gacaca* proceedings would have had an impact on the verdict. As a general matter, the Appeals Chamber does not consider the alleged failure of witnesses to discuss an appellant's activities in separate

[73] Fourth Motion, para. 35; Reply to Fourth Motion, paras. 5, 6.
[74] Response to Fourth Motion, paras. 2-9, 14, 20, 22, 26 [sic].
[75] Response to Fourth Motion, paras. 3-9, 20.
[76] Response to Fourth Motion, paras. 3, 12, 14, 15, 17-21.
[77] *See supra* para. 10.
[78] Trial Judgement, paras. 272, 334.
[79] Trial Judgement, para. 273.

trials involving different accused sufficiently serious to call into question the reasonableness of the Trial Chamber's findings on appeal.[80]

28. In addition, the Appeals Chamber notes that Mr. Bikindi's declarations pertaining to his claim of ineffective assistance of counsel concern the cross-examination of Witness AKJ, not Witness AKK, who actually testified about when the killings of Father Gatore and Kalisa occurred. Finally, Mr. Bikindi's submissions related to the availability of the evidence concerning Witness AKK's schooling, as well as the distances along the Kivumu-Kayove road, do not clearly demonstrate how this evidence would have impacted the verdict, had it been available at trial.[81]

29. Accordingly, the Appeals Chamber denies the admission of this additional evidence.

DISPOSITION

30. For the foregoing reasons, the Appeals Chamber **DISMISSES** Mr. Bikindi's motions.

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

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

Patrick Robinson
Presiding Judge

[Seal of the Tribunal]

[80] *Cf. Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 176 ("[T]o suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility.") ("*Kajelijeli* Appeal Judgement"). *See also Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 13 (relying on the above quoted passage from the *Kajelijeli* Appeal Judgement with respect to testimony by witnesses in separate judicial proceedings).

[81] Reply to Fourth Motion, paras. 18, 19. With respect to the evidence related to the distances, Mr. Bikindi simply submits that the distances are crucial to understanding how the Trial Chamber undervalued the evidence of his movements as well as those of *Opération Turquoise*. Mr. Bikindi concedes however that the Trial Chamber traveled this route during the site visit. These issues will be addressed on the merits in the Appeal Judgement.

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Date: 16 September 2009	Case Name / *affaire: Simon* ***BIKINDI*** Case No / *no. de l'affaire:* ***ICTR-01-72-A***	**Simon BIKINDI** v. The Prosecutor

To: / *A:*

OTP, Trial Attorney in charge of case ☐ In The Hague ✖ **In Arusha** ☐ In Kigali

CMS, ARUSHA
✖ Judicial Proceedings Unit, CMS, Arusha

✖ Judge / Juge Patrick Robinson, Presiding
✖ Judge / Juge Mehmet Guney
✖ Judge / Juge Fausto Pocar
✖ Judge / Juge Liu Daqun
✖ Judge / Juge Theodor Meron

✖ Ms Catherine Marchi-Uhel
✖ Mr Roman Boed
✖ Concerned Associate Legal Officers
✖ Ms. Kate Aboagye

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DEFENSE
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From: / *De:* ✖ **Koffi Afande** ✖ Rosette Muzigo-Morrison

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