

ICTR-98-44A-A

6341

4 MAY 2004

(6341H-6311H)



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

**IN THE APPEALS CHAMBER**

**Before:** Judge Florence Ndepele Mwachande Mumba, Pre-Appeal Judge

**Registrar:** Mr. Adama Dieng

**Order of:** 4 May 2004

**Juvénal KAJELIJELI**  
(Appellant)

v.

**THE PROSECUTOR**  
(Respondent)

JUDICIAL RECORDS  
2004 MAY -4 P 10 55  
*[Handwritten signature]*

Case No. ICTR-98-44A-A

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**ORDER FOR THE DEFENCE TO FILE A DETAILED EXPLANATION ON  
THE AVAILABILITY OF THE ADDITIONAL EVIDENCE SOUGHT FOR  
ADMISSION PURSUANT TO RULE 115 OF THE RULES OF PROCEDURE  
AND EVIDENCE**

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ICTR Appeals Chamber

Date: 4 MAY 2004

Action:

Copied To: CONCERNED JUD

PARTIES, COS, ALG

**Counsel for the Prosecution**

Melanie Werrett  
James Stewart

**Counsel for the Appellant**

Lennox Hinds

*[Handwritten signature]*

**I, FLORENCE NDEPELE MWACHANDE MUMBA**, Judge of 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 (“International Tribunal”);

**NOTING** the “Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge”, filed on 10 December 2003, which designated me to serve as Pre-Appeal Judge in this case;

**NOTING** the “Defense Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence” (“Defence Motion”), filed by the Defence on 16 February 2004;

**NOTING** the “Prosecution Response to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence” (“Response”), filed by the Prosecution on 26 February 2004;

**NOTING** the “Order for the Defence to File Additional Evidence in Support of Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence” (“Order”), issued by the Appeals Chamber on 26 February 2004;

**NOTING** the “Addendum to Defense Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence and Reply to Prosecutor’s Response” (“Addendum”), filed by the Defence on 8 March 2004;

**NOTING** the “Amended Prosecution Response to Defense Motion of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence” (“Amended Response”), filed by the Prosecution on 12 March 2004;

**NOTING** that, under Rule 108*bis* (B) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), “the Pre-Appeal Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing”;

**NOTING** that Rule 115 (A) and (B) of the Rules provide that:

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

(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

**CONSIDERING** that, in order to have additional evidence admitted pursuant to Rule 115, the moving party is required primarily to establish that the evidence itself “was not available at trial” in any form<sup>1</sup> and that it could not have been discovered through the exercise of due diligence,<sup>2</sup> meaning that the moving party must show, *inter alia*, that it made use of “all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal” to bring evidence on behalf of the accused before the Trial Chamber”;<sup>3</sup>

**CONSIDERING** that evidence that was unavailable at trial and could not have been discovered through the exercise of due diligence is admissible under Rule 115 if it is relevant to a material issue and credible and such that it *could* have had an impact on the verdict, *i.e.*, if it could have shown, in the case of a request by a defendant, that a conviction was unsafe;<sup>4</sup>

**CONSIDERING** that, if the evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party will be required to establish that the exclusion of the additional evidence *would* lead to a miscarriage of justice, *i.e.*, it would have affected the verdict;<sup>5</sup>

**CONSIDERING** that a motion pursuant to Rule 115 should contain detailed submissions on the availability of the evidence sought for admission, including how and when the moving party became aware of such evidence and whether it could have been discovered through the exercise of due diligence ;

**FINDING** that the submissions of the Defence in this respect are not sufficiently detailed;

**FOR THE FOREGOING REASONS,**

<sup>1</sup> See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Subpoenas Decision”), para. 4. See also *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 (“*Krstić* Rule 115 Decision”), p. 3.

<sup>2</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of Time Limit and Admission of Additional Evidence, 15 October 1998 (“*Tadić* Rule 115 Decision”), paras 35-45; *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić* Appeal Judgement”), para. 50 ; *Prosecutor v. Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 (“*Delić* Review Decision”), para. 10 ; *Krstić* Rule 115 Decision, p.3; *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Decision on Appellants’ Motions to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004 (“*Kvočka* Rule 115 Decision”), p. 3.

<sup>3</sup> *Tadić* Rule 115 Decision, para. 47, see also paras. 40 and 44; *Kupreškić* Appeal Judgement, para. 50 ; *Krstić* Rule 115 Decision.

<sup>4</sup> *Krstić* Rule 115 Decision, p. 3; *Kvočka* Rule 115 Decision, p. 3.

<sup>5</sup> *Krstić* Subpoenas Decision, para. 16; *Delić* Review Decision, para. 15 ; *Krstić* Rule 115 Decision, p. 4; *Kvočka* Rule 115 Decision, p. 3.

**ORDERS** the Defence to file before the Appeals Chamber a detailed explanation as to how and when the Defence obtained the evidence sought for admission under Rule 115, and whether such evidence could have been discovered through the exercise of due diligence, no later than 13 May 2004;

**GRANTS** the Prosecution leave to respond to the Defence filing, should it seek to do so, by 21 May 2004.

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



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Florence Ndepele Mwachande Mumba  
Pre-Appeal Judge

Done this 4<sup>th</sup> day of May 2004,  
At the Hague,  
The Netherlands.



[Seal of the International Tribunal]

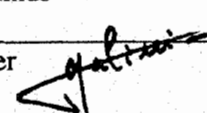


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Tribunal Pénal International pour le Rwanda**

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**JUDICIAL DOCUMENTS TRANSMISSION SHEET – APPEALS CHAMBER**  
*FICHE DE TRANSMISSION DE DOCUMENTS JUDICIAIRES-CHAMBRE D'APPEL*

Date:	4 May 2004	Case Name / <i>Affaire</i> : Juvenal KAJELIJELI	Juvenal KAJELIJELI v.
		Case No / <i>no. de l'affaire</i> : <i>Joint Case no ICTR-98-44A-A</i>	THE PROSECUTOR
To: A:	<p><b>OTP, Trial Attorney in charge of case</b></p> <p><input checked="" type="checkbox"/> Ms Mélanie Werrett <input checked="" type="checkbox"/> Mr James Stewart</p> <p><b>REGISTRY</b></p> <p><input checked="" type="checkbox"/> Ms Félicité Talon <input checked="" type="checkbox"/> Mr Sankara Menon</p> <p><b>APPEALS CHAMBER</b></p> <p><input checked="" type="checkbox"/> Judge / Juge Theodor Meron, <i>Président / Président</i> <input checked="" type="checkbox"/> Judge / Juge Mohamed Shahabuddeen <input checked="" type="checkbox"/> Judge / Juge Florence Mumba <input checked="" type="checkbox"/> Judge / Juge Fausto Pocar <input checked="" type="checkbox"/> Judge / Juge Inés Mónica Weinberg de Roca</p> <p><input checked="" type="checkbox"/> Mr John Hocking <input checked="" type="checkbox"/> Ms Catherine Marchi-Uhel <input checked="" type="checkbox"/> Mr Jamie Williamson <input checked="" type="checkbox"/> Mr Roman Boed <input checked="" type="checkbox"/> Associate Legal Officers</p> <p><b>TRANSLATION SECTION</b></p> <p><input checked="" type="checkbox"/> Mr Charles Zama <input type="checkbox"/> For Information <input checked="" type="checkbox"/> For Translation</p> <p><b>DEFENSE</b></p> <p><input checked="" type="checkbox"/> Accused / <i>accusé</i> : Mr Juvenal Kajelijeli <input checked="" type="checkbox"/> Lead Counsel / <i>Conseil Principal</i>: Mr Lennox Hinds</p>		
From: De:	<input type="checkbox"/> R. Burriss. <input checked="" type="checkbox"/> P. Galinier 		
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<b>Documents name / Titre du document</b>	<b>Date Filed / Date d'enregistrement</b>	<b>Pages</b>	
Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence	4 May 2004	634/H-631/H	

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