

ICTR-01-71-A  
14 April 2005  
(189/H - 181/H)

189/H  
RMM



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Mehmet Güney  
Judge Wolfgang Schomburg  
Judge Inés Mónica Weinberg de Roca

**Registrar:** Mr. Adama Dieng

**Decision of:** 14 April 2005

ICTR Appeals Chamber  
Date: 14 April 2005  
Action:  
Copied To: Concerned Judges

Parties, Judicial Archives,  
LOs, LSS  
*[Signature]*

**EMMANUEL NDINDABAHIZI**

v.

**THE PROSECUTOR**

Case No. ICTR-01-71-A

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2005 APR 15 A 9:49  
*[Signature]*

**DECISION ON THE ADMISSION OF ADDITIONAL EVIDENCE**

**Counsel for the Prosecution**

Mr. James Stewart

**Counsel for the Defence**

Mr. Michel Konitz  
Ms. Magali Pirard

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR MOI  
NAME / NOM: Rosette Muzigo-Morrison  
SIGNATURE: *[Signature]* DATE: 14 April 05

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**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 “International Tribunal”, respectively);

**BEING SEIZED OF** the “Defence Motion to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence”, filed by Emmanuel Ndindabahizi (“Appellant”) on 27 September 2004 (“Motion”), in which the Appellant seeks leave to present the following documents (“Four Documents”)<sup>1</sup> as additional evidence before the Appeals Chamber, pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”):

- Presidential Order No. 03/01 of 13 April 1994, signed by Dr. Théodore Sindikubwabo (Interim President of the Republic), Emmanuel Ndindabahizi (Minister of Finance), Justin Mugenzi (Minister of Trade, Industry and Crafts), and Agnès Ntamabyaliro (Minister of Justice) (“First Document”) and indicating that it was signed in Kigali (Exhibit P.2 (78) F in *Prosecutor v. Bizimungu et al.*, ICTR-99-45);
- A letter sent from Emmanuel Ndindabahizi to the Governor of the National Bank of Rwanda, dated 13 April 1994 and signed by Emmanuel Ndindabahizi (“Second Document”), indicating that it was signed in Kigali (Exhibit P.2 (79) F in *Prosecutor v. Bizimungu et al.*, ICTR-99-45);
- A letter sent from Emmanuel Ndindabahizi to the Governor of the National Bank of Rwanda, dated 23 April 1994 and signed by Emmanuel Ndindabahizi; together with this letter goes an Agreement No. 01/94 for a special advance by the National Bank of Rwanda to the Government of the Republic of Rwanda, dated 23 April 1994 and signed by, *inter alia*, Emmanuel Ndindabahizi; both pages together constitute the “Third Document” which indicates that it was signed in Kigali (Exhibit P.2 (80) F in *Prosecutor v. Bizimungu et al.*, ICTR-99-45);
- A letter signed by the Governor of the National Bank of Rwanda to the ICTR Deputy Prosecutor, forwarding the First Document, the Second Document, and the Third Document, dated

<sup>1</sup> “Prosecutor’s Disclosure of Exhibits P.2 (78) F, P.2 (79) F, P.2 (80) F, and P.2 (81) F, in the Case of *Prosecutor v. Bizimungu et al.*, ICTR-99-45”, 3 March 2005. English translations have been communicated – with the exception of the Fourth Document – by the Office of the Prosecutor (“Prosecution”) to the Appeals Chamber and the Appellant on 22 March 2005 in the “Confidential Annexes in Support of Prosecutor’s Additional Submissions in Response to the Requête de la Défense en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement (Pre-appeal Judge’s directive of 8 March 2005). In the Motion, the Appellant had also requested the Appeals Chamber to order the Registrar to communicate to the Appeals Chamber and to all the parties a copy of the Four Documents. After having received these copies, this request has become moot.

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20 June 2001 ("Fourth Document") (Exhibit P.2 (81) F in *Prosecutor v. Bizimungu et al.*, ICTR-99-45);

**NOTING** that the decision called "Judgement and Sentence" was rendered on 15 July 2004 by Trial Chamber I of the International Tribunal ("Trial Judgement");

**NOTING** that the Appellant filed his Notice of Appeal against the Trial Judgement on 13 August 2004;

**NOTING** the "Prosecutor's Response to 'Requête de la Défense en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement'", filed by the Prosecution on 7 October 2004 ("7 October 2004 Response"), in which the Prosecution requests the Appeals Chamber to dismiss the Motion in its entirety, and the "Corrigendum to Prosecutor's Response to 'Requête de la Défense en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement'", filed by the Prosecution on 8 March 2005, with the corrected version of the 7 October 2004 Response ("Corrigendum");<sup>2</sup>

**NOTING** the "Appellant's Reply to 'Prosecutor's Response to Defence Motion to present additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence'", filed by the Appellant on 12 October 2004 ("Reply");

**CONSIDERING** that the Reply is validly filed in accordance with Rule 7ter of the Rules;

**BEING ALSO SEIZED OF** the "Prosecutor's Urgent Motion for Clarification of Matters Raised in the 'Réplique de l'Appelant (Requête en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement)'" , filed by the Prosecution on 13 October 2004 ("Prosecution's Clarification Motion"), in which the Prosecution asks the Appeals Chamber to take into account arguments relative to distances between Gitarama and Kibuye and between Kigali and Gitarama;

**NOTING** that during the Status Conference of 8 March 2005, the Pre-Appeal Judge ruled that

- "both parties are invited to submit additional arguments within the next two weeks, and the Prosecution in particular, whether they are in possession of these originals of these documents"; and in relation to the Appellant,

<sup>2</sup> The 7 October 2004 Response did not include a page 1 due to an oversight.

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- “you can elaborate [...] on the importance or non-importance of these trial documents. So leave is granted to file [...] within two weeks additional submissions” (“Oral Rulings”);<sup>3</sup>

**NOTING** the “Prosecutor’s Additional Submissions in Response to the ‘Requête de la Défense en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement’ [Pre-appeal Judge’s directive of 8 March 2005]”, filed by the Prosecution on 22 March 2005 (“Prosecution’s Additional Submissions”), in which the Prosecution reiterates the request to dismiss the Motion, and makes submissions in relation to

- the authenticity of the Four Documents pursuant to Rule 115 of the Rules;
- the inadmissibility of the Four Documents pursuant to Rule 115 of the Rules; and
- the absence of material prejudice from any failure to disclose, under Rule 68 of the Rules, in this instance;

**NOTING** the “Observations de la Défense sur les documents communiqués par le bureau du Procureur”, filed confidentially by the Appellant on 22 March 2005 (“Appellant’s Additional Submissions”), in which the Appellant requests to consider the submissions made therein in relation to, *inter alia*,

- the authenticity of the Four Documents;
- a possible modification of the Appellant’s arguments with respect to the Four Documents; and
- the Prosecution’s Clarification Motion;

**BEING ALSO SEIZED OF** the “Requête de l’Appellant en clarification, en irrecevabilité des conclusions additionnelles du Procureur, et en demande de délais supplémentaires”, filed by the Appellant on 29 March 2005 (“Appellant’s Clarification Motion”), in which the Appellant, *inter alia*, contests the validity of the Prosecution’s Additional Submissions;

**NOTING** that at this stage of the appellate proceedings, the Appeals Chamber is only seized of the question whether the Four Documents fulfil the prerequisites for being presented by the Appellant as additional evidence pursuant to Rule 115 of the Rules, and that consequently the Appeals

<sup>3</sup> Transcript of Status Conference of 8 March 2005, p. 9.

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Chamber at this stage will not decide on the probative value of the Four Documents, if any, in relation to any grounds of appeal;

**CONSIDERING** that for additional evidence to be admitted pursuant to Rule 115(B) of the Rules, the Appellant must establish that (i) the evidence was not available at trial in any form and could not have been discovered through the exercise of due diligence, and (ii) that the evidence is relevant to a material issue, credible, and could have shown that the conviction was unsafe;<sup>4</sup>

**CONSIDERING** that, as to the burden of proof, it must be recalled that it is the Appellant who claims that he is entitled to a right given to him pursuant to Rule 115 of the Rules, and that therefore it is for him to demonstrate that he is entitled to the right which he claims, and to prove the elements of this entitlement;<sup>5</sup>

**CONSIDERING** that the Appellant submits that the Four Documents were in the custody of the Prosecution since June 2001 when they were sent to the Prosecution by the National Bank of Rwanda, and that he had heard about their existence for the first time only after the Trial Judgement was rendered on 15 July 2004;<sup>6</sup>

**CONSIDERING** that the Prosecution responds, *inter alia*, that the Four Documents were available during the trial proceedings through the exercise of due diligence by the Appellant who was a signatory of the First, the Second and the Third Document and therefore surely knew of their existence and could have made inquiries of the Prosecution or the National Bank to have them produced;<sup>7</sup>

**CONSIDERING** that the Prosecution also argues that the Appellant had the opportunity during the pre-trial and trial stage to call evidence on the transfer of funds recorded in the Four Documents, when Witness DP<sup>8</sup> and the Appellant himself testified on these transactions, and that he thus was able to use the evidence at least in testimonial form at the time of his trial;<sup>9</sup>

<sup>4</sup> See *Prosecutor v. Nahimana et al.*, ICTR-9952-A, Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Decision on Second Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 7 March 2005, p. 3; *Prosecutor v. Semanza*, ICTR-97-20-A, Decision on Laurent Semanza's Motion for the Admission of Additional Evidence, 5 April 2005, paras 6-7.

<sup>5</sup> Cf. *Prosecutor v. Duško Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998 ("*Tadić* Rule 115 Decision"), para. 52.

<sup>6</sup> Motion, paras 17, 18;

<sup>7</sup> Prosecution's Additional Submissions, para. 28.

<sup>8</sup> Prosecution's Additional Submissions, para. 20, referring to Transcript of 7 November 2003, p. 7.

<sup>9</sup> Prosecution's Additional Submissions, para. 29, referring to the direct examination of the Appellant during the trial proceedings, Transcript of 25 November 2003, pp 9 and 10.

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**CONSIDERING** that the availability test is two-fold, requiring the Appellant to demonstrate that the evidence was not available at trial in any form, and that it could not have been discovered through the exercise of due diligence, including the obligation of a party to make appropriate use of all mechanisms of protection and compulsion that are available under the Statute and the Rules to bring evidence on behalf of a party before a Trial Chamber;<sup>10</sup>

**CONSIDERING** that the unavailability of additional evidence must not result from the lack of due diligence on the part of the counsel who undertook the defence of the accused during trial;<sup>11</sup>

**CONSIDERING** that pursuant to a request of the Prosecution, the Governor of the *Banque Nationale du Rwanda* transmitted the Four Documents to the Prosecution on 20 June 2001, *i.e.* before the initial appearance of the Appellant took place on 9 October 2001;

**CONSIDERING** that the Appellant himself – among others – was a signatory of the First, Second and Third Document in 1994;

**CONSIDERING** that the Prosecution states that “[i]t appears that the Prosecution team that conducted the Appellant’s trial was not aware that this evidence was available to it at the time of the Appellant’s trial”,<sup>12</sup> however drawing a different conclusion than the Appellant from this fact with respect to a possible violation of Rule 68 of the Rules;

**CONSIDERING**, however, that the Appeals Chamber is not satisfied that counsel for the Appellant did not act with due diligence during trial in failing to be aware that the Appellant signed – no doubt among other documents – the First, Second and Third Document in 1994, thereby upholding the “strong presumption that counsel at trial acted with due diligence, or putting it another way, that the performance of counsel fell within the range of reasonable professional assistance”,<sup>13</sup>

**CONSIDERING** that the Appellant did not act without due diligence in failing to be aware that the Prosecution had requested and received the First, Second and Third Documents, together with the Fourth Document;

**CONSIDERING THEREFORE** that the Four Documents were not available at trial for the Appellant within the meaning of Rule 115 of the Rules;

<sup>10</sup> See *Tadić* Rule 115 Decision, para. 47; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9.

<sup>11</sup> *Tadić* Rule 115 Decision, para. 47.

<sup>12</sup> Response, para. 8.

<sup>13</sup> *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, para. 24.

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**CONSIDERING** that the Four Documents are relevant within the meaning of Rule 115 of the Rules, as they, *inter alia*, relate to the alibi defence of the Appellant which is a material issue of the case;

**CONSIDERING** that as to credibility, evidence will only be refused to be admitted if it is so lacking in terms of credibility and reliability that it is devoid of any probative value<sup>14</sup> in relation to a decision pursuant to Rule 115 of the Rules;

**CONSIDERING** that the Appellant does not dispute the authenticity of the Four Documents;<sup>15</sup>

**CONSIDERING** that the Prosecution submits that while the Four Documents are “not necessarily accurate” with respect to the exact dates of their creation, and “inaccurate, in relation to the exact location at which the signatories were, physically, on the relevant dates”, “all four documents appear to be authentic”,<sup>16</sup>

**CONSIDERING** that the Appeals Chamber, for the purposes of this decision, determines that the Four Documents meet the credibility requirement within the meaning of Rule 115 of the Rules;

**CONSIDERING** that the Four Documents *could* have been a decisive factor in reaching the decision at trial if they *could* have had an impact on the verdict, *i.e.* they *could* have shown that a conviction was unsafe;<sup>17</sup>

**CONSIDERING** that the significance of the additional evidence must be considered in the context of the evidence which was given at trial and not in isolation;<sup>18</sup>

**CONSIDERING** that the Four Documents could have established that the Appellant was not in Gitwa in April 1994, and that this could have strengthened an alibi defence of the Appellant;

**CONSIDERING** that the Four Documents could have had an impact on the credibility of Witnesses CGY and CGN who testified, *inter alia*, on arms being distributed by the Appellant at Gitwa Hill on 23 and 24 April 1994, respectively;

<sup>14</sup> *Cf. Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22.

<sup>15</sup> Appellant's Observations, para. 5; “[...] il n'y a aucune contestation sur leur véracité, leur authenticité”, Transcript of Status Conference of 8 March 2005, p. 12.

<sup>16</sup> Prosecution's Additional Submissions, paras 7-9.

<sup>17</sup> *Cf. Prosecutor v. Krstić*, IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003, p. 3.

<sup>18</sup> *Cf. Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 12.

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**CONSIDERING THEREFORE** that the Four Documents could have had an impact on the verdict if they had been available for the Appellant at trial;

**CONSIDERING** that the question whether or not the Prosecution was under the obligation to disclose the Four Documents pursuant to Rule 68 of the Rules to the Appellant has to be dealt with only in the appeal judgement, as it refers to the Appellant's fourth ground of appeal;

**CONSIDERING** that the Appellant's Additional Submissions and the Prosecution's Additional Submissions were considered in relation to this decision pursuant to Rule 115 of the Rules only;

**CONSIDERING THEREFORE** that the Appellant is not prejudiced by not being granted the right to respond to the Prosecution's Additional Submissions, although they contained arguments that were for the first time raised therein;

**NOTING** that the Prosecution states in the Prosecution's Additional Submissions that it "respectfully reserves the right to seek to file further submissions, in response to any fresh points raised by the Appellant";<sup>19</sup>

**CONSIDERING** that the Appellant's Additional Submissions do not contain any such "fresh points" that would warrant a response of the Prosecution;<sup>20</sup>

**CONSIDERING** that the Prosecution filed the Prosecution's Clarification Motion "in the light of a misleading assertion made in the Reply", namely that "[t]he Trial Chamber did not make a specific finding with regards to the distance between Gitarama and Kibuye, contrary to the assertion in the Reply", and that "[o]n the evidence adduced at trial, which was not disputed by the Appellant, the distance between Kigali and Gitarama is not 75 km and the distance between Kibuye and Gitarama is not 150 km, contrary to the assertion in the Reply";<sup>21</sup>

**CONSIDERING** that pursuant to Rules 54 and 107 of the Rules, at the request of either party the Appeals Chamber may issue such orders as may be necessary for the conduct of the appeal;

**CONSIDERING** that the Appeals Chamber is competent to determine whether references of the Appellant to the Trial Judgement correctly correspond to the findings therein, and that therefore the arguments made in the Prosecution's Clarification Motion are not necessary for the conduct of the appeal;

<sup>19</sup> Prosecution's Additional Submissions, para. 2.

<sup>20</sup> The Appellant declares that he "ne modifiera pas son argumentation, telle qu'elle figure dans sa Requête initiale et dans sa Réplique du 11 octobre 2004", Appellant's Additional Submissions, paras 6, 10.

<sup>21</sup> Prosecution's Clarification Order, paras 2, 3.



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**CONSIDERING** that the arguments in the Appellant's Additional Submissions relating to the Prosecution's Clarification Motion were not covered by the Oral Rulings;

**FOR THE FOREGOING REASONS**

**GRANTS** the request of the Prosecution to replace the 7 October 2004 Response with the Corrigendum, adding a page 1 missing in the 7 October 2004 Response due to an oversight;

**GRANTS** the Motion insofar as it relates to the request for leave to present the Four Documents as additional evidence pursuant to Rule 115 of the Rules;

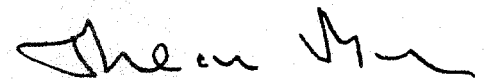
**DECLARES MOOT** the remaining part of the Motion requesting the Appeals Chamber to order the Registrar to communicate to the Appeals Chamber and to all the parties a copy of the Four Documents;

**DECLARES MOOT** the Appellant's Clarification Motion; and

**DISMISSES** the Prosecution's Clarification Motion.

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

Dated this fourteenth day of April 2005,  
At The Hague,  
The Netherlands.



Theodor Meron  
Presiding Judge

[Seal of the International Tribunal]

