



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

2048/H

ICTR-98-44D-A

22nd April 2014

{2048/H - 2041/H}

IN THE APPEALS CHAMBER

Before:

Judge Mehmet Güney, Presiding
Judge William H. Sekule
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Koffi Kumelio A. Afande

Registrar:

Mr. Bongani Majola

Decision of:

22 April 2014

ICTR Appeals Chamber

22 APR 2014

Date: *June R.*

Action: *Chambers, Dofay*

Copied To: *OTP-ACAD & JCS*

CALLIXTE NZABONIMANA

v.

THE PROSECUTOR

Case No. ICTR-98-44D-A

**DECISION ON CALLIXTE NZABONIMANA'S MOTION FOR ADMISSION
OF ADDITIONAL EVIDENCE ON APPEAL PURSUANT TO RULE 115 OF
THE RULES**

Counsel for Callixte Nzabonimana

Mr. Vincent Courcelle-Labrousse
Mr. Philippe Larochelle

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Mr. Steffen Wirth
Ms. Memory Maposa

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: *Douglass Hansen*

SIGNATURE: *Douglass Hansen* DATE: *22/4/2014*

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);

BEING SEISED of a motion filed by Nzabonimana on 5 June 2013,¹ seeking admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), in particular: (i) a prior statement of Prosecution Witness CNAX, dated 20 December 1996 (“1996 CNAX Statement”) in which CNAX fails to mention Evariste Munyagatare (“Munyagatare”) as a victim of the attacks at the Nyabikenke *commune* office on 15 April 1994;² and (ii) a statement of Ancile Musabyemariya, the wife of Munyagatare, dated 23 March 2013 (“Musabyemariya Statement”), in which she states that she saw her husband in May 1994 and that he and their children died in the Nyabarongo River in May 1994 (together the “Additional Statements”);³

NOTING the “Judgement and Sentence” pronounced in this case by Trial Chamber III of the Tribunal (“Trial Chamber”) on 31 May 2012 and issued in writing on 25 June 2012 (“Trial Judgement”);

NOTING that the Trial Chamber convicted Callixte Nzabonimana (“Nzabonimana”) of, *inter alia*, genocide (Count 1) and extermination as a crime against humanity (Count 4) for instigating, on 14 April 1994 at the Cyayi centre, the killings of Tutsi refugees at the Nyabikenke *commune* office on 15 April 1994;⁴

NOTING that both the Prosecution and Nzabonimana appealed the Trial Judgement,⁵ and that as part of his appeal, Nzabonimana alleges that the Trial Chamber erred in law and in fact in its

¹ Callixte Nzabonimana’s Motion to Present Additional Evidence on Appeal, 24 July 2013 (confidential) (original French version filed on 5 June 2013) (“Motion”).

² Motion, paras. 9, 11, 18, 26, 27, p. 16. *See also* Motion, Annex I. The Trial Chamber found on the basis of Witness CNAX’s testimony that Munyagatare, a Tutsi refugee, was killed at the Nyabikenke *commune* office on 15 April 1994 (Trial Judgement, paras. 935, 936).

³ Motion, paras. 10, 11, 18, 32, p. 16. *See also* Motion, Annex II. Nzabonimana also requests: (i) an extension of the word limit of this Appellant’s Brief to address the additional evidence and its impact on his appeal; and (ii) to recall Witness CNAX. *See* Motion, p. 16.

⁴ Trial Judgement, paras. 1718, 1737, 1787, 1790, 1800.

⁵ Prosecutor’s Notice of Appeal, 29 June 2012; *Corrigendum* to Prosecutor’s Notice of Appeal, 23 August 2012; Prosecution Appeal Brief, 12 September 2012; Nzabonimana’s Response Brief, 5 September 2013 (confidential) (original French version filed on 9 July 2013) (public redacted version filed on 10 October 2013); Prosecution Reply Brief, 24 July 2013. *Acte d’appel*, 24 July 2012; Amended Notice of Appeal, 3 December 2013 (original French version filed on 4 September 2013) (“Nzabonimana Notice of Appeal”); *Mémoire d’appelant*, 29 July 2013, *as corrected by Mémoire d’appelant*, 9 August 2013 (*see also Corrigendum au Mémoire d’appelant*, 1 August 2013; *Corrigendum au Mémoire d’appelant*, 5 August 2013); *Mémoire d’appelant amendé*, 4 September 2013, *as corrected by* Amended

assessment of Witness CNAX's credibility in relation to his convictions for instigating the killings of Tutsis refugees at the Nyabikenke *commune* office on 15 April 1994;⁶

NOTING that the appeal hearing is scheduled to be held on 29 April 2014;⁷

NOTING Nzabonimana's submissions that the Additional Statements fulfil the Rule 115 requirements as: (i) they are reliable,⁸ (ii) were either unavailable at trial or their exclusion would amount to a miscarriage of justice,⁹ and (iii) are relevant as they contradict Witness CNAX's evidence, thus undermining his overall credibility concerning events at the Cyayi centre and the Nyabikenke *commune* office attacks;¹⁰

NOTING FURTHER Nzabonimana's submission that the Trial Chamber could not have convicted him in relation to the Cyayi and Nyabikenke events if it had before it the new information contained in the Additional Statements regarding Munyagatare's death;¹¹

NOTING the Prosecution's response, filed on 5 July 2013, arguing that the Motion should be dismissed as the information contained in the Additional Statements could or would not have impacted the Trial Chamber's decision;¹²

NOTING Nzabonimana's reply, filed on 16 July 2013;¹³

RECALLING the requirements for the admission of evidence on appeal under Rule 115 of the Rules,¹⁴ in particular, that the applicant must show that the additional evidence is relevant and credible¹⁵ and was not available at trial or discoverable through the exercise of due diligence;¹⁶

Appellant's Brief Public Corrigendum, 3 December 2013 (original French version filed on 10 September 2013) (*see also Corrigendum au Mémoire d'appelant amendé*, 10 September 2013; *Corrigendum bis au Mémoire d'appelant amendé*, 13 September 2013) (confidential version filed on 10 October 2013) ("Nzabonimana Appeal Brief"); Prosecution Response Brief, 13 September 2013 (confidential) (public redacted version filed on 8 October 2013); Brief in Reply, 19 December 2013 (original French version filed on 30 September 2013).

⁶ Nzabonimana Notice of Appeal, paras. 3.1-3.5; Nzabonimana Appeal Brief, paras. 33-116.

⁷ Scheduling Order, 31 March 2014.

⁸ Motion, paras. 24, 31.

⁹ Motion, paras. 24, 28, 31. Nzabonimana further submits that the Prosecution's disclosure of the 1996 CNAX Statement is in violation of its disclosure obligations pursuant to Rules 66 and 68 of the Rules. *See* Motion, para. 24.

¹⁰ Motion, paras. 9, 25-33, 48, 51-54, 56, 57.

¹¹ Motion, paras. 48, 57.

¹² Prosecution's Response to Nzabonimana's Motion for Additional Evidence, 5 July 2013 (confidential), paras. 1, 18.

¹³ Reply to Prosecution's Response to Nzabonimana's Motion for Additional Evidence, 6 August 2013 (confidential) (original French version filed on 16 July 2013).

¹⁴ *See, e.g., Édouard Karemera and Mathieu 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*"), 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*"), para. 6; *Augustin Ndindiliyimana 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*"), para. 8.

RECALLING that, in order to fulfil the relevancy criteria, the proposed evidence must relate to “a material issue”;¹⁷

RECALLING that: (i) once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine whether it *could* have been a decisive factor in reaching the decision at trial;¹⁸ and (ii) 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 can establish that its exclusion *would* amount to a miscarriage of justice;¹⁹

FINDING that the 1996 CNAX Statement bears sufficient indicia of credibility including signatures and dates;²⁰

CONSIDERING the Trial Chamber’s explicit conclusion that it would not consider the death of Munyagatare as a basis for conviction, and the Trial Chamber’s reliance on several other factors, unconnected to Munyagatare’s death, in finding Nzabonimana guilty of instigating genocide and extermination as a crime against humanity;²¹

FINDING, therefore, that the 1996 CNAX Statement is not relevant to Nzabonimana’s convictions as such;

CONSIDERING, however, that the 1996 CNAX Statement relates to the material issue of Witness CNAX’s overall credibility and is therefore relevant for the purposes of a Rule 115 application;

NOTING that the Prosecution does not oppose Nzabonimana’s submission that the 1996 CNAX Statement was not available at trial;²²

¹⁵ See, e.g., *Karemera and Ngirumpatse* Decision, para. 7; *Ndahimana* Decision, para. 6; *Bizimungu* Decision, para. 8.

¹⁶ See, e.g., *Karemera and Ngirumpatse* Decision, para. 7; *Ndahimana* Decision, para. 6; *Bizimungu* Decision, para. 8.

¹⁷ See, e.g., *Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako’s Motion to Amend His Notice of Appeal and Motion to Admit Evidence, 23 March 2011 (public redacted version filed on 9 November 2011), para. 32; *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, para. 18; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza’s and Ferdinand Nahimana’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 7.

¹⁸ See, e.g., *Karemera and Ngirumpatse* Decision, para. 8; *Ndahimana* Decision, para. 6; *Bizimungu* Decision, para. 9.

¹⁹ See, e.g., *Karemera and Ngirumpatse* Decision, para. 9; *Ndahimana* Decision, para. 7; *Bizimungu* Decision, para. 10.

²⁰ See Motion, Annex I.

²¹ Trial Judgement, paras. 935, 1712-1715.

²² See Response, para. 1.

FINDING, accordingly, that the 1996 CNAX Statement was unavailable at trial and therefore, the determination to be made is whether it *could* have been a decisive factor in reaching the decision at trial;

CONSIDERING that Witness CNAX's testimony, upon which the Trial Chamber relied for Nzabonimana's convictions for instigating genocide and extermination as a crime against humanity, namely his evidence concerning the Cyayi centre meeting on 14 April 1994, was found to be corroborated by the testimony of Prosecution Witness CNAI;²³

FINDING, therefore, that the 1996 CNAX Statement *could* not have been a decisive factor in reaching the decision at trial;

FINDING that the Musabyemariya Statement bears sufficient indicia of credibility as it bears signatures;²⁴

FINDING that the Musabyemariya Statement is not relevant to Nzabonimana's convictions as such;²⁵

FINDING that the Musabyemariya Statement is relevant for the purposes of a Rule 115 application as it relates to Witness CNAX's overall credibility;

CONSIDERING that Nzabonimana has failed to demonstrate that the Musabyemariya Statement was unavailable at trial;²⁶

FINDING, accordingly, that the Musabyemariya Statement can only be admitted as additional evidence on appeal if Nzabonimana demonstrates that it *would* have impacted the Trial Chamber's verdict had it been before the Trial Chamber;

RECALLING that Witness CNAX's testimony is not the only evidence underpinning Nzabonimana's convictions for instigating genocide and extermination as a crime against humanity;²⁷

²³ Trial Judgement, paras. 867, 869-872. *See also* Trial Judgement, paras. 751-755.

²⁴ *See* Motion, Annex II.

²⁵ The Appeals Chamber recalls the Trial Chamber's explicit conclusion that it would not consider the death of Munyagatare as a basis for conviction, and the Trial Chamber's reliance on several other factors, unconnected to Munyagatare's death, in finding Nzabonimana guilty of instigating genocide and extermination as a crime against humanity. *See supra*, p. 3.

²⁶ The Appeals Chamber considers Nzabonimana's assertions that it was "utterly impossible" to have obtained the statement earlier are insufficient to apprise the Appeals Chamber of all the difficulties encountered in obtaining the statement. *See* Motion, para. 31.

²⁷ *See supra*, fn. 23. The Trial Chamber relied on Witnesses CNAI and CNAX with respect to the events at the Cyayi centre on 14 April 1994 and primarily on them in making its findings relating to the attacks at the Nyabikenke *commune*

FINDING, therefore, that the Musabyemariya Statement *would* not have impacted the Trial Chamber's verdict;


HEREBY DENIES the Motion in its entirety;²⁸

EMPHASISING that the present conclusion pertains only to the admissibility of the additional evidence and is in no way indicative of the Appeals Chamber's assessment of the merits of Nzabonimana's appeal.

Judge Afande appends a separate opinion.

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

Done this 22nd day of April 2014,
At The Hague,
The Netherlands.



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]



office on 15 April 1994. See Trial Judgement, paras. 867-878, 887-890, 892-895, 900-902, 910-913, 915, 923, 925-929, 936, 938-940.

²⁸ Based on the foregoing, the Appeals Chamber also finds Nzabonimana's request to recall Witness CNAX moot.

SEPARATE OPINION OF JUDGE KOFFI KUMELIO A. AFANDE

1. I agree with the Majority's conclusion to deny the motion, but my reasoning is different.
2. Nzabonimana seeks admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"),¹ on the basis that:
 - in a prior statement dated 20 December 1996, Prosecution Witness CNAX ("1996 CNAX Statement"), fails to mention Evariste Munyagatare ("Munyagatare") as a victim of the attacks at the Nyabikenke *commune* office on 15 April 1994;² and
 - in a statement dated 23 March 2013, Ancile Musabyemariya ("Musabyemariya Statement"), the wife of Munyagatare, affirms that she saw her husband in May 1994 and that he and their children died in the Nyabarongo River in May 1994.³
3. Nzabonimana contends that the Trial Chamber could not have convicted him in relation to the Cyayi meeting and the attacks on the Nyabikenke *commune* Office, if it had before it the new information regarding Munyagatare's death.⁴
4. The Majority not only finds that the 1996 CNAX Statement bears sufficient indicia of credibility including signatures and dates,⁵ but moreover considers that the 1996 CNAX Statement relates to the material issue of witness CNAX's overall credibility.⁶
5. In my view, these findings compel the Appeals Chamber to scrutinise the Trial Judgement as to whether, and if yes, to what extent it can defer to the Trial Chamber's findings in regard to the credibility of witness CNAX and his testimony relating to Cyayi and Nyabikenke events.⁷ The Appeals Chamber ought to do so, without acting as triers of fact, but bearing in mind the well-established standard that:

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is

¹ Callixte Nzabonimana's Motion to Present Additional Evidence on Appeal, 24 July 2013 (confidential) (original French version filed on 5 June 2013) ("Motion").

² Motion, paras. 9, 11, 18, 26, 27, p. 16. *See also* Motion, Annex I. The Trial Chamber found on the basis of Witness CNAX's testimony that Munyagatare, a Tutsi refugee, was killed at the Nyabikenke *commune* office on 15 April 1994 (Trial Judgement, paras. 935, 936).

³ Motion, paras. 10, 11, 18, 32, p. 16. *See also* Motion, Annex II. Nzabonimana also requests: (i) an extension of the word limit of this Appellant's Brief to address the additional evidence and its impact on his appeal; and (ii) to recall Witness CNAX. *See* Motion, p. 16.

⁴ Motion, paras. 48, 57.

⁵ The main decision page 3, para. 3.

⁶ The main decision, page 3, para. 6.

⁷ Trial Judgement, para. 856.

wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.⁸

6. The decision does not show any such analysis, but seems to defer to the Trial Chamber's findings on witness CNAX credibility concerning the Cyayi and Nyabikenke events.

7. Indeed, the Trial Chamber explicitly concluded that it would not consider the death of Munyagatare as a basis for conviction, and the Trial Chamber relied on several other factors unconnected to Munyagatare's death, in finding Nzabonimana guilty of instigating genocide and extermination as a crime against humanity.⁹ In that regard, I agree with the Majority's finding that the 1996 CNAX Statement is not relevant to Nzabonimana's convictions as such.¹⁰

8. I am however of the opinion that the reference in the Majority's decision, to the exclusion of Munyagatare's death from the basis of the convictions, without any further substantiation is somewhat misleading. In fact, a thorough analysis of the relevant paragraph of the Trial Judgement shows that the Trial Chamber excluded the death of Munyagatare from the basis for convictions, not because of the credibility of Witness CNAX, which is called into question by the 1996 CNAX Statement and Musabyemariya's Statement. On the contrary, the Trial Chamber considers that witness CNAX provided credible and reliable testimony regarding Munyagatare's death at the Nyabikenke *commune* Office,¹¹ and that witness CNAX has identified his body.¹² But, the Trial Chamber excluded it simply because the Prosecution did not mention it in the Indictment and had not provided sufficient notice to Nzabonimana.¹³

9. Moreover, in my view, the Majority did not take into account that, even though it excluded Munyagatare's death as a basis for guilt, the Trial Chamber used it as "contextual background" to further corroborate allegations pled in the Indictment."¹⁴ Indeed, the Trial Chamber noted Munyagatare's death at the Nyabikenke in several paragraphs.¹⁵ My own approach would be to identify all the Trial Chamber's findings in which the death of Munyagatare served as "contextual background" concerning the Cyayi and Nyabikenke events or any other allegations adequately pled in the indictment, and to enter any remedies that may be necessary. For example, based on witness CNAX's testimony, the Trial Chamber found beyond reasonable doubt that Munyagatare

⁸ *Krstić* Appeal Judgement, para. 40 (internal references omitted). See also, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10.

⁹ Trial Judgement, paras. 935, 1712-1715 and Footnote 2167.

¹⁰ The main decision, page 3, para. 5.

¹¹ Trial Judgement, paras. 872, 932, 935.

¹² Trial Judgement paras. 776, 932.

¹³ Trial Judgement, para. 935.

¹⁴ Trial Judgement, para. 935, last sentence.

¹⁵ Trial Judgement, para. 770, 869.

was killed at Nyabikenke,¹⁶ contrary to the testimonies of Prosecution witness CNAI,¹⁷ as well as of Defence witnesses T28 and T193.¹⁸ In my view, the Trial Chamber erred in reaching that factual finding, especially since CNAX is the only one to testify that Munyagatare was killed at Nyabikenke.¹⁹

10. More importantly, the Trial Chamber invoked Munyagatare's death in the context of its finding on the crime of direct and public incitement to commit genocide pursuant to article 6(1) of the Statute.²⁰ But, an analysis of the Trial Chamber's reasoning shows that it entered the conviction based rather on the "public element" of the Cyayi meeting and not on Munyagatare's death.²¹ In that regard, the issue of Munyagatare's death and the 1996 CNAX Statement supporting it are irrelevant to the conviction.

11. Furthermore, regardless of the exclusion of Munyagatare's death as a basis to enter guilt, it is noteworthy that the Trial Chamber used its findings on both the credibility of witness CNAX and other issues in his testimony in conjunction with other witnesses' testimonies, especially witness CNAI, to underpin the convictions. This is exactly where an analysis of the Trial Chamber's findings on those issues would have been decisive. The question is whether, based on the Trial Chamber's above erroneous findings of fact on Munyagatare's death,²² the Appeals Chamber would invalidate, in part or in its entirety, the Trial Chamber's findings on witness CNAX's credibility and testimony, for the Cyayi and Nyabikenke events. Regarding those events, the Trial Chamber heard the testimonies of Prosecution witnesses CNAX, CNAI, CNAY and CNAF, but mainly based its findings on the evidence by witnesses CNAX and CNAI.

12. At first glance, the decision by the Majority is correct when it states that witness CNAX's testimony, upon which the Trial Chamber relied for convicting Nzabonimana of instigating genocide and extermination as a crime against humanity, *namely his evidence concerning the Cyayi centre meeting on 14 April 1994*²³, was corroborated by witness CNAI.²⁴

13. However, I am uncomfortable with the reference to the Trial Judgement without further substantiation. In fact, the Trial Chamber's findings on the Cyayi meeting are not based solely on the corroboration of witness CNAX by witness CNAI, as stated in the Majority decision. Instead,

¹⁶ Trial Judgement, paras. 936, 939, 1711, 1763.

¹⁷ Trial Judgement, para. 933.

¹⁸ Trial Judgement, para. 801, 818-819, 934.

¹⁹ Trial Judgement, para. 932.

²⁰ Trial Judgement, paras. 1763-1768.

²¹ Trial Judgement, para. 1766.

²² See above, page 3.

²³ Emphasis added.

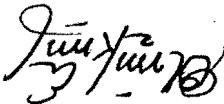
²⁴ The main decision, page 4, para. 2.

the Trial Chamber based its findings also on evidence in witness CNAI's testimony, which do not corroborate anything in witness CNAX testimony. Concretely, for the "public" nature of the Cyayi meeting, the Trial Chamber found that "[t]he fact that witness CNAI was summoned over, and that Evariste Munyagatare, a Tutsi, was also present, establishes beyond reasonable doubt that the words were intended to be heard by anyone in the area, rather than an exclusive and limited group. Therefore, the Chamber concludes that Nzabonimana's conduct satisfies the "public" element of the crime".²⁵ Hence, the 1996 CNAX Statement and Musabemariya's Statement do not affect that finding of the Trial Chamber, based on CNAI's testimony.

14. Nothing in this separate opinion should be read or interpreted to prejudge my views and opinion on the merits of the appeal case as a whole.

Done this 22nd of April 2014,
At The Hague,
The Netherlands.




Judge Koffi Kumelio A. Afande

[Seal of the Tribunal]

²⁵ Trial Judgement, para. 1766.



**COURT MANAGEMENT
ADMINISTRATION DES CHAMBRES**

UNITED NATIONS
NATIONS UNIES

Churchillplein 1, 2517 JW, The Hague, The Netherlands. Tel. +3170512 8225 /+31705125703/+31705128804
Fax : +31705128932. Mobile +31611923750 /+31611923748. muzigo-morrison@un.org, juma3@un.org,
boed@un.org

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		Case No / no. de l'affaire: ICTR-98-44D-A		
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DECISION ON CALLIXTE NZABONIMANA'S MOTION FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL PURSUANT TO RULE 115 OF THE RULES		22 April 2014	{2048/H - 2041H}	