



ICTR-99-52-A
 03 May 2005
 (2399/H-2396/H)
 Tribunal Penal International pour le Rwanda
 International Criminal Tribunal for Rwanda

2399/H
 RMM

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
 Judge Mohamed Shahabuddeen
 Judge Florence Ndepele Mwachande Mumba
 Judge Fausto Pocar
 Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 3 May 2005

ICTR Appeals Chamber
 Date: 03 May 2005
 Action:
 Copied To: Concerned Judges
 Parties, Judicial Archives
 LOS LSS [Signature]

Ferdinand NAHIMANA
 Jean-Bosco BARAYAGWIZA
 Hassan NGEZE
 (Appellants)

v.

THE PROSECUTOR
 (Respondent)

Case No. ICTR-99-52-A

JUDICIAL RECORDS/ARCHIVES
 ICTR
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DECISION ON APPELLANT HASSAN NGEZE'S MOTION FOR THE APPROVAL OF THE INVESTIGATION AT THE APPEAL STAGE

Counsel for the Appellant, Hassan Ngeze

Office of the Prosecutor

Bharat B. Chadha
 Behram Shroff

James Stewart
 Neville Weston
 Abdoulaye Seye

International Criminal Tribunal for Rwanda
 Tribunal pénal international pour le Rwanda
 CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
 COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS
 NAME / NOM: ROSETTE MUZIGO-MORRISON
 SIGNATURE: [Signature] DATE: 03 May 05

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 “The Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage”, filed on 22 March 2005 (“Appellant” and “Motion for Approval of Investigation”, respectively), in which the Appellant requests the Appeals Chamber “to allow [him] to conduct investigation and to collect newly discovered evidence before filing the motion to present additional evidence under Rule 115(B) of [the] Rules of Procedure and Evidence” or, “alternatively, to direct the Registrar to approve estimated expenditure related to such investigation as the witnesses are staying overseas [sic], without recourse to the Appeals Chamber for the approval of investigation to provide newly discovered additional evidence”;

NOTING the “Prosecutor’s Response to ‘The Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage’”, filed on 31 March 2005 (“Response”);

NOTING the “Appellant’ [sic] Reply to the Prosecutor’s Response to the Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage”, filed on 11 April 2005 (“Reply”);

BEING SEISED ALSO OF the “Prosecutor’s Motion for Rejection and Dismissal of the ‘Appellant’ [sic] Reply to the Prosecutor’s Response to the Appellant Hassan Negeze’s [sic] Motion for the Approval of the Investigation at the Appeal Stage”, filed 12 April 2005 (“Motion for Rejection of Reply”), in which the Prosecution submits that the Reply was filed out of time and that no good cause has been shown for this;

NOTING “Appellant Hassan Ngeze’s Response to the Prosecutor’s Motion for Rejection and Dismissal of the Appellant’s Reply to the Prosecutors [sic] Response to the Appellant Hassan Negeze’s [sic] Motion for the Approval of the Investigation at the Appeal Stage”, filed 18 April 2005 (“Response to Motion for Rejection of Reply”), in which the Appellant argues that his Counsel only received the Response on 6 April 2005 and that therefore good cause for the delay has been shown;

NOTING that the Prosecutor has not filed a reply to the Response to Motion for Rejection of Reply;

FINDING that, because of the delay in notifying Counsel for the Appellant of the Response, good cause has been shown for the delay in filing the Reply;

NOTING the Appellant's argument that he is put in an impossible position because, on the one hand, the Registrar does not approve funding for investigations at the appellate stage in the absence of an order of the Appeals Chamber, and, on the other hand, the Appeals Chamber does not admit new evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules") if the moving party does not append the statements of the proposed witnesses, which statements cannot be obtained without investigating;¹

RECALLING the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia ("ICTY") that an appeal pursuant to Article 24 of the Statute of the Tribunal (or pursuant to Article 25 of the Statute of the ICTY) is not a *de novo* trial,² and that the appeal is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases;³

CONSIDERING that Rule 115 of the Rules provides for a corrective measure and that its purpose is to deal "with the situation 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";⁴

CONSIDERING that investigations should be made during the pre-trial and trial stage, and that the Registrar will generally not fund investigations at the appeal stage;⁵

CONSIDERING, however, that in an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party could show, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation at the appeal stage is not a fishing

¹ Motion for Approval of Investigation, pp. 2-3.

² *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 17; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Reasons for the Judgement, 13 December 2002, para. 11; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR 96-17-A, Judgement, 13 December 2004, para. 13. See also, e.g., *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras 41-42; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 40; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 22; *Prosecutor v. Mucić et al.*, Case No. IT-96-21-Abis, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 5; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras 13 and 21.

³ *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement of 7 October 1997, para. 15.

⁴ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 5 (emphasis added).

⁵ T. 9 March 2005, p. 9.

expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence;

FINDING that Appellant has not established that his is an exceptional case justifying ordering the Registrar to fund further investigations at the appeal stage in that:

- The Appellant is extremely vague as to the evidence he seeks to uncover and he does not show that he has specific information that needs to be further investigated in order to avoid a miscarriage of justice, or that this specific information was not available to him at trial or could not have been discovered through the exercise of due diligence;
- The two motions for additional evidence which the Appellant intended to file at the time he filed the present Motion⁶ have now been filed,⁷ and it does not appear that investigations in relation to these motions for additional evidence are still necessary;


HEREBY

DISMISSES the Motion for Rejection of Reply;

DISMISSES the Motion for Approval of Investigation.

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

Dated this 3rd day of May 2005,
At The Hague, The Netherlands


Theodor Meron
Presiding Judge



⁶ See Motion for Approval of Investigation, para. 1.

⁷ Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed 4 April 2005; Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed 11 April 2005. The Appellant even submitted a third motion: Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed 25 April 2005 and corrected 28 April 2005.