7231/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
05 May 2006
(7231/H – 7221/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 5 May 2006

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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DATE: 05 May 2006

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

2006 MAY -9 A 12:08

Case No. ICTR-99-52-A

DECISION ON APPELLANT JEAN-BOSCO BARAYAGWIZA'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE PURSUANT TO RULE 115

Counsel for Jean-Bosco Barayagwiza
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Counsel for Ferdinand Nahimana
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Ms. Diana Ellis

Counsel for Hassan Ngeze
Mr. Bharat B. Chadha
Mr. Behram N. Shroff

Office of the Prosecutor
Mr. James Stewart
Mr. Neville Weston
Mr. Abdoulaye Seye

ICTR Appeals Chamber
Date: 05 May 2006
Action: R.S.
Copied To: Concerned Judges, Parties, SCSL, LOR, ACSS, DCDMS, Bits.

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 "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" ("Rule 115 Motion") confidentially filed by Jean-Bosco Barayagwiza ("Appellant") on 28 December 2005, in which he requests the Appeals Chamber to admit twelve pieces of additional evidence on appeal.

2. The Prosecution responded to the Rule 115 Motion on 9 January 2006 requesting the Appeals Chamber to dismiss it in its entirety.[1] The Appellant filed two different versions of his reply on 16 and 17 January 2006.[2]

I. Procedural Background

3. Trial Chamber I rendered its Judgement in the present case on 3 December 2003.[3] The Appellant filed a first Notice of Appeal on 22 April 2004,[4] which was amended on 27 April 2004.[5] The initial Appellant's Brief was filed by him on 25 June 2004.[6]

4. The proceedings in relation to the Appellant were stayed from 19 May 2004[7] through 26 January 2005,[8] pending the assignment of a new lead counsel. The current Lead Counsel was assigned to the Appellant by the Registrar on 30 November 2004, and on 19 January 2005, the Appeals Chamber dismissed the Appellant's challenge to this assignment.[9] The Appellant's request

[1] "The Prosecutor's Response to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)", 9 January 2006, para. 50 ("Response to Rule 115 Motion").
[2] "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to the Appellant's Motion for Leave to Present Additional Evidence (Rule 115)", 16 and 17 January 2006. For the purposes of the present decision these will be referred to collectively as the "Rule 115 Reply".
[3] *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Judgement").
[4] *« Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) »*, 22 April 2004.
[5] *« Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' »*, 27 April 2004.
[6] *« Mémoire d'Appel »*, 25 June 2004.
[7] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.
[8] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005 ("Order of 26 January 2005"). In particular, the Appellant was initially ordered to file "any amended or new Notice of Appeal no later than 21 February 2005 (*i.e.*, thirty days from the Decision of 19 January 2005)" and "any amended or new Appellant's Brief no later than 9 May 2005 (*i.e.*, seventy-five days after the time limit for filing the Notice of Appeal)."
[9] Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 ("Decision of 19 January 2005").

for reconsideration of the Decision of 19 January 2005 was dismissed by the Appeals Chamber on 4 February 2005.[10]

5. As per the decisions of 17 May 2005[11] and 6 September 2005,[12] both his "Amended Notice of Appeal" and "Amended Appellant's Brief" were filed by the Appellant on 12 October 2005.

II. Preliminary Matters

6. The Appeals Chamber recalls the Pre-Appeal Judge's decision of 23 January 2006 in the present case, which granted both the Appellant's and Prosecution's requests for extension of the page limit for the Rule 115 Motion and Response thereto respectively, and which found the filing of both versions of the Rule 115 Reply to be untimely and frivolous, accordingly ordering that they be expunged from the record ("Decision of 23 January 2006").[13] Pursuant to the same decision, the Prosecution's submission referred to as its "sur-reply"[14] was found invalidly filed and moot,[15] and was also expunged from the record.[16]

A. Appellant's Request for Clarification of the Decision of 23 January 2006

7. On 31 January 2006, the Appellant seized the Appeals Chamber with a request for clarification of the Decision of 23 January 2006.[17] The Appellant "specifically request[s] [the Appeals Chamber] to make an order permitting the re-filing of a [r]eply to the [p]rosecution [r]esponse".[18] The Prosecution has not responded to the Motion for Clarification.

8. The Appeals Chamber considers that the Appellant's request for clarification is in fact a motion for reconsideration of the Decision of 23 January 2006 and finds that none of the arguments raised by the Appellant establish cause for reconsideration.[19] As to the Appellant's argument that

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[10] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 ("Decision of 4 February 2005").
[11] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005.
[12] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005.
[13] Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006 ("Decision of 23 January 2006"), p. 7.
[14] "The Prosecutor's Requested Sur-Reply to 'The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Motion for Leave to Present Additional Evidence (Rule 115)'", 20 January 2006.
[15] Decision of 23 January 2006, p. 5.
[16] *Ibid.*, p. 7.
[17] "The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion Requesting Clarification of the Decision of the Appeals Chamber, Dated 23rd January 2006, on the Formal Requirements Applicable to the Parties Filings", 31 January 2006 ("Motion for Clarification").
[18] *Ibid.*, para. 2.
[19] The Appeals Chamber has an inherent discretionary power to reconsider its own previous interlocutory decisions if the existence of a clear error of reasoning has been demonstrated or if it is necessary in order to prevent an injustice

the Rule 115 Reply contained "arguments and submissions of law and fact which are currently not before the Appeals Chamber",[20] this does not constitute a valid cause to be relieved from the failure to file a reply in time. In addition, the Appeals Chamber recalls that a reply should be limited to arguments contained in the response and that, to the extent the Rule 115 Reply included any completely new submission of law or fact, it was improper.[21]

9. In his Motion for Clarification, the Appellant also requests the Appeals Chamber to order an oral hearing to consider the Appellant's Motion for Additional Evidence to enable "a full argument as to the admissibility of the proposed additional evidence", given "both the gravity and complexity of the issues" set out in the Rule 115 Motion and Response thereto.[22] Pursuant to Rule 115(C) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Appeals Chamber may decide a motion for leave to present additional evidence on appeal "with or without an oral hearing". Generally, the granting of an oral hearing is a matter for the discretion of a Chamber and may legitimately be regarded as unnecessary when the information before the Chamber is sufficient to enable it to reach an informed decision.[23] In the instant case, the Appeals Chamber finds that the Appellant has not put forward any convincing reasons justifying that written submissions are inadequate to put forward his arguments in relation to the Rule 115 Motion and thus, does not consider that the efficient conduct of the present proceeding requires an oral hearing prior to rendering its decision on the Rule 115 Motion.[24]

10. On the basis of the foregoing, the Appeals Chamber dismisses the Motion for Clarification. Moreover, the Appeals Chamber considers the Motion for Clarification as frivolous and, pursuant

(Decision of 4 February 2005, p. 2; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203). No such error or injustice has been shown here.

[20] Motion for Clarification, para. 2..

[21] *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Motion to Strike Portion of Reply, 30 September 2002, p. 3. *Cf.* generally, Practice Direction on Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 6. *Cf.* also *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004, p. 3; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005, p. 3; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, para. 145.

[22] Motion for Clarification, para. 5.

[23] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj Request for Provisional Release, 31 October 2003, para. 17; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005, para. 4; *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, para. 29.

[24] The Appeals Chamber has on numerous occasions determined the admissibility of evidence without a separate oral hearing on a Rule 115 motion, including cases where evidence of gross negligence of counsel was involved: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Decision (On the Consolidation or Summarization of Motions not yet Disposed of), 22 August 2000, p. 6; *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-A, Decision on the Appellant's Motion for Admission of New Evidence, 13 June 2000 (*Kambanda* Decision of 13 June 2000); *See* also *Prosecutor v. Zoran Kupreškić et al.*, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, issued confidentially on 26 February 2001, paras 52, 62, 66.

to Rule 73(F), imposes sanctions against the Appellant's Counsel in the form of non-payment of fees and costs associated with it.

B. Annexes to the Rule 115 Motion

11. Due to the apparent inconsistencies of the Rule 115 Motion with the formal requirements set out in Paragraph 7 of the Practice Direction on Formal Requirements for Appeals from Judgement ("Practice Direction"),[25] the Pre-Appeal Judge ordered the Appellant to "re-file, no later than 30 January 2006, appendices to the Rule 115 Motion which should be copies of the evidence that he is applying to present before the Appeals Chamber in strict accordance with the precise list of such evidence already contained in his Rule 115 Motion".[26]

12. In "[t]he Appellant Jean-Bosco Barayagwiza's Extremely Urgent Corrigendum to the Rule 115 Motion Filed 28 December 2005, pursuant to the Order of the Pre-Appeal Judge of 23 January 2006" filed on 31 January 2006 ("Corrigendum to Rule 115 Motion"),[27] the Appellant requests the Appeals Chamber to accept an "amended list of annexed documents referred to in the contents of the Rule 115 Motion itself"[28] and provides as annexes "all the documents referred to in the body of the Appellant's Rule 115 Motion".[29]

13. The Appeals Chamber accepts the documents annexed to the Corrigendum to Rule 115 Motion only inasmuch as they correspond to the pieces of evidence mentioned in the Rule 115 Motion itself but omitted from its annexes. Indeed, the Corrigendum to Rule 115 Motion cannot be used to widen the scope of the Rule 115 Motion.

C. Prosecution Request of 10 February 2006 and Reply Thereto

14. On 10 February 2006,[30] the Prosecution filed the "Prosecutor's Request to File a Response Limited to Fresh Additional Evidence Appended to 'The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Corrigendum to the Rule 115 Motion Filed 28 December 2005, Pursuant to the Order of the Pre-Appeal Judge of 23 January 2006'" ("Prosecution Request of 10 February 2006"), in which the Prosecution requests the Appeals Chamber to consider its response to "fresh matters

[25] 16 September 2002.
[26] Decision of 23 January 2006, p. 7.
[27] It appears that the Appellant sent the Corrigendum to Rule 115 Motion to the Registry by e-mail on 30 January 2006, and the Appeals Chamber will thus consider it as timely filed.
[28] Corrigendum to Rule 115 Motion, para. 3. The Appellant contends that "[t]he original list of annexes should be expunged from the record as an inaccurate and incomplete list of documents" (para. 2) and that the corrections are "administrative and typographical" and properly reflect the substance of the Rule 115 Motion (para. 4)
[29] Corrigendum to Rule 115 Motion, para. 2.
[30] The distribution to the parties by the Registry took place on 13 February 2006.

appearing in the Corrigendum" to the Rule 115 Motion.[31] The Appellant replied on 16 February 2006, submitting that the Prosecution Request of 10 February 2006 should be expunged from the record as "an inappropriate use of the Rules" of the Tribunal.[32]

15. The Appeals Chamber notes that both the Prosecution Request of 10 February 2006 and the Appellant's reply thereto contain arguments on the merits of the Rule 115 Motion which in substance, constitute a response and a reply to the Corrigendum to Rule 115 Motion. In that respect, the Appeals Chamber considers both the Prosecution Request of 10 February 2006 and the Appellant's reply thereto as validly filed. However, the Appeals Chamber will only take into account arguments pertaining to documents referred to in the Rule 115 Motion but not initially annexed to it or to alleged changes between the documents filed with the Rule 115 Motion and those filed with the Corrigendum to Rule 115 Motion. The Appeals Chamber notes that the Prosecution Request of 10 February 2006 and the reply thereto may not be used indirectly as a vehicle to make new submissions that should have been made in the Response to Rule 115 Motion or in a timely reply to it. In conformity with this principle, the Appeals Chamber also denies the Appellant's request to file "a full reply given that the original reply has been expunged from the record".[33]

D. Prosecution's Request to Submit a Fuller Response

16. In its Response to Rule 115 Motion, the Prosecution requested the authorization to submit, at a later stage, a fuller response to certain matters raised by the Appellant in his Rule 115 Motion.[34] The Appeals Chamber notes the Prosecution's submission that this is necessary because of the voluminous and unorganized annexes attached to the Rule 115 Motion.[35] The Appeals Chamber does not agree. Because 1) the Decision of 23 January 2006 ordered the Appellant to re-file the annexes; 2) the Appellant did so through his Corrigendum to Rule 115 Motion and, 3) the Appeals Chamber has already stated[36] that it will consider the arguments in the Prosecution Request of 16 February 2006 as long as they are really in response to "fresh matters appearing in the

[31] Prosecution Request of 10 February 2006, para. 1. In particular, the Prosecution submits that there are apparent changes between the copies of the documents filed with the Rule 115 Motion and the copies of the purportedly same documents attached to the Corrigendum to Rule 115 Motion.

[32] "Appellant's Reply to the Prosecutor's Request to File a Response to [*sic*] Limited to Fresh Additionla [*sic*] Evidence Appended to 'The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Corrigendum to the Rule 115 Motion Filed 28 December 2005, Pursuant to the Order of the Pre Trial [*sic*] Appeal Judge of 23rd January 2006'", 16 February 2006 ("Reply to the Prosecution Request of 10 February 2006"), para. 1.

[33] *Idem*.

[34] Response to Rule 115 Motion, para. 6.

[35] *Ibid.*, paras 2 – 3.

[36] *See supra* para. 15.

Corrigendum", the Appeals Chamber is of the view that the Prosecution need not be authorized to submit another response to the Rule 115 Motion.

E. Appellant's Motion of 29 March 2004

17. Lastly, in his Rule 115 Motion, the Appellant submits that he considers his motion filed on 29 March 2004[37] as still pending before the Appeals Chamber.[38] As the Appellant notes himself,[39] the Pre-Appeal Judge ordered him "to notify the Appeals Chamber of his intention to pursue or abandon the Motion for Additional Evidence no later than 21 February 2005".[40] Since the Appellant failed to do so,[41] the Appeal Chamber considers that he waived his right to pursue the Motion of 29 March 2004. The Appeals Chamber notes that this does not prejudice the Appellant in any way, as the requests contained in the Motion of 29 March 2004 are reiterated in the current Rule 115 Motion.[42] The Appeals Chamber is also of the view that, while the Motion of 29 March 2004 was abandoned by the Appellant, this does not amount to a general waiver of the Appellant's right to pursue the admission of additional evidence on appeal.[43]

III. Discussion

A. Materials Submitted by the Appellant for Admission as Additional Evidence on Appeal

18. The Appeals Chamber recalls that a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.[44] For the sake of clarity and in light of the Appeals Chamber's findings above,[45] the Appeals Chamber notes that not all of the materials referred to in the Rule 115 Motion and/or contained in the Annexes thereto can in fact be considered as meeting the formal requirements for submission of additional evidence to be considered for admission on appeal.

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[37] *« Requête d'acceptation des moyens de preuves supplémentaires pour des motifs valables qui permettent d'accorder une extension du délai ex article 115 du Règlement de Procédure et de Preuve (concernant le Rapport du Juge d'instruction français Jean-Louis Brugutère sur le crash d'avion présidentiel au Rwanda) »*, 29 March 2004 ("Motion of 29 March 2004").

[38] Rule 115 Motion, para. 7.

[39] *Ibid.*, para. 4.

[40] Order of 26 January 2005, p. 3.

[41] The Appeals Chamber notes that the first time that the Appellant referred to his Motion of 29 March 2004, since the Order of 26 January 2005, was in his current Rule 115 Motion, justifying the delay by the fact that the current counsel for the Appellant only "started effectively his work" in April 2005 and that "no coherent or reasoned decision could be taken in relation to the motion for additional evidence until the Appeal Brief had been filed" (Rule 115 Motion, paras 5 – 6). The Appeals Chamber is not convinced by these arguments.

[42] Rule 115 Motion, paras 18 – 28.

[43] As argued by the Prosecution in its Response to Rule 115 Motion, paras 47 – 49.

[44] Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3.

[45] *See* paras 13 and 15-16 above.

19. In particular, pursuant to Article 7 of the Practice Direction,[46] the following documents should fall out of the consideration by the Appeals Chamber since they were either not annexed to the Rule 115 Motion and not later submitted with the Corrigendum or were annexed to the Rule 115 Motion but not listed therein and the Rule 115 Motion thus contains no arguments as to their admissibility: "Affidavit from Dr. Shimamungu Eugène, Expert in Kinyarwanda language and in political speech on the use of certain terms imputed to the Appellant"[47]; "Fax of 6 February 1994 on the election of JBB as President of Gisenyi";[48] "CDR Internal Rules".[49] Similarly, the Appeals Chamber notes that Annexes 1[50] and 2[51] to the Rule 115 Motion are referred to by the Appellant as relevant to the respective request for leave to submit additional evidence on appeal in respect of Judge Bruguière's Report. While he admits that these two documents "fall within the generic description" contained in the Rule 115 Motion,[52] he persists that they "should be considered as evidence which may undermine the convictions"[53] but does not make any argument as to their admissibility in his Rule 115 Motion.[54] The Appellant re-filed these documents in his Corrigendum to the Rule 115 Motion despite a clear indication of the discrepancy between the contents of his Rule 115 Motion and Annexes thereto made to him by the Pre-Appeal Judge.[55] Therefore, the Appeals Chamber does not consider Annex 1 and Annex 2 as documents tendered as additional evidence on appeal.

20. With regard to the report allegedly issued by the French *juge d'instruction* Bruguière on the results of the investigation with regard to the President Habyarimana's plane crash on 6 April 1994, the Appellant affirms that he "cannot succeed in obtaining" it by himself and prays the Appeals Chamber to request the said report from the French authorities under Article 28 of the Statute of the Tribunal "or summon Judge Bruguière to appear as a witness before the Appeals Chamber".[56] The

[46] Pursuant to this provision, a motion applying to present additional evidence shall contain:
"(a) a precise list of the evidence the party is seeking to have presented;
(b) an identification of each ground of appeal to which the evidence relates and, where applicable, a request to submit any additional grounds of appeal based on such evidence;
(c) arguments in relation to the requirements of non-availability at trial, relevance and credibility;
(d) arguments in relation to the requirement that the admission of the additional evidence could have been a decisive factor in reaching the decision made by the Trial Chamber to which the additional evidence is directed;
(e) an appendix with copies of the evidence the party is applying to present before the Appeals Chamber".
[47] Annex No. 9 to the Corrigendum to the Rule 115 Motion, but not referred to in the Rule 115 Motion.
[48] Rule 115 Motion, para. 50, but not attached as Annex.
[49] *Ibid.*, paras. 42-43, but not attached as Annex.
[50] "Statement by the Appellant before Judge Bruguière during his investigation on the murder of President Habyarimana", Rule 115 Motion, footnote 24.
[51] "Extract from Newspaper *Le Monde* dated 10 March 2004".
[52] Reply to the Prosecution Request of 10 February 2006, para. 10.
[53] *Ibid.*, para. 11.
[54] Rule 115 Motion, paras 18 – 28.
[55] Decision of 23 January 2006, p. 6.
[56] Rule 115 Motion, para. 28. The Prosecution argues that the piece of evidence in question is "irrelevant to the Appellant's case and could not be a decisive factor in the decision to convict him at trial" (Response to Rule 115 Motion, para. 21).

Appeals Chamber recalls that it has "the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal proceedings, and especially Rule 115's power to admit additional evidence."[57] Similarly, the Appeals Chamber has the power to request a State to provide judicial assistance by producing certain evidence under Article 28(2)(b) of the Statute of the Tribunal. However, the purpose of Rule 115 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."[58] The Rule does not permit a party to merely request a particular person to be summoned as a witness to give evidence or that a State be requested to produce certain documentation.[59] In this case, the Appellant has failed to provide material in his possession that would be admissible as additional evidence directed to a specific finding of fact of the Trial Chamber.[60] Therefore, the Appellant's request falls out of the scope of a motion filed pursuant to Rule 115.

21. Finally, the Appellant tenders a number of documents (all **referred** to in the Rule 115 Motion but not attached as Annexes),[61] which were in fact already admitted into evidence at trial and therefore do not constitute "additional evidence" to be admitted in this case. The Appeal Chamber notes that it is consequently not necessary to examine them in considering the Rule 115 Motion.[62]

B. Late Filing of the Rule 115 Motion

22. As to the remainder of the material tendered as additional evidence on appeal, under Rule 115 (A) of the Rules, a motion to present additional evidence on appeal must be filed "not later than seventy-five days from the date of the judgement", which in this case was 16 February 2004, "unless good cause is shown for further delay."

23. The Appellant submits that his current Lead Counsel could only start his work effectively in April 2005, that the Defence team only became complete with the appointment of the legal assistant

[57] *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 ("*Kupreškić* Decision"), para. 5.
[58] *Kupreškić* Decision, para. 5; Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and /or Further Investigation, 23 February 2006 ("Decision of 23 February 2006"), para. 40.
[59] *Kupreškić* Decision, para. 5.
[60] *Idem.*
[61] "273 tapes in Kinyarwanda" (Exhibit P103) - Rule 115 Motion, para. 67; "Information on dialogue between the CDR and RPF: 'Letter of 28 March 1993 from CDR to RPF' (Exhibit 2D32), 'Speech delivered by Martin Bucyana on 23 March 1992' (Exhibit P141)" - *Ibid.*, paras 29-30; "Letter of Jean Nduwayezu to the President of CDR dated 14 December 1992 (Exhibit P203)" - *Ibid.*, para. 38; "The Appellant's report of a mission to Europe dated on 7 September 1993 (Exhibit 140)" - *Ibid.*, paras 42 and 49; "General Assembly creating the CDR party 22 February 1992" (Exhibits 2D12 and 3D80A) – *Ibid.*, para. 52; "Document on the Organization and Structure of the broad Initiative Committee" (Exhibit P53) – *Ibid.*, para. 57.

on 13 June 2005, and that the legal assistant could only start working on documents in Kinyarwanda language around 20 August 2005.[63] He adds that by the time the Defence team became familiarised with the case and the Tribunal's procedures, the priority had to be given to the preparation of the Amended Notice of Appeal and Amended Appellant's Brief.[64] It was in the course of preparation of these filings, that the Appellant could identify "numerous materials of exculpatory nature which were not put before the Trial Chamber and which could have had great impact on its findings and its judgement and sentence for the benefit of the accused".[65] Finally, he requests that the Rule 115 Motion be considered as validly filed in the interests of justice.[66]

24. The Prosecution asserts that the explanation provided by the Appellant is unsatisfactory and unconvincing given, in particular, the "Appellant's knowledge of his own case and appeal strategy" and the fact that the delay in the appointment of the Lead Counsel is "attributable to the Appellant's opposition to it".[67]

25. The Appeals Chamber considers that the Appellant has failed to show good cause for the late filing of his Rule 115 Motion. In the first place, he fails to establish why his current Lead Counsel was only able to begin effective work in this case in April 2005 although he had been appointed in November 2004, the stay on proceedings in this case was lifted on 26 January 2005, and the appointment of Lead Counsel was confirmed by the Appeals Chamber on 4 February 2005. Furthermore, the Appellant fails to provide a convincing explanation for why the legal assistant was only able to begin working on documents in Kinyarwanda at the end of August 2005 even though appointed in June 2005, and why the Appellant himself was not able to assist his Lead Counsel in dealing with such documents.

26. Even if the Appeals Chamber were to count the seventy-five days period from the date on which the Appellant claims that the current Defence team was complete (13 June 2005), such that the deadline for filing the Rule 115 Motion would have been 27 August 2005, the Rule 115 Motion would still have been filed 123 days late. The Appeals Chamber reiterates that "a Counsel, when accepting assignment as Lead Counsel in a case before the Tribunal, is under an obligation to give absolute priority to observe the time limits as foreseen in the Rules."[68] The Appeals Chamber is not convinced by the Appellant's argument that the Defence team could not file a timely motion for

[62] *Cf. e.g., Kambanda* Decision of 13 June 2000, pp. 2-3 and Rule 109 (A) of the Rules.
[63] Rule 115 Motion, para. 6.
[64] *Idem*,
[65] *Ibid.*, para. 7.
[66] *Ibid.*, para. 8.
[67] Response to Rule 115 Motion, paras 47 – 48.
[68] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 2 September 2005, p. 5.

admission of additional evidence under Rule 115 because it had to focus on preparation of the Amended Notice of Appeal and Amended Appellant's Brief. The Appeals Chamber recalls that the Appellant was granted generous extensions of time for filing these submissions as early as May 2005, such that both were accepted as timely filed on 12 October 2005.[69] The additional time allowed for preparing the Amended Notice of Appeal and Amended Appellant's Brief should have allowed for the Appellant to work with his Defence team to prepare a timely motion pursuant to Rule 115.

27. On the basis of the foregoing, the Appeals Chamber finds that the Appellant has not shown good cause for the delay.

IV. Disposition

28. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion for Clarification in its entirety as frivolous and imposes sanctions on the Appellant's Counsel pursuant to Rule 73(F) in the form of non-payment of fees and costs associated with it; **FINDS** that the Motion of 29 March 2004 was abandoned by the Appellant and dismisses it as such; and **DISMISSES** the Rule 115 Motion in its entirety.

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

Dated this 5th day of May 2006.
At The Hague, The Netherlands

Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[69] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice, 17 May 2005, p. 4. The Appellant was granted a further extension of time by the Decision of 2 September 2005 (p. 3).

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APPEALS CHAMBER – PROOF OF SERVICE
CHAMBRE D'APPEL - PREUVE DE NOTIFICATION

8 May 2006	Case Name / *Affaire: NAHIMANA ET AL.* Case No / *No. de l'affaire*: *ICTR-99-52-A*	Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE v. THE PROSECUTOR

To: / *A:*

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

APPEALS UNIT
✖ Ms Félicité Talon

APPEALS CHAMBER
✖ Judge / Juge Fausto Pocar, Presiding
✖ Judge / Juge Mohamed Shahabuddeen
✖ Judge / Juge Mehmet Güney
✖ Judge / Juge Andresia Vaz
✖ Judge / Juge Theodor Meron

✖ Ms Catherine Marchi-Uhel
✖ Mr Roman Boed
✖ Concerned Associate Legal Officers
✖ Mr Charles Zama

DEFENSE
✖ Accused / *accusé* : Ferdinad NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE
(complete CMS4 Form)

✖ Lead Counsel / *Conseil Principal*: **Mr. Biju-Duval, Mr. Donald Herbert, Mr. Bharat Chadha** ☐ **In Arusha** (complete CMS 2) ✖ **Fax Number: 00-33-1 53 60 47 48 00 44 207 841 6199/6197 00 255-27-250 8854**

☐ Co-Counsel / *Conseil Adjoint*: Ms. Diana Ellis, Ms. Gabriele Della Morte, Ms. Nathalie Leblanc
(name / nom)
☐ In Arusha (complete CMS 2) ☐ Fax Number:

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

Subject / *Objet:* ~~Kindly find attached the following documents / *Veuillez trouver en annexe les documents suivants:*~~

Documents name / *Titre du document*	**Date Filed / *Date d'enregistrement***	**Pages**
Decision on appellant Jean-Bosco Barayagwiza's motion for leave to present additional evidence pursuant to Rule 115	**05 May 2006**	**7231/H - 7221/H**

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