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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A

2-03-2009

(9158bis/A-9145bis/A)

9158bis/A
R

APPEALS CHAMBER

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Decision rendered on: 8 December 2006

FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE

v.

THE PROSECUTOR

Case No. ICTR-99-52-A

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**DECISION ON FERDINAND NAHIMANA'S MOTIONS FOR DISCLOSURE OF
MATERIAL IN THE PROSECUTOR'S POSSESSION NECESSARY FOR THE
APPELLANT'S DEFENCE AND FOR REGISTRY'S ASSISTANCE TO
CONDUCT FURTHER INVESTIGATIONS AT THE APPEAL STAGE**

Counsel for Ferdinand Nahimana:

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9/157 h/s/A

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 1994 and 31 December 1994 (hereinafter the "Appeals Chamber" and the "Tribunal" respectively), has been seized by Appellant Ferdinand Nahimana (hereinafter "Appellant") of the following two Motions:

- "*Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant*" "[Motion for disclosure of material in the Prosecutor's possession necessary for the Appellant's Defence]", filed on 10 July 2006 (hereinafter "Motion of 10 July 2006");

- "*Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel*" "[Urgent Defence Motion for Registry's assistance to conduct further investigations at the appeal stage]", filed on 10 October 2006 (hereinafter "Motion of 10 October 2006").

2. The Prosecutor responded to the said Motions on 20 July 2006¹ and 20 October 2006² respectively. The Appellant's Replies were filed on 21 July 2006³ and 25 October 2006⁴ respectively.

3. It will be recalled that the Trial Chamber rendered its judgement in the present case on 3 December 2003.⁵ The Appellant appealed the Judgement and filed his Notice of Appeal on 4 May 2004 and also his Appeal Brief on 27 September 2004.⁶ The Brief in Reply was filed on 21 April 2006.⁷

¹ Prosecutor's Response to the "*Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant*", 20 July 2006 (hereinafter "Response to the Motion of 10 July 2006").

² Prosecutor's Response to Appellant Nahimana's "*Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel*", 20 October 2006 (hereinafter "Response to the Motion of 10 October 2006").

³ *Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant* - *Réplique de la Défense*, 21 July 2006 (hereinafter "Reply to the Response to the Motion of 10 July 2006").

⁴ *Réponse de la Défense à la Réplique du Procureur (Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel)*, 25 October 2006 (hereinafter "Reply to the Response to the Motion of 10 October 2006").

⁵ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Judgement").

⁶ "Notice of Appeal", 4 May 2004, "Appeal Brief (revised)", 27 September 2004 (confidential version) and 1 October 2004 (public version) ("Appeal Brief").

⁷ "Defence Reply", 21 April 2004 (sic) ("Reply Brief"); Translator's Note: date should read "21 April 2006".

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I. MOTION OF 10 JULY 2006

Submissions of the parties

4. The Appellant requests the Appeals Chamber⁸ to order the Prosecutor to disclose the following documents to the Defence pursuant to Rules 66(B) and 68 (A) and (B) of the Tribunal's Rules of Procedure and Evidence (hereinafter the "Rules");⁹

- All the documents bearing references K050 2000 to K050 5000 on the one hand, and L0020 200 to L0020 600 on the other hand, from the "MINALOC or MRND" which the Appellant claims to be "[directly relevant to the charges against the Appellant]" and "[necessary for his defence [...] in that they help to determine the real causes of the massacres that occurred in March 1992 [in Bugesera region], identify those actually responsible and exonerate the Appellant]".¹⁰ He adds that the documents in question should have been disclosed at trial but that it is still necessary to disclose them on appeal to enable him to effectively support his grounds of appeal on the merits;¹¹
- The plea agreement between Joseph Serugendo and the Office of the Prosecutor, together with all the statements made by Joseph Serugendo to the Office of the Prosecutor, as well as the video recordings;¹² the Appellant argues that the documents "[contain exculpatory evidence and are necessary for his defence]",¹³ as Joseph Serugendo's Judgement¹⁴ shows that he was convicted on the basis of the RTLM broadcasts and his activities at that radio station, and also on the basis of a plea agreement in which he purportedly made statements concerning his activities, RTLM's broadcasts and internal operations, and the role played by each RTLM member.¹⁵

⁸ The Appellant states that he is appealing to the Appeals Chamber because he has already written to the Prosecutor seeking disclosure of the documents. He recalls his Requests of 31 March 2006 and 20 June 2006 for disclosure of the "MINALOC and MRND" file; the second letter reiterated the same request and contained details regarding the documents sought, as well as an additional request for disclosure of Joseph Serugendo's plea agreement together with the transcripts of all his statements. The Appellant refers to the negative reply received from the Prosecutor in a letter dated 10 April 2006 and the fact that he did not get a response to his letter of 20 June 2006 (Motion of 10 July 2006, paras. 1, 3-6).

⁹ Motion of 10 July 2006, paras. 8 and p. 5.

¹⁰ *Ibid.*, paras. 8 and 14. The Appellant asserts that the Trial Chamber assessed "[his personality [...] and the value of his testimony in the light of his alleged involvement in the events that occurred in the Bugesera region in March 1992]" (*ibid.*, para. 9). He cites paragraph 691 of the Judgement which states that the Appellant "ordered the broadcast on Radio Rwanda [...] of a communiqué [...] which spread fear and led to violence against the Tutsi population by Hutu who had been falsely made to believe that they faced imminent attack)". (*ibid.*, para. 10). The Appellant explains that these documents are necessary to the Defence as they help to assess the materiality and context of some acts with which he is charged (Reply to the Response to the Motion of 20 July 2006, para. 7).

¹¹ *Ibid.*, paras. 15-16.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 18.

¹⁴ *The Prosecutor v. Joseph Serugendo*, Case No. ICTR-2005-84-I, Judgement and Sentence, 12 June 2006 (hereinafter "*Serugendo Judgement*").

¹⁵ *Ibid.*, paras. 3 and 18.

5. The Prosecutor submits that the Motion of 10 July 2006 should be denied in its entirety.¹⁶ First, he claims that the Motion is unfounded in law as the Appellant failed to show how Article 66(B) was applicable at this stage of the proceedings. The Prosecutor notes in this connection that the "MINALOC and MRND" documents could not be disclosed at trial because they were filed in the Prosecutor's database only in October 2004.¹⁷ He adds that the Appellant failed to show during the appeal proceedings why the documents relating to the events that occurred in Bugesera in March 1992 were necessary for his defence, or their impact, if any, on the Trial Chamber's findings.¹⁸ Secondly, the Prosecutor argues that the reference to Rule 68(A) has no basis and is comparable to an unacceptable fishing expedition in that it covers 3,400 pages of documents, some of which are unrelated to the events of Bugesera.¹⁹ The Prosecutor contends that the Appellant failed to show *prima facie* that the Prosecutor is in possession of documents that may suggest the Appellant's innocence.²⁰ Lastly, the Prosecutor asserts that the MINALOC and MRND documents, as well as Joseph Serugendo's statements, are accessible on the Electronic Disclosure Suite (hereinafter "EDS"). He further contends that the guilty plea agreement was filed with the Registry confidentially and does not fall within the ambit of Rule 68(A).²¹ The Prosecutor also argues that the Appellant does not show in what way Rule 68(B) is applicable since he simply states that the documents in question are "[relevant]" and "[of interest]" to the Appellant.²²

6. The Appellant replies that he takes note of the fact that the MINALOC and MRND files as well as Joseph Serugendo's statements are available on the EDS, but that, as of the date of his Reply, he is not in a position to ascertain their accuracy.²³ Arguing that there is no reason why the plea agreement should remain confidential, he moves the Appeals Chamber to rule and find that said plea is not at all confidential in nature and to order the Registry to make it accessible to the public.²⁴ He further notes that this document is necessary for the preparation of his appeal, as it contains "[numerous details regarding the internal operations of RTLM radio, particularly from April to July 1994]", and "[indications as to the role played by the armed militia at RTLM from April 1994, at the technical and moral levels]".²⁵

Analysis

7. The Appeals Chamber recalls that the material referred to in Rule 68 is that which may suggest the innocence or mitigate the guilt of the accused, or affect the credibility of the

¹⁶ Response to the Motion of 10 July 2006, para. 3. Noting that the Appellant has reiterated, in a motion, his baseless requests received through the mail, the Prosecutor reiterates all the submissions made in his Response of 10 April 2006, sent by mail (*ibid.*, paras. 2-3).

¹⁷ *Ibid.*, paras. 3 and 6.

¹⁸ *Ibid.*, para. 7.

¹⁹ *Ibid.*, paras. 3, 14 and 20.

²⁰ *Ibid.*, para. 13.

²¹ *Ibid.*, para. 18. The Prosecutor notes "[it would appear that Counsel for the Appellant have not [...] deemed it useful to subscribe to EDS]" (*ibid.*, para. 19).

²² *Ibid.*, para. 17.

²³ *Ibid.*, paras. 3 and 10. The Appeals Chamber notes that, since the filing of the Reply to the Response to the Motion of 10 July 2006, the Appellant has not indicated whether he has managed to access the said documents on EDS.

²⁴ Reply to the Response to the Motion of 10 July 2006, paras. 11-12, p. 3.

²⁵ *Ibid.*, paras. 13-15.

Prosecutor's evidence,²⁶ and that the requirement to disclose such evidence is a continuing obligation which extends beyond the trial stage, and continues during the appeals process.²⁷ Since it is the duty of the Prosecutor to determine which documents meet the criteria set out in Rule 68, the Appeals Chamber assumes that the Prosecutor is acting in good faith and would not intervene in the exercise of the Prosecutor's discretion, unless it is shown that the Prosecutor abused it.²⁸ Any submission made by the Defence regarding a potential breach of Rule 68 must be accompanied by all *prima facie* proofs which show that it is likely that the evidence is exculpatory and is in the possession of the Prosecutor.²⁹ Even where an appellant satisfies the Chamber that his request was specific enough and that the Prosecutor failed to comply with his obligations, the Appeals Chamber will issue a disclosure order only if it is satisfied that such a failure caused prejudice to the appellant.³⁰

8. The Appeals Chamber notes the Prosecutor's statement to the effect that he is "[aware of his obligations under Rule 68(A), to actively seek and, if necessary, disclose at every stage

²⁶ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004 (hereinafter "*Krstić* Appeal Judgement"), para. 178. See also Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("*Barayagwiza* Decision of 8 December 2006"), para. 34.

²⁷ Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006, (hereinafter "*Barayagwiza* Decision of 30 October 2006"), para. 6; Decision on Motions Relating to the Appellant Hassan Ngeze's and Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB", 27 November 2006 ("*Ngeze* Decision of 27 November 2006"), para. 11; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (hereinafter "*Brđanin* Decision of 7 December 2004"), p. 3; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 (hereinafter "*Bralo* Decision of 30 August 2006"), para. 29.

²⁸ *Barayagwiza* Decision of 8 December 2006, para. 34; *Barayagwiza* Decision of 30 October 2006, para. 6; *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Decision on Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002, pp. 4-5; *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 18 May 2001, p. 4; *Brđanin* Decision of 7 December 2004, p. 3; *Bralo* Decision of 30 August 2006, paras. 30-31; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16; *Brđanin* Decision of 7 December 2004, pp. 3-4; *Prosecutor v. Tihomir Blaškić*, Case No. 95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 264; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber Regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004, ("*Blaškić* Decision of 4 March 2004"), para. 44; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, [Confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber Regarding Redaction of the Statement of "Witness Two" for the Purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 ("*Blaškić* Decision of 30 March 2004"), paras. 31-32; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* Decision of 26 September 2000"), paras. 38, 39 and 45; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision, 22 March 2004, p. 3.

²⁹ *Barayagwiza* Decision of 8 December 2006, para. 34; *Brđanin* Decision of 7 December 2004, p. 1; *Bralo* Decision of 30 August 2006, para. 31; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para. 262.

³⁰ *Barayagwiza* Decision of 8 December 2006, para. 34; *Bralo* Decision of 30 August 2006, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153.

of the proceedings, any material which may be in his possession, and which in his actual knowledge may suggest the innocence or mitigate the guilt of the Accused]"³¹ The Appeals Chamber notes that the Prosecutor decided that the documents sought did not meet the criteria set out in Rule 68³² and that the Appellant failed to show in what way the Prosecutor's opinion that the documents do not contain any exculpatory evidence is abusive in this case. In this regard, the Appeals Chamber notes in particular that the Appellant himself describes the said documents as "[relevant]" to his case and "[necessary to the defence]" and merely asserts that "[they contain exculpatory evidence]"³³ without any further explanation as to how they may "[suggest his innocence]"³⁴ or mitigate his personal responsibility.

9. The Appeals Chamber recalls that Rule 66(B) is applicable on appeal on condition that the evidence referred to in the Defence request for review was not available at trial.³⁵ The applicability of Rule 66(B) to the appeal proceedings implies that the Prosecutor must permit the Defence to inspect any objects which "are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial, or were obtained from or belonged to the accused".³⁶ In this regard, the Appeals Chamber recalls that documents that are purely inculpatory are not necessarily irrelevant to the preparation of the Defence case and that the Prosecutor should determine whether "the issues to which the material relates are the subject of a ground of appeal" or whether "the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence admissible under Rule 115".³⁷ Consequently, it is the duty of the Prosecutor to allow the Appellant to inspect "[any material that may be admissible on appeal or that could lead to the discovery of evidence that may be admissible]"³⁸.

10. The Appeals Chamber notes that the Prosecutor informed the Defence of the availability of the MINALOC and MRND files and of Joseph Serugendo's statements after the filing of the Appellant's Motion, whereas he could have done so earlier.³⁹ However, the Appellant has, to date, not indicated any difficulties he may have encountered in obtaining the said documents through EDS.⁴⁰ The Appeals Chamber therefore considers as moot the request for disclosure under Rule 66 relating to said documents.

³¹ Response to the Motion of 10 July 2006, para. 11.

³² *Idem*.

³³ Motion of 10 July 2006, para. 18.

³⁴ *Ibid.*, para. 14.

³⁵ *Georges Anderson Nderumbumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Decision on "Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions", 28 June 2002, p. 3 of the French version.

³⁶ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, [Confidential] Decision on the Prosecutor's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C), 27 March 2003, p. 3.

³⁷ *Ibid.*, p. 4.

³⁸ *Idem*.

³⁹ See Footnote 8 above.

⁴⁰ At the same time and considering that the Prosecutor seems to be referring to Rules 66 and 68 by stating that the material in question is available on EDS (Response to the Motion of 10 October 2006, paras. 17-19), the Appeals Chamber wishes to recall that the mere fact that the Prosecutor filed a particular document in EDS does not necessarily mean that he discharged his obligations under Rule 68 and made such material "reasonably accessible" to an accused (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging

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11. Regarding Joseph Serugendo's plea agreement, the Appeals Chamber notes that the Appellant's request is erroneously based on Rules 66 and 68. The Appeals Chamber will, however, consider the request - as set out in the Reply to the Response to the Motion of 10 July 2006⁴¹ - as a request for access to a confidential document.

12. The Appeals Chamber has consistently held that a party is always entitled to seek material from any source to facilitate the preparation of its case, provided that the material sought has been identified or described in its general nature and that a legitimate forensic purpose for such access has been shown.⁴² The relevance of the material sought by a party may be determined by showing the existence of a nexus between the said party's case and the case or cases in the course of which such material was presented, for example, if the cases stem from events alleged to have occurred in the same region and during the same period or if there are other overlaps.⁴³ It is sufficient for the requesting party to show that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would.⁴⁴ In ruling on such a request, it falls within the Appeals Chamber's discretion to strike a balance between respect for the right of a party to have access to

Disclosure Obligations, 30 June 2006 ("Karemera Decision of 30 June 2006"), para. 15; *Bralo* Decision of 30 August 2006, para. 35).

⁴¹ Reply to the Response to the Motion of 10 July 2006, p. 3 (French version).

⁴² *Prosecutor v. Blagoje Simić*, Case No IT-95-9-A, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motion Filed by the Parties in the *Simić et al.* Case, 13 April 2005 ("*Simić* Decision of 13 April 2005"), p. 3; *Momir Nikolić v. The Prosecutor*, Case No. IT-02-60/1-A, Decision on Emergency Motion for Access to Confidential Document, 4 February 2005, p. 4; *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-A, Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 January 2004, p. 4; *Prosecutor v. Mladen Naletilić, alias "Tuta", & Vinko Martinović, alias "Stela"*, Case No. IT-98-34-A, Decision on Joint Motion by Enver Hadžihasanović and Amir Kubura for Access to all Confidential Material, Filings, Transcripts and Exhibits in the Naletilić and Martinović Case, 7 November 2003, pp. 2-3.

⁴³ *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-R, Decision on "Defence Motion on Behalf of Rasim Delić Seeking Access to all Confidential Material in the Blaškić Case", 1 June 2006 ("*Blaškić* Decision of 1 June 2006"), p. 9; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galić Case, 16 February 2006 ("*Galić* Decision of 16 February 2006"), para. 3; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No IT-02-60-A, Decision on Momčilo Perišić Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case", 18 January 2006 ("*Blagojević* Decision of 18 January 2006"), para. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 8; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 23 janvier 2003, pp. 4-5; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Cerkez's Request for Assistance of the Appeals Chamber in Gaining Access to the Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002 ("*Blaškić* Decision of 16 May 2002"), para. 15.

⁴⁴ *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Ojdanić's Application for Access to Exhibit P92, 3 November 2006, para. 6; *Blaškić* Decision of 1 June 2006, p. 9; *Galić* Decision of 16 February 2006, para. 3; *Blagojević* Decision of 18 January 2006, para. 4; *Blagojević* Decision of 16 November 2005, para. 8; *Simić* Decision of 13 April 2005 (sic) [Translator's Note: date should read 12 April 2005], p. 3; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003 ("Decision of 13 January 2003"), para. 5; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-I, Decision on Application by Dragoljub Ojdanić for Disclosure of *Ex Parte* Submissions, 8 November 2002, para. 18; *Blaškić* Decision of 16 May 2002, para. 14.

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material that is necessary for the preparation of its case and the Tribunal's obligation to guarantee the protection and the integrity of confidential information.⁴⁵

13. The Appeals Chamber holds that it has jurisdiction, under Rule 75(G)(ii), to rule on the request relating to Joseph Serugendo's plea agreement, because no Chamber is seized of the first proceedings,⁴⁶ which ended with the delivery of the Trial Judgement on 12 June 2006 and the death of Joseph Serugendo on 22 August 2006. Thus, the Appeals Chamber considers that it has the power to vary the status of protected documents.⁴⁷

14. The Appeals Chamber is satisfied that the Appellant has described the exhibit at issue in sufficient detail as it was incumbent on him to do and shown that legally, there is a legitimate forensic purpose justifying that the said exhibit be consulted. In accordance with Rule 75(H) of the Rules, the Appeals Chamber has obtained all relevant information from the Judges of Trial Chamber I which delivered the Judgement in *Serugendo* and decides to grant the Appellant access to Joseph Serugendo's plea agreement.

15. The Appeals Chambers grants the Prosecutor 14 days from the date of this Decision to file a motion for redaction, if he can establish that there are sufficient grounds for redacting some information contained in the said document. The protective measures adopted by the Trial Chamber regarding this exhibit thus remain in force.

II. 10 OCTOBER 2006 MOTION

Submissions of the parties

16. In his Motion of 10 October 2006, the Appellant requests the Appeals Chamber to "order the Registry to provide logistical and financial assistance to the Appellant's Defence to conduct investigations in the territory of Rwanda, in particular, in Kigali, in its attempt to obtain the complete recording of an interview given by the Appellant on Radio Rwanda on 24 April 1994 and broadcast on 25 April 1994",⁴⁸ pursuant to Article 20(4)(b) of the Statute

⁴⁵ *Miroslav Bralo v. The Prosecutor*, Case No. IT-95-17-A, Decision on Motion of Miroslav Bralo for Access to Certified Trial Record, 2 May 2006, p. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, [Confidential] Decision on Prosecution Request for Redaction of Confidential Filings Disclosed to Momčilo Perišić, 9 March 2006, p. 1; *Galić* Decision of 16 February 2006, para. 10; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, [Confidential] Decision on Prosecution Request for Redactions, 17 January 2006, p. 1; *Blaškić* Decision of 16 May 2002, para. 29.

⁴⁶ *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Order *Proprio Motu* Granting Access to Confidential Material, 3 February 2006, p. 1.

⁴⁷ The Appeals Chamber holds that it is proper to apply *mutatis mutandis* the same procedure as that provided for varying witness protective measures under Rule 75 of the Rules in the case of protected documents, like the plea agreement; in this regard, see *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision to Lift the Confidential Nature of the Plea Agreement in the *Erdemović* Case, 26 August 2003, p. 2. Rule 75(G) of the Rules is drafted in terms similar to those of ICTY Rules: "(...) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: (i) to any Chamber, however constituted, remaining seized of the first proceedings; or (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings."

⁴⁸ Motion of 10 October 2006, p. 5. The Appellant specifies that such investigations require the participation of the Lead Counsel, the Co-Counsel and an assistant and gives details of the relevant programme spanning eight days (two days for the travel to Arusha, coordination with the Registry and discussions with the Appellant at

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of the Tribunal (hereinafter referred to as the "Statute"), Rules 73, 107, 108bis and 115 of the Rules and the "Decision on Ferdinand Nahimana's '*Requête aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P105*' [Decision on Ferdinand Nahimana's 'Motion for disclosure of exculpatory evidence and investigations into the origin and content of Exhibit P105'] of 12 September 2006 (hereinafter referred to as 'Decision of 12 September 2006')".⁴⁹ The Appellant asserts that in its Decision of 12 September 2006, the Appeals Chamber "[places the onus on the Defence to conduct the relevant investigations to obtain the complete recording of the interview given by the Appellant on 24 April 1994 and held against him]".⁵⁰ In this regard, the Appellant asserts that despite the numerous attempts already made by the Defence at trial, it has never managed to obtain the full recording of the interview.⁵¹

17. The Appellant further asserts that producing the full recording "[will be such as to rebut one of the main assertions by the Judges on the Appellant's criminal intent, and confirm the Appellant's constant and unequivocal position (...) that only the RPF can be considered to be the enemy of the people of Rwanda]".⁵² He also argues that the full version of this interview would bolster the credibility and consistency of his testimony before the Trial Chamber.⁵³

18. The Prosecutor submits that the 10 October 2006 Motion must be dismissed because it is without merit, and is an abuse of process, not deserving the payment of the Counsel's fees and costs.⁵⁴ He asserts that the Motion is, in large part, repetitive of the "*Requête aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P105*" (hereinafter referred to as "Motion of 10 April 2006") which requested the Rwandan authorities to disclose the full interview, a request which was denied by the Decision of 12 September 2006. According to the Prosecutor, these two Motions seek essentially the same relief, i.e., the assistance of the Appeals Chamber in obtaining the whole version of the interview.⁵⁵ He therefore argues that the Appellant has failed to meet the tests justifying further investigations on appeal.⁵⁶

UNDF; five days for the journey to Kigali for investigations at ORINFOR, the RPF Documentation Centre and with any other relevant authorities or organizations; one day for the return journey to Arusha and discussions with the Appellant at UNDF to report on the conduct of the investigations) (*ibid.*, para. 18).

⁴⁹ *Ibid.*, p. 5.

⁵⁰ *Ibid.*, para. 19. The Appellant emphasizes that "*le Procureur ne propose aucune assistance sur ce point et n'envisage aucune démarche auprès des autorités rwandaises pour tenter d'obtenir l'intégralité de cet enregistrement*" "[the Prosecutor does not propose any assistance in this regard and has no plan to approach the Rwandan authorities to obtain the full recording]" (*ibid.*, para. 20).

⁵¹ Motion of 10 October 2006, paras. 1-3 and 25. The Appellant refers to Annex 3 of his revised Appeal Brief, in particular, the "Chronology of efforts made by the different teams to obtain listed material."

⁵² *Ibid.*, para. 21. In other words, the Trial Chamber allegedly committed an error of fact in finding that "the Appellant allegedly confused RPF-*Inkotanyi* with the entire Tutsi community" (*Ibid.* para. 22).

⁵³ *Ibid.*, para. 23.

⁵⁴ Prosecutor's Response of 10 October 2006, para. 7.

⁵⁵ *Ibid.*, para. 3.

⁵⁶ *Ibid.*, paras. 8-23.

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19. On the one hand, the Prosecutor emphasizes that for both the request for an order to conduct investigations under Rules 54 and 107 (Motion of 10 April 2006) and the request for funding for further investigations at the appeal stage (the present Motion), the Appellant must demonstrate that he had exercised due diligence during trial.⁵⁷ Hence, since the Decision of 12 September 2006 dismissed the Motion of 10 April 2006 on the grounds that the Appellant had failed to demonstrate that he had exercised due diligence, the Motion of 10 October 2006 should be dismissed on the same basis.⁵⁸ The Prosecutor notes that in the Motions of 10 October and 10 April 2006, the Appellant refers to the same document - the Motion of 13 May 2003 - to demonstrate the difficulties he allegedly encountered during his trial to obtain evidence in Rwanda.⁵⁹ The Prosecutor reiterates that this Motion of 13 May 2003 was only seeking a stay of the proceedings and not the assistance of the Trial Chamber in obtaining evidence, and that the Motion did not specifically mention the interview of 24 April 1994.⁶⁰ The Prosecutor maintains that the Appeals Chamber had already taken the document into consideration in its Decision of 12 September 2006 but did not accept that this qualified as demonstrating that the Appellant had exercised due diligence.⁶¹

20. On the other hand, the Prosecutor asserts that the Appellant has failed to demonstrate that exceptional circumstances exist to justify further investigations at the appeal stage, inasmuch as he failed to demonstrate that a miscarriage of justice will ensue without further investigations.⁶² In this regard, the Prosecutor notes that if the Appellant's Motion were to be granted, he would purely be engaging in a "fishing expedition" - which, in his view, the Appeals Chamber has always refused - since the Appellant offers no indication that the full broadcast exists.⁶³ He further states that the issue of the incomplete nature of the broadcast was a live issue during the trial,⁶⁴ that the Trial Chamber was informed of the alleged substance of the whole broadcast⁶⁵ and that it exercised its discretion to determine the weight of this evidence;⁶⁶ hence, disclosure of the entire interview would add nothing new to the factual context and cannot qualify as exceptional circumstances.⁶⁷ The Prosecutor argues that the Appellant is attempting to re-litigate the issue *de novo* on appeal, which is impermissible.⁶⁸ Lastly, he contends that the Appellant has in neither of his Motions given the reason why he waited almost two and half years from the date of the Trial Judgement to file the Motion of 10 October 2006.⁶⁹

⁵⁷ *Ibid.*, para. 5.

⁵⁸ *Ibid.*, paras. 4, 5 and 19.

⁵⁹ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 13 May 2003 ("Motion of 13 May 2003").

⁶⁰ Prosecutor's Response to the Motion of 10 October 2006, para. 16, referring to para. 15 of his Response to the Motion of 10 April 2006.

⁶¹ *Ibid.*, para. 18.

⁶² *Ibid.*, paras. 8-14.

⁶³ *Ibid.*, paras. 6, 14.

⁶⁴ The Prosecutor reiterates that the circumstances surrounding the manner in which the Office of the Prosecutor obtained the broadcast and its admission as exhibit were given in the Response to the Motion of 10 April 2006 (see *ibid.*, para. 10).

⁶⁵ In support of this argument, the Prosecutor cites paragraph 48 of the Judgement (*ibid.*, para. 13, footnote 17).

⁶⁶ *Ibid.*, paras. 9 and 12. The Prosecutor specifies that the Appellant testified regarding the incomplete nature of the broadcast by giving his own version of the missing part of the interview (*ibid.*, para. 11).

⁶⁷ *Ibid.*, para. 12.

⁶⁸ *Ibid.*, paras. 9 and 13.

⁶⁹ *Ibid.*, para. 22.

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21. The Appellant replies that the investigations envisaged by the Defence would not be “fishing expeditions” since they are aimed at obtaining possession of a specifically identified piece of evidence whose existence and content have not been contested by the Prosecutor and whose possessors are known.⁷⁰ He submits that the Defence exercised due diligence timeously, by continuously requesting disclosure of the entire recording each time it had opportunity to do so at trial.⁷¹ In general, he asserts that the Prosecutor is making an impermissible attempt to thwart the discovery of the truth, whereas he has all necessary facilities in Kigali to obtain the missing part of the recording.⁷²

Analysis

22. The Appeals Chamber reiterates that, by its Decision of 12 September 2006, it rejected the Motion of 10 April 2006, essentially on the grounds that the Appellant had failed to demonstrate that, even after exercising due diligence, he had not succeeded in obtaining the recording in question. In the said Motion, the Appellant merely stated that his investigations “*would have* met with obstruction from the Rwandan authorities”; does not provide any information on the concrete measures undertaken since the commencement of his appeal process, nor does he provide any evidence of lack of cooperation by the Rwandan authorities with regard to access to the archives that may contain the recording being sought.⁷³ Having been seized of a motion under Rules 54 and 107 of the Rules, the Appeals Chamber assessed the diligence exercised by the Appellant at the appeal stage by considering whether he had undertaken concrete measures since the start of the appeal process to obtain the recording in question.⁷⁴

23. The Motion of 10 October 2006 seeks leave to conduct further investigation on appeal under Rule 115 of the Rules. In this case, the Applicant must demonstrate that the evidence sought was not available during the trial period, even though he had exercised due diligence.⁷⁵ The Appeals Chamber also reiterates that it is only in exceptional circumstances that it may order the Registry to fund investigations at the appeal stage. Such circumstances may be noted, if the moving party shows, for example, that it is in possession of specific information that was not available at trial and could not have been discovered at trial even through the exercise of due diligence, and that further investigation was necessary in order to

⁷⁰ Reply to the Response to the Motion of 10 October 2006, paras. 1-4. [Translator’s note: This filing is entitled “*Réponse de la Défense à la Réplique du Procureur(...)*”, dated 22 October 2006].

⁷¹ *Ibid.*, paras. 7-9.

⁷² *Ibid.*, paras. 10-14.

⁷³ Decision of 12 September 2006, para. 15.

⁷⁴ Decision of 12 September 2006, para. 15; Decision on Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 (“*Ngeze* Decision of 3 May 2005”), pp. 3-4.

⁷⁵ Decision of 12 September 2006, para. 13; Decision on Appellant Hassan Ngeze’s Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006, paras. 4-5; [Confidential] Decision on Appellant Hassan Ngeze’s Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 (“*Ngeze* Decision of 23 February 2006”), paras. 5 and 9; Decision on Jean-Bosco Barayagwiza’s Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005, p. 4; *Ngeze* Decision of 3 May 2005, p. 3; Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 (“*Nahimana* Decision of 3 May 2005”), para. 2.

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avoid a miscarriage of justice.⁷⁶ However, in the instant case, the Appeals Chamber finds that the Appellant has failed to show that such circumstances exist to justify the investigation sought.

24. First, the test for the unavailability of the evidence at trial and the diligence exercised in order to obtain it, of necessity implies that the party in question must show that it sought to make appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring the evidence before the Trial Chamber.⁷⁷ In this regard, the Appeals Chamber notes that the Appellant had approached the Rwandan authorities on various occasions in 2000, 2001, 2002 and 2003 concerning a large volume of materials and evidence he had wished to consult, without filing a specific request for the recording in question.⁷⁸ However, the Appeals Chamber notes that even if the Appellant did not expressly request the Trial Chamber to order the Rwandan authorities to transmit to him the entire recording in question, he nevertheless got the Trial Chamber to order Rwanda to cooperate with him, particularly as concerns access to “tapes of broadcasts by Radio Rwanda (relevant to evidence given by witnesses of the OTP), as well as those of Radio RTLM and Radio Muhabura for the period 1990-1994”.⁷⁹ Furthermore, following the unsuccessful approaches made to these same authorities, the Appellant requested, after closure of the discussions on 9 May 2003, a stay of the proceedings against him;⁸⁰ this request was denied by the Trial Chamber essentially on grounds that the documents sought had not been specifically identified nor had their relevance been demonstrated.⁸¹ Therefore, even though the Appeals Chamber finds that the measures taken by the Appellant at trial lacked in precision and promptitude, it is satisfied that the recording in question was not available at trial despite the diligence exercised by the Appellant at the time to obtain it.

25. However, the Appeals Chamber is not satisfied that the Appellant has justified the existence of exceptional circumstances for his request to be granted. Indeed, the Appellant mentions no further efforts made to obtain the recording in question from the Rwandan authorities.

26. It was only on 10 April 2006, that is, nearly two years after the filing of his Notice of Appeal, that he filed his first request, since the Judgement was delivered, for an order to the Rwandan authorities to transmit the entire recording in question. In addition, the Appeals

⁷⁶ *Nahimana* Decision of 3 May 2005, para. 3; *Ngeze* Decision of 3 May 2005, pp. 3-4.

⁷⁷ See on this subject, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for Extension of Time-Limit and Admission of Additional Evidence, 15 October 1998, paras. 40, 44, 45 and 47; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 50.

⁷⁸ Motion of 10 October 2006, paras. 1-2. The Appellant refers to his Annex 3 to the Appeal Brief (revised) corresponding to his Annex II to his Motion of 13 May 2003.

⁷⁹ *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-T, Request for cooperation by the Government of the Republic of Rwanda pursuant to Article 28 of the Statute, 24 September 2002.

⁸⁰ *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-T, Skeleton Argument for Defence Application to Stay Proceedings, 8 May 2003 and Motion of 13 May 2003 (see, for instance, para. 2.2(d)).

⁸¹ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003 (“Decision of 5 June 2003”), paras. 1-12. The Appeals Chamber notes that the Appellant did not file an interlocutory appeal against the Decision of 5 June 2003 but instead waited to contest this decision and file his Notice of Appeal on 4 May 2004 appealing the Judgement on its merits (Notice of Appeal, p. 5).

Chamber notes that the Trial Chamber was aware of the incomplete nature of the recording in question and that the Appellant did testify on that subject.⁸² The Appellant has raised this same issue in his Appeal Brief.⁸³ It is incumbent on the Appellant to demonstrate, within the context of his appeal on the merits, that the Trial Chamber erred in admitting the material into evidence and/or in relying on it in the Judgement, and should have assessed, when drafting his Notice of Appeal and Appeal Brief, the necessity of renewing the efforts made at trial in order to obtain the recording in question. The Appeals Chamber reiterates that this Decision does not pre-empt its subsequent assessment of the merits of this motion.⁸⁴

27. Furthermore, the Appeals Chamber does not see how the investigations would require the Lead Counsel, Co-Counsel and an assistant to travel to Rwanda just to obtain a copy of the recording whereas the Appellant claims to know its exact source and he could address a written request directly to those holding it.

28. In the light of the foregoing, the Appeals Chamber is of the opinion that the Appellant has failed to establish that exceptional circumstances exist to justify assistance from the Registry to conduct, more than two and half years after the Judgement, additional investigation at the appeal stage.

IV. (sic) DISPOSITION

29. For the foregoing reasons, the Appeals Chamber **ORDERS** the Registry, subject to any motion for redaction filed within 14 days by the Prosecutor, to allow the Appellant to consult the plea agreement concluded in *Serugendo*, and **DISMISSES** the Motion of 10 July 2006 and the Motion of 10 October 2006 in all other respects.

30. The plea agreement concluded in *Serugendo* shall remain under the protective measures ordered by the Trial Chamber.⁸⁵ In addition, the Appellant, his Counsel or any person working for the Defence who, on the instruction or authorization of the said Counsel, applies to consult confidential documents filed in the instant case, shall undertake:

- (i) not to disclose to a third party, the names and details [contacts] of witnesses, copies and content of their statements, the transcripts and content of their testimony in court, or any information that would identify them and breach the confidentiality sought by the protective measures in force, unless such information is absolutely necessary for the preparation of the Appellant's case, and with the prior authorization of the Appeals Chamber; and
- (ii) not to disclose to a third party any documentary or other evidence, nor the content, in whole or in part, of any evidence, statement or testimony declared confidential.

⁸² T., 14 October 2002. pp. 216-217 and 219-222 (French version).

⁸³ Appeal Brief (revised), paras. 116-121, 132-135, 148, 276-279.

⁸⁴ See also Decision of 12 September 2006. para. 5.

⁸⁵ Including, but not limited to *The Prosecutor v. Joseph Serugendo*, Case No. ICTR-2005-84-I, Decision on Motion for Protection of Witnesses, 1 June 2006.

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31. If, for purposes of preparing the Appellant's case, a confidential document is disclosed to a third party in compliance with the conditions prescribed in subparagraph (i), any person who receives such disclosure in the instant case must be informed that it is forbidden to make copies thereof, reproduce or publish, in whole or in part, any confidential document, or to disclose it to any other person; furthermore, any person who has received disclosure of the said document, must return it to the Appellant or his Counsel once it is no longer needed for the preparation of the Appellant's case.

32. For purposes of the foregoing paragraphs, the following are not considered to be "third parties": (i) the Appellant, (ii) persons authorized by the Registrar to assist Counsel for the Appellant, (iii) staff of the Tribunal, including (iv) staff members of the Office of the Prosecutor.

Done in French and English, the French text being authoritative,
on 8 December 2006, at The Hague, The Netherlands.

Fausto Pocar
Presiding Judge

[Seal of the Tribunal]
