



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

ICTR-99-52-A
9 September 2005
(4956/H-4951/H)

4956/H
EX

ICTR Appeals Chamber

IN THE APPEALS CHAMBER

Date: 9 September 2005
Action: R-U.
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3/10/05

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar
Judge Andresia Vaz

Registrar: Mr. Adama Dieng

Decision of: 9 September 2005

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: KATFI KUMELIO A. AKEANDU
SIGNATURE: [Signature] DATE: 09/09/2005

DECISION ON "JOSEPH NZIRORERA'S MOTION FOR ACCESS TO APPEAL BRIEFS"

The Prosecutor v. Joseph Nzirorera

Counsel for the Applicant Joseph Nzirorera
Mr. Peter Robinson

Office of the Prosecutor
Mr. Don Webster
Mr. Gregory Lombardi
Mr. Iain Morley

Nahimana, Barayagwiza and Ngeze v. The Prosecutor

Counsel for the Appellants
Mr. Jean-Marie Biju-Duval
Mr. D. Peter Herbert
Mr. Bharat B. Chadha

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

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THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

BEING SEISED OF "Joseph Nzirodera's Motion for Access to Appeal Briefs", filed on 8 July 2005 ("Applicant" and "Motion", respectively), whereby the Applicant requests access to the confidential Appellants' Briefs filed by the appellants Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze ("Appellants") in the present case ("Appellants' Briefs");

NOTING the "Prosecutor's Response to 'Nzirodera's Motion for Access to Appeal Briefs'", filed on 25 July 2005 ("Response"), in which the Prosecution states that it does not oppose the Motion, save for some assertions relating to the standard to be applied for granting access to the briefs;¹

NOTING that in his Motion, the Applicant explains that, in the case *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirodera*,² the Prosecution submitted on 30 June 2005 a "Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts" ("Prosecution Motion for Judicial Notice"), wherein it requested that the Trial Chamber take judicial notice of six adjudicated facts from the Trial Judgement in the present case, which adjudicated facts it asserts are not contested in the Appellants' Briefs;³

NOTING that, in support of his application, the Applicant argues that access to the Appellants' Briefs is necessary to verify the representations made in the Prosecution Motion for Judicial Notice;⁴

CONSIDERING that a party is always entitled to seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown;⁵

¹ The Prosecution specially argues that since the underlying motion is not before the Appeals Chamber, the standard to be applied in deciding that motion is irrelevant to the question whether he should be granted access to the briefs, Response, paras. 1, 2.

² ICTR-98-44.

³ Motion, paras. 2-5, referring to Prosecution Motion for Judicial Notice, para. 30 and Annex B, p. 1.

⁴ Motion, para. 5.

⁵ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Tihomir Blaškić*, 16 May 2002 ("Blaškić Decision"), para. 14; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002 ("Kordić and Čerkez Order") p. 4; *Prosecutor v.*

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CONSIDERING that "access to confidential material [from another case] may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case"⁶ and that "it is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least good chance that it would";⁷

CONSIDERING that "the relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the case from which such material is sought";⁸

CONSIDERING that the Applicant has sufficiently identified the confidential material to which he seeks access;

CONSIDERING that access to the Appellants' Briefs is likely to assist the Applicant's case by enabling him to verify whether the six facts of which the Prosecution requests judicial notice and claims were adjudicated in the present case are not contested by the Appellants in their briefs;

CONSIDERING, therefore, that the Applicant has demonstrated a legitimate forensic purpose in relation to the said confidential material;

NOTING that, although the Appellants' Briefs of Appellants Ferdinand Nahimana and Hassan Ngeze have already been filed,⁹ the Appellant Jean-Bosco Barayagwiza has not yet filed his Appellant's Brief;¹⁰

NOTING that the Appellant Ferdinand Nahimana filed, on 1 October 2004, a public version of his Appellant's Brief and that therefore, leave from the Appeals Chamber for access to that material is not required;

FINDING that the Applicant shall, if deemed necessary, submit a new request to the Appeals Chamber to gain access to Jean-Bosco Barayagwiza's Appellant's Brief when it is filed;

Kvočka et al., IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003 ("*Kvočka et al.* Decision"), para. 5; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005 ("*Naletilić and Martinović* Decision"), p. 5.

⁶ *Blaškić* Decision, para. 14; *Kordić and Čerkez* Order, p. 4.

⁷ *Kvočka et al.* Decision, para. 5.

⁸ *Blaškić* Decision, para. 15; *Naletilić and Martinović* Decision, p. 6.

⁹ Filed on 27 September 2004 and 2 May 2005 respectively.

¹⁰ Barayagwiza's amended Notice of Appeal and new Appellant's Brief are due not later than 12 October 2005. See 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.

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NOTING that, in his Motion, the Applicant undertakes to respect the protective measures with regard to any protected witness whose identity might be disclosed in the Appellants' Briefs to which he is seeking access;¹¹

RECALLING that "once [the] Appeals Chamber determines that confidential material filed in another case may materially assist an applicant, the Appeals Chamber shall determine which protective measures shall apply to said material as it is within the Appeals Chamber's discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and the integrity of confidential information";¹²

FOR THE FOREGOING REASONS,

GRANTS the Motion with respect to the Appellant's Brief filed by Hassan Ngeze;¹³

ORDERS that:

- (a) the Prosecution, Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze apply to the Appeals Chamber for additional protective measures, if required, within fifteen working days from this decision and identify, which, if any, portions of Hassan Ngeze's Appellant's Brief contain confidential information and must, therefore, be redacted;
- (b) where no redactions or additional protective measures are requested within fifteen working days, the Registry shall give access to Hassan Ngeze's Appellant's Brief to the Applicant;
- (c) where redactions or additional protective measures are requested within fifteen working days, the Registry shall withhold Hassan Ngeze's Appellant's Brief until the Appeals Chamber has issued a decision on the request:
 - (i) if the Appeals Chamber denies the request(s), the Registry shall be ordered to provide the Applicant, his Counsel, and any employees who have been instructed or authorised by his Counsel, with Hassan Ngeze's Appellant Brief to which the Appeals Chamber grants access;
 - (ii) if the Appeals Chamber grants the request(s), the party or parties applying for redactions shall be ordered to proceed with the authorised redactions or additional

¹¹ Motion, para. 7.

¹² *Blaškić* Decision, para. 29; *Naletilić and Martinović* Decision, para. 7.

¹³ Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), filed confidentially on 2 May 2005.

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protective measures and, thereafter, shall provide the redacted Hassan Ngeze's Appellant's Brief to the Registry for provision to the Applicant, his Counsel and any employee who have been instructed or authorised by his Counsel.

- (d) Hassan Ngeze's Appellant's Brief provided by the Registry shall remain subject to protective measures previously imposed by the Trial Chamber.

The Applicant, his Counsel and any employees who have been instructed or authorised by the Applicant's Counsel to have access to Hassan Ngeze's Appellant's Brief shall not, without express leave of the Appeals Chamber finding that third-party disclosure is absolutely necessary for the preparation of the Applicant's case:

(i) disclose to any third party, the names of witnesses, their whereabouts or any information which would enable them to be identified and would breach the confidentiality;

(ii) contact any witness whose identity was subject to protective measures without first obtaining leave of the Appeals Chamber to do so upon demonstrating that the witness may materially assist the Applicant's case and that such assistance is not otherwise reasonably available to him.

If, for the purpose of preparing his case, the Applicant requests and obtains from the Appeals Chamber the permission to disclose to third parties Hassan Ngeze's Appellant's Brief, any person to whom disclosure of Hassan Ngeze's Appellant's Brief in this case is made shall be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any part of the brief, or to disclose it or any information contained therein to any other person, and that he or she must return it to the Applicant or his Counsel as soon as it is no longer needed for the preparation of the case.

For the purposes of the foregoing paragraphs, third parties exclude: (i) the Applicant, (ii) Applicant's Counsel and any employees who have been instructed or authorised by the Applicant's Counsel to have access to the confidential material, (iii) personnel from the Tribunal, including members of the Prosecution.

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

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Theodor Meron

Theodor Meron
Presiding Judge

Dated this 9th day of September 2005,
At The Hague, The Netherlands



[Seal of the Tribunal]