



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

8209bis/A
du/A

THE APPEALS CHAMBER

Case No. ICTR-99-52-A

ENGLISH
Original: FRENCH

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

ICTR-99-52-A
06-11-2006
(8209bis/A - 8202bis/A)

Registrar: Adama Dieng
Decision of: 12 September 2006

JUDICIAL RECORDS/ARCHIVES
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FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE

v.

THE PROSECUTOR

**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 P 105"**

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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 (the "Appeals Chamber" and the "Tribunal" respectively) is seized of a Motion by Ferdinand Nahimana (the "Appellant"), "*Requête aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P 105*" (the "Motion"), filed confidentially on 10 April 2006.¹ The Appeals Chamber is not persuaded as to why the Motion should be classified as confidential, because it does not refer to protected witnesses, and the Appellant has not submitted any argument for such level of classification. Consequently, the Motion and this Decision should be public.

2. The Prosecutor filed his Response on 18 April 2006.² The Appellant did not reply thereto.

1. PROCEDURAL BACKGROUND

3. On 20 March 2002, during the presentation of the Prosecution case before the Trial Chamber, the Prosecutor tendered into evidence the recording of an interview granted by the Appellant on 24 April 1994 to a journalist of Radio Rwanda and broadcast on 25 April 1994. The said recording was admitted by the Trial Chamber as Exhibit P105.³ The Appeals Chamber also notes that seven copies of this audio tape were disclosed to the Accused in this case on 14 June 2001.⁴

4. On 13 May 2003, the Appellant requested a stay of trial proceedings because he had been unable to obtain from Rwanda, in particular, documents and sound recordings of broadcasts and speeches to enable him to make his case.⁵ By Decision of 5 June 2003,⁶ the

¹ The Appeals Chamber notes that the amended version of the Motion filed on 10 April 2006 superseded the previous version filed on 7 April 2006 ("*Proof of service*", 10 April 2006).

² "Prosecutor's Response to the Appellant 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 P 105*'", 18 April 2006 ("the Response").

³ Exhibit P105: "FOUR TAPES Nos. 0271, AV/933, AV/942 and 1044". This exhibit was provisionally admitted on 11 March 2002 during the testimony of Witness Kaiser Rizvi, a Prosecution investigator. It contains, in particular, Cassette No. AV/933, K0149117-K0149119, from which Exhibit P105/2A is a transcript in Kinyarwanda. The Appellant's interview is on page 24 of that transcript. Exhibit P105/2B contains the English translation of an extract from the transcript referred to above, relating to the Appellant's interview (T.11 March 2002, p. 91; T. 20 March 2002, p. 162-164, 187, 189 (FV); see *infra*, para. 11).

⁴ "Disclosure of Witnesses' Statements, Audio-Cassette and Video-Cassette", 22 January 2001, "Proof of service", 14 June 2001.

⁵ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Skeleton Argument for Defence Application to Stay Proceedings, 8 May 2003; *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.

⁶ *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").

Trial Chamber dismissed this request because it was not persuaded that the Accused's rights to a fair trial had been breached through lack of cooperation from the Rwandan authorities.⁷ The Appellant did not appeal this Decision.

5. On 3 December 2003, the Trial Chamber rendered its Judgement in this case.⁸ The Appellant appealed the Judgement and filed his Notice of Appeal on 4 May 2004 and his Appeal Brief on 27 September 2004.⁹ The Appeals Chamber notes that in his Appeal Brief, the Appellant challenges the admissibility of Exhibit P105 because of its incomplete nature.¹⁰ This Decision does not pre-empt subsequent assessment of these submissions by the Appeals Chamber during its deliberations of the merits.

II. DISCUSSION

Submissions of the parties

6. The Appellant submits that, notwithstanding his many objections during the trial, he failed to obtain both an integral copy of the interview corresponding to Exhibit P105 (AV/933)¹¹ and the Prosecutor's explanations relating to "[the incomplete version of the recording of this interview obtained from RPF archives]".¹² He adds that the production of the full version of this recording "[will be such as to rebut one of the material assertions by the Judges as to the Appellant's criminal intent, and confirm the Appellant's constant and unequivocal position [...] that only the RPF-Inkotanyi may be considered as the enemy of the people of Rwanda]".¹³ In other words, the Trial Chamber allegedly committed an error of fact in finding that "[the Appellant harhoured some confusion between the RPF-Inkotanyi and the Tutsi community as a whole]".¹⁴ He adds that the integral copy of the interview "[will also be such as to strengthen and bolster the credibility and consistency of the Appellant's testimony]" before the trial Chamber.¹⁵

⁷ Decision of 5 June 2003, para. 19. The Trial Chamber emphasised in particular that the Appellant was alluding to a large amount of documentary material [...] to which he wanted to have access without providing sufficiently specific identification of the items and their relevancy, and pointed out that his request to the Rwandan authorities for cooperation was tantamount to requesting the authorities to locate and identify the documents in question (*Ibid.*, para. 12). Lastly, the Chamber recalled the efforts made by the Trial Chamber to help him obtain the documents (*Ibid.*, paras. 14 and 17).

⁸ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Judgement").

⁹ "Notice of Appeal", 4 May 2004 ("Notice of Appeal"); "Appeal Brief (Revised)", 27 September 2004 (confidential version) and 1 October 2004 (public version) ("Appeal Brief").

¹⁰ Appeal Brief, paras. 120, 121, 132-135, 148, 276-279.

¹¹ Motion, paras. 2, 5-8. The Appellant refers in particular to the hearings of 27 March, 24 September and 14 October 2002, the transcripts of which are attached herewith in Annexes 2 to 4.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 18.

¹⁴ *Ibid.*, para. 19.

¹⁵ *Ibid.*, para. 20.

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7. The Appellant also contends that “[since he was not informed in time about the purpose of the evidence, the Defence did not, in the course of the trial, have the necessary time to conduct such investigations, which, in any case, would have met with obstructions from the Rwandan authorities]”.¹⁶ Consequently, it is “[in the higher interest of justice]”¹⁷ that he is requesting the Appeals Chamber to enjoin the Prosecutor to explain the incomplete nature of the interview, and to order the Rwandan authorities to forward to the Registry of the Tribunal the full version of the recording of the aforementioned interview, pursuant to Article 28 of the Statute of the Tribunal (the “Statute”) and Rules 54 and 107 of the Rules of Procedure and Evidence (the “Rules”).¹⁸

8. The Prosecutor submits that the Motion is inappropriate and lacks merit.¹⁹ He emphasises that the Appellant, as from the month of January 2001, knew that the recording was incomplete, but failed to take any measure to seek the relief he is now seeking from the Appeals Chamber, up to the filing of the present Motion, which the Prosecutor thinks is belated.²⁰ He also contends that the fact that Exhibit P105 (AV/933) does not correspond to the full interview was known during the trial.²¹ He contends that the Office of the Prosecutor had already disclosed the explanations requested by the Appellant²² and points out in this connection that during the presentation of the Prosecution case, Witnesses Kaiser Rizvi, Prosecution investigator, and Mathias Ruzindana, expert, in their testimonies provided information on the manner in which the recording of the interview had been obtained as well as on their incomplete nature.²³ He further contends that the Prosecution adduced the evidence that it had in its possession.²⁴

9. In any event, for the Prosecutor, the Appellant has not demonstrated what impact any further explanations from the Office of the Prosecutor would have had on the findings of the Trial Chamber regarding that broadcast.²⁵ In this regard, the Prosecutor notes that, in his testimony, the Appellant referred to the incomplete nature of the recording, described the content of the rest of the interview, and also made submissions in this connection in his Closing Brief.²⁶ Consequently, the Trial Chamber was informed of the alleged significance of the full interview when it rendered judgement by exercising its discretion to determine the proper weight to accord to this evidence. The Prosecutor submits that producing the full interview at the current stage of proceedings will not affect the Trial Chamber’s factual findings.²⁷

¹⁶ Ibid., para. 16.

¹⁷ Ibid., paras. 14, 21.

¹⁸ Ibid., para. 17 and p. 6.

¹⁹ Response, para. 3.

²⁰ Ibid., paras. 3-4, 14.

²¹ Ibid., paras. 7-11.

²² Ibid., paras. 3, 9.

²³ Ibid., paras. 5-8.

²⁴ Ibid., paras. 3, 9.

²⁵ Ibid., para. 9.

²⁶ Ibid., para. 10.

²⁷ Ibid., para. 11.

10. The Prosecutor argues that the Appellant is improperly seeking the assistance of the Appeals Chamber to conduct further investigations without addressing the test applicable in such circumstances, or showing that a miscarriage of justice will be committed if the further investigations are not funded.²⁸ The Prosecutor further contends that the Appellant does not demonstrate that he could not have obtained the full interview on his own by exercising due diligence, or that his efforts were unsuccessful, or even that the whole interview exists in Rwanda.²⁹ Lastly, the Prosecutor submits that the Appellant's suggestion that the tape was deliberately abbreviated is unfounded and scurrilous.³⁰

Deliberations

11. The Appeals Chamber notes that the Appellant is first of all requesting it to order the Prosecutor to explain the incomplete nature of the recording of the interview. However, the Appeals Chamber points out that during the presentation of the Prosecution case, Witness Kaiser Rizvi, an investigator at the Office of the Prosecutor, explained precisely how the recording had been obtained. He indicated having recorded this tape with his colleagues at the secretariat of RPF archives. On that occasion, they reproduced 259 of the 263 tapes preserved at the said secretariat and dated from December 1993 ending to the end of broadcasts from Radio Rwanda in April 1994.³¹ Since the Trial Chamber took into account the fact that Prosecution Expert Witness Ruzindana would give details on the content of the broadcast when he testified, it provisionally admitted the impugned recording.³² On 27 March 2002, Mr. Ruzindana was cross-examined by Counsel for the Appellant on the incomplete nature of the recording. He indicated that he was not in a position to give further details on the circumstances of the recording of the tape, and regretted its incomplete nature.³³ The Appeals Chamber further notes that the Prosecutor restates these explanations in his Consolidated Respondent's Brief,³⁴ as well as in his Response.³⁵

²⁸ *Ibid.*, paras. 3, 17.

²⁹ *Ibid.*, paras. 13, 15, 18-19.

³⁰ *Ibid.*, para. 12.

³¹ T. 11 March 2002, pp. 81-83, 87. The Appeals Chamber notes that the figure 273 is mentioned in the transcript of the hearing in French. However, since the hearing was conducted in English, the Appeals Chamber considers the English version referring to 263 tapes authoritative (T. 11 March 2002, p. 83).

³² T. 11 March 2002, p. 91: "So the tapes will be provisionally admitted, as we've learned from the Prosecutor that she intends to call supplementary evidence in relation to these four tapes."

³³ T. 27 March 2002, pp. 158-161: "I have already indicated that we do not know exactly or precisely how these tapes were recorded, and it isn't clear that this person was necessarily trying to record Mr. Nahimana's speech, which is why even the beginning of the tape is not Nahimana's speech -- it is something else. [...] I am not the one who recorded the tape -- it's just sad we do not have the full recording of everything."

³⁴ Consolidated Respondent's Brief, 22 November 2005, paras. 110-112, 342-343.

³⁵ Response, paras. 5-9.

12. Rule 68(B) of the Rules states clearly that the Prosecutor's obligation to disclose exculpatory evidence is subject to his being in possession of such evidence.³⁶ However, in the light of the foregoing, the Appeals Chamber notes that the Prosecutor sufficiently explained the manner in which the recording of the interview was obtained as well as its incomplete nature, and pointed out that this was the only version in his possession. The Appellant's request for the Appeals Chamber to order the Prosecutor to explain the incomplete nature of the recording of the interview and to include it in the case-file cannot therefore stand.

13. As to the Appellant's request to order the Rwandan authorities to forward to the Tribunal the full version of the interview in question, the Appeals Chamber recalls that a similar request had been the subject of a ruling by the Trial Chamber.³⁷ The Appeals Chamber notes in the first place that, contrary to the Prosecutor's submission,³⁸ and regardless of the title of the Motion, the Appellant does not make his request as part of an additional investigation by the Defence for the purpose of adducing additional evidence under Rule 115 of the Rules, which is the only means allowed by the practice in the Appeals Chamber for approval of investigations at the appeal stage.³⁹ In reality, he bases his Motion on Rules 54 and 107 of the Rules which empower the Appeals Chamber to issue orders "necessary for the purposes of an investigation or for the preparation or conduct of the trial". In this regard, it should be recalled that the Appeals Chamber would only grant a motion to issue such an order if the moving party shows a legitimate judicial reason to this effect.⁴⁰ In fact, the Appeals Chamber has the discretion to determine whether the applicant "succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism [...] is not abused".⁴¹

³⁶ See, e.g., *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44-A, Judgement, 23 May 2005, para. 262; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 268; *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, paras. 31, 40.

³⁷ Decision of 5 June 2003, paras. 7-17. See *supra*, para. 4.

³⁸ Response, para. 17.

³⁹ The Appeals Chamber has reiterated on several occasions in this case that investigations should be carried out at the pre-hearing stage or at the trial stage – see e.g. 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, footnote 6; 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, para. 5; Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005, p. 4; Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005, p. 3; Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, para. 2.

⁴⁰ *The Prosecutor v. Joseph Nzirorera et al.*, Case No. ICTR-98-44-I, Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries and other Written Materials from 1992 to 1994 and their Statements made before the Rwandan Judicial Authorities, 24 November 2003, para. 6; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("Krstić Appeal Judgement"), para. 10.

⁴¹ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31.

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14. In some cases, once the difficulties encountered by the Defence have been brought to the attention of the appropriate Chamber, the Prosecutor may, in pursuance of his duty to assist the Tribunal to establish the truth and to render justice to the accused,⁴² use his own resources and powers to facilitate the task of obtaining the necessary information.⁴³ However, the obligation incumbent upon the Defence to inform the Chamber that it cannot obtain the necessary cooperation from State authorities constitutes the first step in exercising the required due diligence.⁴⁴ The Appeals Chamber notes that the Appellant has not exercised such due diligence in the instant case at the current stage of proceedings.

15. Thus, it is up to the Appellant to take his own steps to obtain exculpatory evidence that is not in the Prosecutor's possession and to demonstrate that even after exercising due diligence, he has not succeeded in obtaining the recording in question.⁴⁵ However, in his Motion, the Appellant merely states that his investigations "[would have met with obstruction

⁴² Prosecutor's Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel, 14 September 1999, para. 2.h).

⁴³ *Krstić* Appeal Judgement, para. 13.

⁴⁴ *Ibid.*, para. 14.

⁴⁵ *Ibid.*, paras. 5, 9-10; see, by analogy, *The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request entitled Request of Cooperation from the Kingdom of Belgium pursuant to Article 28 of the Statute, 7 June 2006, para. 6; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, 7 February 2005, para. 5; *The Prosecutor v. André Rwamakuba et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions: Request for Certification to Appeal Rulings Disallowing Cross-Examination on Prior Inconsistent Statements and Motion for a Request to the State of Rwanda for Assistance in Accessing and Obtaining Documents in Court Dossiers, 4 February 2004, para. 18; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for the Cooperation of Rwandan Government pursuant to Article 28, 28 October 2004, paras. 3-5; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records pursuant to Rule 68, 4 October 2004, para. 11.

The Appeals Chamber notes further that Rule 54bis (A) of the Rules of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY") specifies the elements which must be identified by the party requesting the issuance to a State of an order to produce documents or information; the conditions are obligatory and cumulative. Hence, the party shall "(i) identify as far as possible the documents or information to which the application relates; (ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and (iii) explain the steps that have been taken by the applicant to secure the State's assistance". See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision [confidential] on Applications of Prosecution and Serbia and Montenegro pursuant to Rule 54 bis, 9 March 2006, para. 13; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, 23 March 2005, pp. 3-8; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision [confidential] on Application for Binding Order to Bosnia and Herzegovina and to the Federation of Bosnia Herzegovina and for Access to Evidentiary Material Currently in the Possession of the Prosecution, 15 November 2001, p. 6; see also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 32.

The Appeals Chamber notes that the same tests were applied by the Trial Chambers of the Tribunal in respect of motions pursuant to Article 28 of the Statute. See, *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006, par. 7-8; *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, paras. 6-9.

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from the Rwandan authorities]⁴⁶ and does not provide any information on the concrete measures he undertook in this direction since the commencement of his appeal process. He also does not provide any evidence of lack of cooperation from the Rwandan authorities with regard to access to the archives that may contain the recording being sought. Accordingly, the Appellant's request to the effect that the Appeals Chamber should order the Rwandan authorities to forward the full version of the interview to the Registry of the Tribunal must be dismissed.

III. RULING

16. For these reasons, the Appeals Chamber **DENIES** the Motion in its entirety. Done in French and English, the French text being authoritative.

Done at The Hague, The Netherlands, on 12 September 2006

Fausto Pocar
President of the Appeals Chamber

[Seal of the Tribunal]



⁴⁶ Motion, para. 16 (emphasis added).