8490/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
30 October 2006
[8490/H – 8486/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: 30 October 2006

ICTR Appeals Chamber
Date: 30 October 2006
Action: P.T.
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Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

DECISION ON APPELLANT JEAN-BOSCO BARAYAGWIZA'S MOTION REQUESTING THAT THE PROSECUTION DISCLOSURE OF THE INTERVIEW OF MICHEL BAGARAGAZA BE EXPUNGED FROM THE RECORD

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NAME / NOM: Tchidimbo, Patrice
SIGNATURE: DATE: 30.10.06

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 Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record" filed by Jean-Bosco Barayagwiza ("Appellant") on 5 July 2006 ("Motion"). The Prosecution filed its response on 17 July 2006.[1] The Appellant has not filed a reply.

2. On 4 April 2006, the Prosecution disclosed to the Appellant extracts from the statement provided by Michel Bagaragaza interviewed by the Tribunal's investigators for the purposes of the *Prosecutor v. Protais Zigiranyarazo* Case No. ICTR-2001-73-I ("*Zigiranyarazo* case").[2]

A. Submissions of the Parties

3. In the Motion, the Appellant submits that the Impugned Disclosure represents a misuse of the procedures provided for by Rules 68 and Rules 75 of the Rules of Procedure and Evidence of the Tribunal ("Rules") because (i) while Rule 68 imposes a duty on the Prosecutor to disclose exculpatory material, the Impugned Disclosure was not sought by the Appellant and contains "little or no exculpatory material, but instead contains considerable additional evidence in support of the Prosecution case";[3] and (ii) the Rule 75(F) requirement, under which "the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures in the first proceedings", has not been met.[4] The Appellant argues that the sole purpose of the Impugned Disclosure was to undermine the Appellant's case on appeal, since the disclosed interview "represented a sustained attempt by the Prosecution to obtain evidence in support of various [contested] aspects of the case" and to place "incriminating evidence before the Appeals Chamber, without affording the Appellant an opportunity to test or challenge the evidence".[5]

[1] "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record'" filed by the Prosecution on 17 July 2006 ("Response").
[2] The "Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Relevant Parts of the Interview with Witness Michel Bagaragaza Conducted by ICTR Investigators between 29 September 2004 and 06 January 2005" filed confidentially by the Office of the Prosecutor ("Prosecution") on 4 April 2006 ("Impugned Disclosure").
[3] Motion, paras 4-5, 13. The Appellant's arguments in paras 6 through 12 of the Motion relate to the merits of the present appeal. In light of the reasoning provided hereinafter, the Appeals Chamber does not need to address these arguments in the present decision.
[4] *Ibid.*, para. 3.
[5] *Ibid.*, paras 5, 16.

4. The Appellant claims that the Impugned Disclosure does not contain any exculpatory material[6] and argues that the filing of the Impugned Disclosure with the Registry is calculated to influence the Appeals Judges' assessment of the Appellant's political beliefs and activities.[7] He concludes that such conduct by the Prosecution is contrary to the interests of justice and would deserve sanctioning under Rule 46(A) of the Rules.[8]

5. The Prosecution does not oppose the Appellant's request to have the Impugned Disclosure expunged from the record in the present case but submits that the allegation of misconduct and bad faith should be dismissed by the Appeals Chamber and the Appellant's request for sanctions rejected.[9] It contends that the Impugned Disclosure was made because it appeared to be, on its face, material subject to disclosure pursuant to Rule 68 of the Rules.[10] It adds that the reference therein to Rule 75(F) is meant to provide the Appellant with the requisite warning to maintain the confidentiality of the communicated documents pertaining to the then protected witness Michel Bagaragaza.[11] The Prosecution further avers that the content of the disclosed interview was considered by the Prosecution as relevant, since the answers to questions 93 and 231 specifically pertain to the Appellant's case, while the rest of the references "provide the overall context within which the witness referred to the Appellant".[12] It finally points out that the Impugned Disclosure is neither a Prosecution submission, nor additional evidence.[13]

B. Discussion

6. The Appeals Chamber recalls that the Prosecution's obligation under Rule 68 of the Rules is positive and continuous,[14] and that the determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement made by and under the responsibility of the

[6] *Ibid.*, paras 14-16.
[7] *Ibid.*, para. 16.
[8] *Ibid.*, paras 16-17.
[9] Response, para. 2.
[10] *Ibid.*, para. 8.
[11] *Ibid.*, paras 3-6. The Prosecution specifies that the issue of confidentiality is currently moot "since the witness subsequently waived his right to the witness protection order on 13 June 2006, and testified, on his own name, in *Prosecutor v. Zigiranyarazo*".
[12] *Ibid.*, para. 8.
[13] *Ibid.*, paras 8-9.
[14] *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 ("*Bralo* Decision"), para. 29; *Prosecutor v. Théoneste Bagosora et al.*, Case Nos ICTR-98-41-AR73, ITCR-98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, 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* 30 March 2004 Decision"), para. 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* 26 September 2000 Decision"), paras 29-32.

Prosecution.[15] The Prosecution "is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence".[16] Therefore, the Appeals Chamber would not intervene in the exercise of the Prosecution's discretion, unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.[17]

7. The Impugned Disclosure has not been admitted by the Appeals Chamber as additional evidence under Rule 115 of the Rules, and is thus not part of the case record pending before the Appeals Chamber. Therefore, the Appeals Chamber will not consider the contents of the Impugned Disclosure absent its formal admittance into the appeal record. For the foregoing reasons, the Appeals Chamber sees no need to declare it invalid or, *a fortiori*, to expunge it from the record.

8. The Appeals Chamber also notes that it was unnecessary for the Prosecution to file the Impugned Disclosure before the Appeals Chamber. The appropriate procedure for disclosure of materials under Rule 68 of the Rules when a case is before the Appeals Chamber is to serve the Defence with such material.[18] Where the Prosecution files its disclosure with the Registry for purposes of keeping it in the Registry archives, the Prosecution shall do so without copying the Appeals Chamber. Where the Prosecution considers it necessary to advise the Appeals Chamber of its further disclosures of Rule 68 material to the Defence, it may file a status report before the

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[15] *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16; *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 ("*Brđanin* 7 December 2004 Decision"), p. 3; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeals 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* 4 March 2004 Decision"), para. 44; *Blaškić* 30 March 2004 Decision, paras 31-32; *Blaškić* 26 September 2000 Decision, paras 38, 45.

[16] *Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 183; *Blaškić* Appeals Judgement, para. 264; *Blaškić* 4 March 2004 Decision, para. 44.

[17] *Bralo* Decision, para. 31; *Brđanin* 7 December 2004 Decision, p. 3; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision, 22 March 2004, p. 3; *Georges Rutaganda v. 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. 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; *Blaškić* 26 September 2000 Decision, para. 39.

[18] In this respect, the Appeals Chamber recalls its recent decision, in which it held that the Prosecution's obligation under Rule 68(A) of the Rules "extends beyond simply making available its entire evidence collection in a searchable format", since it "cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession". (*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 Disclosure Obligations, 30 June 2006, para. 10). The Appeals Chamber also found that the EDS does not make documents "reasonably accessible as a general matter", nor does it allow to assume that the Defence knows about all material included therein, to the extent that the Prosecution could be relieved of its Rule 68 obligation. (*Ibid.*, para. 15). In this sense, it has been suggested that the Prosecution should either "separate[] a special file for Rule 68 material or draw[] the attention of the Defence to such material in writing and permanently update[] the special file or the written notice". (*Id.*) *See also Bralo* Decision, para. 35.

Appeals Chamber informing them of the fact and date but not the nature of that disclosure or the communicated material.

9. Finally, with respect to the Appellant's submission that the Impugned Disclosure was done in violation of Rule 75(F) of the Rules, the Appeals Chamber recalls that under Rule 75(F)(ii), the Prosecution, in discharge of its disclosure obligations, should notify the Defence to whom the disclosure is being made of the nature of the applicable protective measures. The Appeals Chamber notes that such notification was included by the Prosecution in the Impugned Disclosure.[19] Consequently, the Appeals Chamber finds the Appellant's contention that the Prosecution failed to meet its Rule 75(F) obligation irrelevant and in any case moot in light of Michel Bagaragaza's open session testimony in the *Zigiranyirazo* case on 13 June 2006.

10. In light of the above findings, the Appeals Chamber need not address the Appellant's request to impose sanctions under Rule 46(A) of the Rules.

C. Disposition

11. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

12. The Appeals Chamber hereby **INSTRUCTS** the Prosecution to follow the procedure described in paragraph eight above for its future disclosures under Rule 68 of the Rules. The Appeals Chamber also **INSTRUCTS** the Registry to ensure that any copies of disclosures filed with it by the Prosecution are to be kept in its records without communicating the disclosed material to the Appeals Chamber.

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

Judge Fausto Pocar
Presiding

Dated this 30th day of October 2006,
At The Hague, The Netherlands

[Seal of the Tribunal]

[19] Impugned Disclosure, para. 3: "Mr. Jean-Bosco Barayagwiza is therefore reminded of his obligation to maintain the strict confidentiality of the disclosed statements. Mr. Michel Bagaragaza is a protected witness as exemplified in the attached Trial Chamber decisions in *The Prosecutor v. Protais Zigiranyirazo*".

International Criminal Tribunal for Rwanda
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Case No / *No. de l'affaire*: ***ICTR-99-52-A***

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THE PROSECUTOR

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✖ Judge / Juge Theodor Meron

✖ Ms Catherine Marchi-Uhel
✖ Mr Roman Boed
✖ Concerned Associate Legal Officers
✖ Ms. Fatou Fall

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✖ Lead Counsel / *Conseil Principal*: **Mr. Biju-Duval, Mr. Donald Herbert, Mr. Bharat Chadha** ☐ In Arusha (complete CMS 2) ✖ Fax Number: **00-33-1 53 80 47 48 00 44 207 841 6199/6197 00 255-27-250 8854**

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✖ **Koffi Afande** ✖ **Patrice Tchidimbo**

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