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UNITED NATIONS
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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
01 December 2006
(8939/H – 8919/H)

P.T.

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: 27 November 2006

ICTR Appeals Chamber
Date: 01 December 2006
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Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

PUBLIC REDACTED VERSION

DECISION ON MOTIONS RELATING TO THE APPELLANT HASSAN NGEZE'S AND THE PROSECUTION'S REQUESTS FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE OF WITNESSES ABC1 AND EB

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

Counsel for Ferdinand Nahimana
Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis

Counsel for Jean-Bosco Barayagwiza
Mr. D. Peter Herbert
Ms. Tanoo Mylvaganam

Office of the Prosecutor
Mr. James Stewart
Mr. Neville Weston
Ms. Linda Bianchi
Mr. Abdoulaye Seye
Mr. Alfred Otono Orono

International Criminal Tribunal for Rwanda
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SIGNATURE: DATE: 01/12/06

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 Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of:

- "Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement [*sic*]", filed confidentially by Hassan Ngeze ("Appellant") on 19 June 2006 ("Motion of 19 June 2006"), in which the Appellant requests the Appeals Chamber to order the Prosecutor to disclose material connected with the investigations conducted by the Special Counsel to the Prosecutor in relation with the alleged perjury committed by Witness EB;[1]

- "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al.* Filed on 22nd June 2006 Pursuant to Rule 75(F)(ii) and Rule 68 of the Rules of Procedure and Evidence", filed confidentially by the Appellant on 4 July 2006 ("Motion of 4 July 2006"), in which he requests the Appeals Chamber to admit into evidence the testimony of Defense Witness ABC1 given before the Tribunal on 13 June 2006 in *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.* case") and to call [the witness] to testify in the present case;[2]

- "Appellant Hassan Ngeze's in Person Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB as per Prosecutor's Disclosure Filed on 20th June 2006 of the Relevant Pages of the Gacaca Records Book Given Before the Gacaca on [REDACTED]", filed confidentially by the Appellant on 14 July 2006 ("Motion of 14 July 2006"),[3] in which he seeks admission into evidence of the testimony of Witness EB given before the Gacaca on [REDACTED];

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[1] *See also* Prosecutor's Response to "Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement", 26 June 2006 ("Response to the Motion of 19 June 2006") and Appellant Hassan Ngeze's Reply to the Prosecutor's Response to "Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statements of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement", 30 June 2006 ("Reply to the Response to the Motion of 19 June 2006").

[2] *See also* Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al.* Filed on 22nd June 2006 Pursuant to Rule 75(F)(ii) and Rule 68 of the Rules of Procedure and Evidence", filed confidentially on 13 July 2006 ("Response to the Motion of 4 July 2006") and Reply to the Prosecutor's Response to "the Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al.* Filed on 22nd June 2006 Pursuant to Rule 75(F)(ii) and Rule 68 of the Rules of Procedure and Evidence", filed confidentially on 20 July 2006 ("Reply to the Response to the Motion of 4 July 2006"). The Appeals Chamber notes that the Response to the Motion of 4 July 2006 was served on the Appellant's Counsel by hand-delivery on 17 July 2006. Therefore, the Appeals Chamber considers the Reply to the Response to the Motion of 4 July 2006 to be filed timely.

[3] This Motion had initially been filed by the Appellant in person on 3 July 2006 but was returned to him as deficiently filed in light of the Order Concerning Filings by Hassan Ngeze dated 24 May 2004 and Order to the Registrar dated 26 November 2004. On 14 July 2006, the said Motion was forwarded to the Appeals Chamber by the Appellant's Counsel. On 21 September 2006, following the Appeals Chamber's Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention of 20 September 2006, the Appellant's Counsel requested the Registrar (with copy to the

- "Appellant Hassan Ngeze's Urgent Motion for Leave to Present *Further* Additional Evidence (Rule 115) of Witness EB", filed confidentially by the Appellant on 28 August 2006 ("Motion of 28 August 2006"), in which he requests the Appeals Chamber to admit into evidence "the additional exculpatory statement of witness EB [...] affirming his recanted statement of 5th April 2005";[4]

- "Prosecutor's Motion Pursuant to Rule 115 to Admit the Envelopes in Which Copies of the Letter Purporting to Be a Statement From Witness EB Were Received", filed confidentially by the Prosecutor on 7 September 2006 ("Motion of 7 September 2006"), in which the Prosecution seeks admission of the envelopes in which copies of the alleged recantation statement of Witness EB were received by the Office of the Prosecutor as additional evidence.

I. PROCEDURAL BACKGROUND

2. Trial Chamber I of the Tribunal ("Trial Chamber") rendered its Judgement in this case on 3 December 2003.[5] The Appellant filed his Notice of Appeal on 9 February 2004,[6] amended on 9 May 2005,[7] and the Appellant's Brief on 2 May 2005.[8] The Prosecution filed its Respondent's Brief on 22 November 2005.[9] The Appellant replied on 15 December 2005.[10]

3. By its Decision of 23 February 2006,[11] the Appeals Chamber admitted as additional evidence on appeal handwritten and typed copies of Witness EB's purported recantation statement dated April 2005 ("Recantation Statement")[12] and the Forensic Report of Mr. Antipas Nyanjwa, an expert in handwriting, who assessed the authenticity of Witness EB's statement,[13] pursuant to Rule

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Presiding Judge in the present case) to "treat all filings of Hassan Ngeze's Motion in person and forwarded by [Counsel] as having been withdrawn". On 25 September 2006, the Registrar requested the Appellant's Counsel to address to the Registrar and the Appeals Chamber a precise list of motions that he wishes to withdraw. Up to date, no communication in this regard has been received from the Appellant's Counsel. In these circumstances and in light of the Practice Direction on Withdrawal of Pleadings, the Appeals Chamber considers the Motion of 14 July 2006 withdrawn. (*See Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR72.7, Decision on Prosecution Motion to Withdraw Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide, 25 August 2006, para. 4, and *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Notice on Prosecutor's Motion Withdrawing Motion Regarding Confidential Filings, 17 May 2006, p. 2).

[4] *See* Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present *Further* Additional Evidence (Rule 115) of Witness EB", filed confidentially on 7 September 2006 ("Response to the Motion of 28 August 2006"). The Appellant has not filed a reply to the Response to the Motion of 28 August 2006.

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

[6] Defence Notice of Appeal (Pursuant to 108 of the Rules of Procedure and Evidence), 9 February 2004.

[7] *Confidential* Amended Notice of Appeal, 9 May 2005.

[8] *Confidential* Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.

[9] Consolidated Respondent's Brief, 22 November 2005.

[10] Appellant Hassan Ngeze's Reply Brief (Article 113 of the Rules of Procedures and Evidence), 15 December 2005.

[11] *Confidential* Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("*Ngeze* Decision on Additional Evidence").

[12] *Ngeze* Decision on Additional Evidence, para. 29; *Confidential* Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006 ("Decision of 14 June 2006"), p. 3.

[13] Report of the Forensic Document Examiner, Inspector Antipas Nyanjwa, dated 20 June 2005, Annex 4 to the "Prosecutor's Additional Submissions In Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", filed confidentially on 7 July 2005 ("Forensic Report"). *See Ngeze* Decision on Additional Evidence, para. 41.

115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and ordered that Witness EB be heard by the Appeals Chamber, pursuant to Rules 98 and 107 of the Rules.[14]

4. On 14 June 2006, the Appeals Chamber dismissed the Prosecution's request for an order to the Appellant to produce the original handwritten and typed versions of Witness EB's purported Recantation Statement, and ordered Witness EB to appear, as a witness of the Appeals Chamber, at an evidentiary hearing, pursuant to Rule 115 of the Rules.[15] By the same decision, the Appeals Chamber modified the protective measures applicable to Witness EB and prohibited the parties, their agents or any person acting on their behalf from contacting Witness EB, unless expressly authorized by the Appeals Chamber.[16]

5. On 20 June 2006, the Prosecution disclosed extracts from the [REDACTED] Gacaca Record Book, dated [REDACTED], which it asserts to be relevant to Witness EB's testimony.[17] The Appeals Chamber recalls that this material cannot currently be considered as tendered into evidence and will therefore not address its contents at the present stage.[18] On 22 June 2006, pursuant to Rules 75 (F)(ii) and 68 of the Rules, the Prosecution disclosed the transcript of Witness ABC1's testimony in the *Bagosora et al.* case dated 13 June 2006.[19]

6. On 3 August 2006, the Prosecution informed the Appellant and the Appeals Chamber that it received, on 6 July 2006, a copy of the statement purportedly written by Witness EB dated 15 or 16 December [year illegible] "affirming his earlier recanted statement" ("Additional Statement").[20] The copy of the said document (in Kinyarwanda with a translation into French) was transmitted by the Prosecution to the Appellant on 17 August 2006.[21] The English translation was transmitted to the Appellant on 22 August 2006.[22]

7. On 13 September 2006, the Appellant requested the Prosecution to transmit to him the transcript of Witness WFP10 [DW20] testimony in *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T ("*Bizimungu et al.* case") dated 1 through 4 September 2006, partly given in closed session, which, in the Appellant's belief, "contains exculpatory evidence and is relevant to

[14] *Ngeze* Decision on Additional Evidence, para. 81.
[15] Decision of 14 June 2006, p. 5.
[16] *Ibid.*, p. 6.
[17] [REDACTED].
[18] *See supra*, at footnote 3.
[19] Disclosure of Transcript of Defence Witness ABC1's Testimony in the *Prosecutor v. Bagosora et al.* Pursuant to Rule 75(F)(ii) and Rule 68 of the Rules of Procedure and Evidence, filed confidentially on 22 June 2006 ("Disclosure of 22 June 2006").
[20] Request for a Further Extension of the *Urgent Restrictive Measures in the Case Prosecutor v. Hassan Ngeze, pursuant to Rule 64* [of the] *Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal*, filed confidentially on 3 August 2006.
[21] *Id.*
[22] Follow up to Prosecutor's Response to [...] Correspondence Dated 15 August 2006 Regarding "Request for Supply of Copy of the Statement of Witness EB Dated 15th December 2005", filed confidentially on 22 August 2006.

the evidentiary hearing of the witness EB before the Appeals Chamber".[23] On 4 October 2006, the Prosecution responded that it was not in a position to accommodate this request because it is too general.[24] The Prosecution also affirmed that, upon review of both the closed and open session transcripts of Witness WFP10's testimony in the *Bizimungu et al.* case, it "has not found any exculpatory material within the meaning of Rule 68(A) of the Rules", specifying that the only mention of Witness EB was made in open session and is thus available to the Appellant.[25]

II. MOTION OF 19 JUNE 2006

8. The Appellant requests the Appeals Chamber to order the Prosecution to disclose material related to investigations into the alleged perjury committed by Witness EB which may have come into its possession after the filing of the Forensic Report.[26] The Appellant submits that such material is necessary for the preparation of his defence and cross-examination of Witness EB during the evidentiary hearing.[27] He suggests that the Appeals Chamber can order the production of additional evidence from either party under Rule 98 of the Rules.[28]

9. The Prosecution responds that the Motion of 19 June 2006 should be dismissed. First, the Prosecution contends that it is well aware of its ongoing obligations under Rule 68 of the Rules and has acted in full compliance with them, notably by making its Disclosures of 20 and 22 June 2006, and will continue to do so.[29] Second, it maintains that since the Motion of 19 June 2006 does not refer to any specific document, it amounts to a "fishing expedition".[30] Third, the Prosecution submits that any material uncovered by the Special Counsel during her investigation is privileged and protected by the provisions of Rule 70 (A) of the Rules and thus, will not be disclosed, except if it falls within the scope of Rule 68.[31]

10. The Appellant replies that he is not asking for any material relating to the Special Counsel's report, but for "the material or statement related to the witness EB only",[32] and notes that "it is not clear from the Prosecutor's response as to whether the Prosecutor has got any further statement

[23] Request for the Supply of the Court Testimony of Witness Testifying under the Pseudo Name WFP10 [DW20] in Government 1 Case No. ICTR-99-50-T, Bizimungu et al. Given during 1st September to 4th September, 2006, as provided under Rule 68 (A) and (E) of the Rules of Procedure and Evidence, filed confidentially on 13 September 2006.
[24] Response to [...] "Request for the Supply of the Court Testimony of Witness Testifying under the Pseudo Name WFP10 [DW20] in Government 1 Case No. ICTR-99-50-T, Bizimungu et al. Given during 1st September to 4th September 2006, as provided under Rule 68 (A) and (E) of the Rules of Procedure and Evidence", 4 October 2006, para. 2.
[25] *Ibid.*, para. 4.
[26] Motion of 19 June 2006, paras 1, 3.
[27] *Ibid.*, para. 4.
[28] *Ibid.*, para. 6.
[29] Response to the Motion of 19 June 2006, para. 3.
[30] *Ibid.*, paras 2, 4.
[31] *Ibid.*, para. 6.
[32] Reply to the Response to the Motion of 19 June 2006, paras 1-2.

from the witness EB or not".[33] He assumes that investigators, who were in contact with Witness EB after the filing of the Forensic Report and before the Appeals Chamber's prohibition of contact, might have received further material from Witness EB.[34] Finally, he affirms that, given the circumstances, he is unable to give further description of the materiel required.[35]

11. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation[36] under Rule 68 of the Rules to, "as soon as practicable, disclose to the Defence any material which in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". Determining what material is subject to disclosure under Rule 68 falls within the Prosecution's discretion and its initial assessment of such exculpatory material must be done in good faith.[37] However, Rule 68(a) does not impose an obligation on the Prosecution to search for material which it does not have knowledge of, nor does it entitle the Defence to embark on a "fishing expedition".[38] Indeed, when an accused requests a Chamber to order the production of material, the accused's request "has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request".[39] At the same time, such request is not required to be "as specific as to precisely identify which

[33] *Ibid.*, para. 5.
[34] *Ibid.*, para. 3
[35] *Ibid.*, para. 6.
[36] 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 ("*Barayagwiza* Decision on Prosecution Disclosure"), para. 6; *The 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* 30 August 2006 Decision"), para. 29; *Prosecutor v. Edouard 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 ("*Karemera* 30 June 2006 Decision"), para. 9; *Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 ("*Bagosora et al.* 6 October 2005 Decision"), 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.
[37] Barayagwiza Decision on Prosecution Disclosure, para. 6; *Bralo* 30 August 2006 Decision, para. 30; *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para. 262; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 183; *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, para. 264; *Prosecutor v. Radislac Krstić*, Case No IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement"), para. 190; *Blaškić* 4 March 2004 Decision, para. 44; *Blaškić* 30 March 2004 Decision, paras 31-32; *Blaškić* 26 September 2000 Decision, para. 45.
[38] *Bralo* 30 August 2006 Decision, para. 30; *Kajelijeli* Appeal Judgement, paras 262-263; *Blaškić* Appeal Judgement, para. 268; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002 ("*Hadžihasanović* 23 April 2002 Decision"), p. 3. *See also Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, paras 11-14; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, paras 8-12.

documents should be disclosed".[40] Finally, if an accused wishes to show that the Prosecution is in breach of these obligations, he/she must identify the material sought, present a *prima facie* showing as to its probable exculpatory nature, and prove the Prosecution's custody or control thereof.[41] Even when the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber will examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.[42]

12. Under Rule 70(A) of the Rules, "reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification" under Rules 66 and 67. Pursuant to Rule 70(B), with respect to information provided to the Prosecution on a confidential basis and used "solely for the purpose of generating new evidence", the Prosecution shall not disclose it to the Defence unless it obtains the consent of the person or entity providing such information and, in any event, cannot tender it into evidence without prior disclosure to the Defence.

13. The Appeals Chamber recalls that on 7 July 2005, the Prosecution confidentially filed the "Prosecutor's Additional Submissions in Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", in which it disclosed certain results of the investigations with respect to Witness EB.[43] These submissions were taken into account by the Appeals Chamber when assessing the *prima facie* credibility of Witness EB's additional evidence.[44] On 7 April 2006, the Prosecution specified that, although it was not in the position to provide a date for conclusion of the investigations, it was taking the necessary measures in order to ensure the communication of the results as soon as possible.[45] The Appeals Chamber notes that the Prosecution continually refers to issues related to Witness EB in its submissions concerning the restrictive measures applicable to the Appellant, notably "in the context of the ongoing investigations, led by the Special Counsel to the Prosecutor".[46] It notes, *inter alia*, that such measures are still necessary, "including in light of the recent letter, purportedly written by witness EB, with multiple copies mailed, from both Rwanda and Tanzania, to three Prosecution's

[39] *Bralo* 30 August 2006 Decision, para. 30; *Blaškić* 26 September 2000 Decision, para. 40; *Blaškić* 29 October 1997 Decision, para. 32.
[40] *Bralo* 30 August 2006 Decision, para. 30; *Blaškić* 26 September 2000 Decision, para. 40.
[41] *Bralo* 30 August 2006 Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Brdanin* 7 December 2004 Decision, p. 3.
[42] *Bralo* 30 August 2006 Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153; *see also Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Oral Decision on Stay of Proceedings, 16 February 2006, pp 4 and 8-9
[43] [REDACTED].
[44] *Ngeze* Decision on Additional Evidence, para. 20
[45] Status Conference, T. 7 April 2006, pp 19-20.
[46] [REDACTED].

Investigators".[47] Further, on 4 September 2006, the Prosecution claimed that the Additional Statement "can only be construed as further evidence that the restrictive measures are appropriate and should even be strengthened, particularly in light of the upcoming Rule 115 evidentiary hearing".[48] In a Memorandum dated 11 September 2006, the Prosecution reasserted that there was a continuing campaign, involving the Appellant, to interfere with Witness EB.[49]

14. With respect to the Special Counsel's investigations, the Appeals Chamber has already stated that (i) the material produced in the course of these investigations is likely to fall under the scope of Rule 70(A) of the Rules, and (ii) no existing orders or decisions obliged the Prosecution to communicate to the Appellant a report that could be prepared by the Special Counsel following her investigations.[50] At the same time, the Appeals Chamber specifically recalls its jurisprudence on distinctions to be made between witness statements and internal documents falling under Rule 70(A).[51] In any event, neither Rule 70 nor the Decision on Special Counsel should in any way be interpreted as lessening the scope of the Prosecution's Rule 68 obligations described above.[52]

15. The Appeals Chamber takes note of the Prosecution's statement that it is "is well aware of its ongoing disclosure obligations, particularly through Rule 68" and "will continue [...] to honour its disclosure obligations."[53] It also notes that, according to the Prosecution, the Disclosures of 20 and 22 June 2006 were not made in response to the Motion of 19 June 2006, but rather as part of its

[47] [REDACTED].
[48] [REDACTED].
[49] [REDACTED]. In its last Memorandum dated 16 November 2006, the Prosecution makes a request for strengthening the restrictive measures in light of the upcoming appeals hearing "in order to safeguard, as much as possible, the integrity and fair outcome of the whole proceedings, as well as the rights to privacy and security of protected witnesses, including Witness EB" [REDACTED].
[50] *Décision relative à la Requête de l'Appelant Hassan Ngeze concernant la communication du rapport de l'Avocat général chargé de l'enquête sur les allégations d'entrave au cours de la justice, 23 février 2006* ("Decision on Special Counsel's Report"), paras 15-16 and 19.
[51] *Eliézer Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeals Judgement"), paras 30-36. The Appeals Chamber specified the following:
"34. Questions that were put to a witness – thus being part of the witness *statement* – have to be distinguished from "internal documents prepared by a party", which are not subject to disclosure under Rule 70(A) of the Rules, as an exception to the general disclosure obligation pursuant to Rule 66(A)(ii) of the Rules. A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules. If, however, counsel or another staff member of the Prosecution notes down a question prior to the interrogation, without putting this question to the witness, such a question is not subject to disclosure. Similarly, any note made by counsel or another staff member of the Prosecution in relation to the questioning of the witness is not subject to disclosure, unless it has been put to the witness.
35. [...] The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded. However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)." [footnotes omitted].
See also Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003, p. 6: "Rule 70 (A) aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party".
[52] *See supra*, at para. 11. *See also Niyitegeka* Appeals Judgement, para. 30 and footnote 2.
[53] Response to the Motion of 19 June 2006, para. 3.

obligations to disclose exculpatory or other relevant material.[54] Finally, the Prosecution has specified that it did not provide copies of the Additional Statement to the Appellant prior to his request of 15 August 2006, since the document was at the same time addressed to the Appellant and his Counsel.[55] In these circumstances, although the Appeals Chamber accepts the Appellant's argument that in the present circumstances he cannot identify with more precision the nature of the material to which he seeks access, it finds that the Appellant has provided no indication of any failure of the Prosecution to comply with its disclosure obligation. Therefore, for lack of evidence to the contrary, the Appeals Chamber considers that the Prosecution is acting in good faith.[56] In light of the above, there is no need for the Appeals Chamber to order the Prosecution to comply with its Rule 68 obligations, since "[o]nly where the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations should an order of the type sought [...] to be contemplated".[57]

16. In addition, while the parties do not refer to Rule 66(B) of the Rules, the Appeals Chamber notes that the Appellant's request appears to fall under this provision since he is seeking access to documents that would be material to the preparation of his defence with respect to the cross-examination of Witness EB at the evidentiary hearing or might be intended for use by the Prosecution as evidence on that occasion. It has already been clarified that Rule 66(B) applies to appellate proceedings and that, consequently, the Prosecution, on request of the Defence, "has to permit the inspection of any material which is capable of being admitted on appeal or which may lead to the discovery of material which is capable of being admitted on appeal".[58] In this respect, the Appeals Chamber recalls that "purely inculpatory material is not necessarily immaterial for the preparation of the Defence" and that the Prosecution should instead consider "(a) whether the issues to which the material relates are subject of a ground of appeal" or "(b) whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence admissible under Rule 115 of the Rules".[59] Therefore, the Appeals Chamber *proprio motu* directs the Prosecution to apply the above-mentioned criteria in order to determine whether it is in possession of any documents that are material to the preparation of the Defence, with the exception of Rule 70 material as discussed above, and then return, if necessary, to the Appeals Chamber for permission to withhold any information provided by these sources under Rule 66(C) of the Rules.

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[54] Disclosure of 20 June 2006, para. 4 (the Appeals Chamber notes that the Prosecution did not specify whether this disclosure was made under Rule 68 of the Rules); Disclosure of 22 June 2006, para. 2 (it is mentioned in para. 1 that the disclosure is made pursuant to Rules 68 and 75(F)(ii)).
[55] Motion of 7 September 2006, para. 13.
[56] *Barayagwiza* Decision on Prosecution Disclosure, para. 6; *Bralo* 30 August 2006 Decision, para. 34; *Brđanin* 7 December 2004 Decision, p. 3; *Blaškić* 26 September 2000 Decision, para. 45.
[57] *Bralo* 30 August 2006 Decision, para. 31; *Blaškić* 26 September 2000 Decision, para. 45.
[58] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, *Confidential* Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C), 27 March 2003, p. 4.
[59] *Id.*

17. Finally, the Appeals Chamber reiterates that, in compliance with its Decision of 14 June 2006, not only the parties, but also their agents or any other persons on their behalf, are prohibited from contacting or interfering with Witness EB.

III. ADDITIONAL EVIDENCE

A. Applicable Law

18. The Appeals Chamber recalls that according to the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), an appeal pursuant to Article 24 of the Statute of the Tribunal (Article 25 of the Statute of the ICTY) is not a trial *de novo* and is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases.[60]

19. Rule 115 of the Rules provides for a corrective measure on appeal, and its purpose is to deal "with the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial".[61] According to this provision, for additional evidence to be admissible on appeal, the following requirements must be met. First, the motion to present additional evidence should be filed "not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for further delay".[62] Second, the Appeals Chamber must find "that the additional evidence was not available at trial and is relevant and credible." When determining the availability at trial, the Appeals Chamber is mindful of the following principles:

> [T]he 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 of the International Tribunal to bring evidence [...] before the Trial Chamber." In this connection, Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously.[63]

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[60] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177; Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, Case No. ICTR-99-52-A, 3 May 2005 ("Decision on Investigation"), p. 3; Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, Case No. ICTR-99-52-A, 4 October 2005 ("Barayagwiza *Decision of 4 October 2005*"), p. 3; *Ngeze* Decision on Additional Evidence, para. 5; Decision on Appellant Hassan Ngeze's Motion for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, Case No. ICTR-99-52-A, 20 June 2006 ("*Ngeze* Decision on Further Investigations"), para. 4.

[61] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001 ("*Kupreškić et al.* Decision of 8 May 2001"), para. 5; Barayagwiza Decision of 4 October 2005, p. 4; *Ngeze Decision on Additional Evidence*, para. 6.

[62] Rule 115 (A) of the Rules as amended on 10 November 2006.

[63] *Prosecutor v. André Ntagerura, et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 ("*Ntagerura et al.* Decision of 10 December 2004"), para. 9. [Internal references omitted].

With regards to relevance, the Appeals Chamber will consider whether the proposed evidence sought to be admitted relates to a material issue. As to credibility, the Appeals Chamber will only refuse to admit evidence at this stage if "it is devoid of *any* probative value in relation to a decision pursuant to Rule 115"[64], without prejudice to a determination of the weight to be afforded.[65]

20. Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine whether the evidence "could have been a decisive factor in reaching the decision at trial."[66] To satisfy this, the evidence must be such that it *could* have had an impact on the verdict, *i.e.* it *could* have shown that a conviction was unsafe.[67] Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.

21. Although Rule 115 of the Rules does not explicitly provide for this, the Appeals Chamber has considered that, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the additional evidence may still be admitted if the moving party establishes that the exclusion of the additional evidence *would* amount to a miscarriage of justice inasmuch as, had it been adduced at trial, it *would* have had an impact on the verdict.[68]

22. Finally, the Appeals Chamber recalls that, whether the evidence was available at trial or not, the additional evidence must always be assessed in the context of the evidence presented at trial, and not in isolation.[69]

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[64] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005 ("*Galić* 30 June 2005 Decision"), para. 95; *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Decision on the Admission of Additional Evidence, 14 April 2005, p. 6; *See also Prosecutor v. Mladen Naletilić & Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 402; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 23 May 2003, para. 266.

[65] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on Motions for the Admission of Additional Evidence filed by the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić, 26 February 2001, para. 28; *Kupreškić* Appeal Judgement, para. 63; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Decision of 31 October 2003"), p. 3; *Ngeze* Decision on Additional Evidence, para. 7; *Ngeze* Decision on Further Investigations, para. 5.

[66] Rule 115 (B) of the Rules.

[67] *Kupreškić* Appeal Judgement, para. 68; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Decision of 5 August 2003"), p. 3; *Blaškić* Decision of 31 October 2003, p. 3; *Ngeze* Decision on Additional Evidence, para. 8; *Ngeze* Decision on Further Investigations, para. 6.

[68] *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004 ("*Kajelijeli* Decision of 28 October 2004"), para. 11; *Ntagerura et al.* Decision of 10 December 2004, para 11; *Ngeze* Decision on Additional Evidence, para. 9; *Ngeze* Decision on Further Investigations, para. 7.

[69] *Juvénal Kajelijeli* Decision of 28 October 2004, para. 12; *Ntagerura et al.* Decision of 10 December 2004, para. 12; *Ngeze* Decision on Additional Evidence, para. 10; *Ngeze* Decision on Further Investigations, para. *See* also *Blaškić* Decision of 31 October 2003, p. 3; *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 25.

B. Motion of 4 July 2006

Submissions of the Parties

23. In his Motion of 4 July 2006, the Appellant seeks the admission of evidence from Witness ABC1 which, he contends, shows that (i) testimony provided by other Prosecution Witnesses was false;[70] and (ii) the Appellant was not a party to the killings which occurred on 7 April 1994 in Gisenyi.[71] The proffered evidence consists of transcripts of Witness ABC1's testimony on 13 June 2006 in the *Bagosora et al.* case, including testimony given in closed session.[72] The Appellant also prays the Appeals Chamber to call the witness to testify in the present case.[73]

24. The Appellant submits that this evidence became available to him only after the Disclosure of 22 June 2006,[74] despite the exercise of due diligence.[75] He submits that it is relevant to the issue relating to his innocence,[76] since it does not implicate him in the killings of 7 April 1994 in Gisenyi, which is in "complete contradiction" with Witness EB's testimony of 15-17 May 2001.[77] In consequence, according to the Appellant, if accepted, this new evidence will "belie the prosecution's story narrated by PWs [*sic*] AGX, Serushago, and AHI" and overturn the Trial Chamber's factual findings at paragraphs 812, 836 and 837 of the Trial Judgement,[78] thus affecting the verdict.[79] Stressing that the finding of credibility of Witness EB was "based upon false evidence", the Appellant avers that the non-admission of Witness ABC1's testimony will result in a miscarriage of justice.[80]

25. The Prosecution opposes the Motion of 4 July 2006 and submits that it does not meet the threshold criteria for admission of additional evidence pursuant to Rule 115 of the Rules.[81] First, the Prosecution argues that the Appellant has not shown that the material was unavailable at trial. It contends that Witness ABC1 and the Appellant knew each other and the Appellant thus could have sought to contact [this person] as a potentially useful witness in support of his alibi defence.[82] Second, the Prosecution maintains that the evidence is not relevant to a material issue, since Witness ABC1 only testified [as to not having seen] the Appellant at [Barnabé Samvura's] house on the morning of 7 April 1994, and not about the Appellant's activities outside that house on that day,

[70] Motion of 4 July 2006, para. 5a.
[71] *Ibid.*, paras 2, 4. [REDACTED]
[72] Motion of 4 July 2006, preliminary para. a.
[73] *Ibid.*, preambulary para. c.
[74] *Ibid.*, paras 1, 3.
[75] *Ibid.*, para. 10.
[76] *Ibid.*, paras 10-11.
[77] *Ibid.*, paras 2, 4, footnote 1, with reference to the *Bagosora et al. case*, T. 13 June 2006, pp 9-14, 16.
[78] *Ibid.*, para. 5.
[79] *Ibid.*, para. 10.
[80] *Ibid.*, para. 6.
[81] Response to the Motion of 4 July 2006, paras 2-3.

in and around Gisenyi.[83] The Prosecution adds that "whether or not a meeting actually took place is not materially relevant to the facts underpinning the Appellant's conviction",[84] the material issue, as presented by Witness EB, being the fact that the Appellant spoke through a loudspeaker, in the street, inciting *Interahamwe* to kill Tutsis.[85] Third, the Prosecution contests the credibility of Witness ABC1 and submits that there is evidence in the *Bagosora et al.* case that contradicts [the] testimony [provided by this witness].[86] Finally, the Prosecution submits that, in any event, the Appellant does not demonstrate that the evidence would or even could have affected the verdict at trial.[87] It points out that the Appellant does not explain why the Trial Chamber would have preferred Witness ABC1's evidence to that of Witness EB[88] or to that of other witnesses concerning his participation in the genocide.[89]

26. In his Reply to the Response to the Motion of 4 July 2006, the Appellant underlines that the Prosecution's contention that the proffered evidence is irrelevant contradicts the fact that it was disclosed to him under Rule 68 as exculpatory and relevant.[90] He maintains that there is no reason to doubt Witness ABC1's credibility, who is an eyewitness and the "most natural witness to describe the true facts which occurred on 7th April, 1994, at [Samvura's] house".[91] He adds that any reference to the evidence of Witness EB is not appropriate at this stage in light of the upcoming evidentiary hearing.[92] Finally, the Appellant concludes that even if another eyewitness' (Witness EB) testimony gave a different version of the incidents of 7 April 1994, Witness ABC1's evidence "is relevant as in that situation according to the principle of evidence neither of the version[s] could be accepted as true".[93]

Discussion

27. As a preliminary matter, the Appeals Chamber considers that there is good cause for the late filing of the Motion of 4 July 2006. Witness ABC1's testimony in the *Bagosora et al.* case, dated 13 June 2006, was made, in the relevant parts, in closed session. The Prosecution disclosed the corresponding transcript on 22 June 2006 and the Motion of 4 July 2006 was filed soon thereafter. The Appeals Chamber therefore recognizes the Motion of 4 July 2006 as timely.

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[82] *Ibid.*, paras 4-6.
[83] *Ibid.*, paras 7-8. According to the Prosecution, the Appellant's interpretation of the scope of Witness ABC1's testimony is grossly exaggerated and can only stand for the proposition that she did not see the Appellant at [Samvura's] house that morning, a fact that has no relevance to the Appellant's conviction.
[84] Response to the Motion of 4 July 2006, para. 9.
[85] *Ibid.*, para. 10.
[86] *Ibid.*, paras 8 and 11. [REDACTED]
[87] Response to the Motion of 4 July 2006, para. 12.
[88] *Ibid.*, para. 13.
[89] *Ibid.*, paras 14-15.
[90] Reply to the Response to the Motion of 4 July 2006, paras 1 and 3.
[91] *Ibid.*, paras 4-5.

28. However, with respect to the availability of the proffered evidence at trial, the Appeals Chamber agrees with the Prosecution that the Appellant failed to exercise the due diligence required for the evidence to be admissible on appeal. The Appeals Chamber recalls that "the mere fact that [a witness] gave evidence in another case and that the Appellant was not aware that [the witness was] in possession of this information until then does not in itself suffice to demonstrate unavailability of the evidence at trial."[94] The Appellant must demonstrate that the "proffered evidence was not available to him at trial in any form" and that he had made use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring the evidence before the Trial Chamber.[95] In the present case, the Appellant has not shown why he could not call [Witness ABC1] [REDACTED] as a Defence witness at trial in order to refute the evidence provided by Witness EB stating that, on the morning of 7 April 1994, he saw the Appellant go into the compound of Samvura's house together with many Interahamwe. Therefore, the Appeals Chamber is not satisfied that this evidence was unavailable at trial.

29. As to the relevance and credibility of the proffered evidence, the Appeals Chamber is satisfied that the *prima facie* requirements have been met. The testimony of Witness ABC1 in the *Bagosora et al.* case is, on its face, in contradiction with the testimony on the same events given by some of the Prosecution witnesses in the present case, and that of Witness EB in particular. The evidence in question thus appears to have some relevance to the Trial Chamber's findings on the credibility of these witnesses as well as to its factual findings with respect to the Appellant's participation in the killings that took place in Gisenyi on the morning of 7 April 1994.[96] Without prejudice to the Trial Chamber's findings in the *Bagosora et al.* case as to the credibility of Witness ABC1 and considering the fact that the testimony was given under solemn oath, the Appeals Chamber is satisfied that the proffered evidence is *prima facie* reasonably capable of belief or reliance.[97]

[92] Reply to the Response to the Motion of 4 July 2006, para. 6.
[93] *Ibid.*, para. 7.
[94] *Galić* 30 June 2005 Decision, para. 115; *Krstić* Decision of 5 August 2003, p. 3; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, paras 4-5: "The defence often seeks to satisfy this requirement by asserting that an attempt had been made before or during the trial to ascertain from such prospective witnesses what evidence they could give, but that the prospective witnesses had either failed or declined to co-operate. However, before additional evidence will be admitted pursuant to Rule 115, the defence is obliged to demonstrate not only that the evidence was not available at trial but also that the evidence could not have been discovered through the exercise of due diligence [...]. This obligation of due diligence is therefore directly relevant to the procedures of the Tribunal (in particular, Rule 54) both before and during trial, as well as on appeal." *See also* para. 19 *supra*.
[95] *Galić* 30 June 2005 Decision, para. 115; *Krstić* Decision of 5 August 2003, p. 3; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, paras 4-5.
[96] Trial Judgement, paras 825 and 836. The Appeals Chamber finds that the proffered evidence is irrelevant to the Trial Chamber's conclusions at paras 831 and 837 of the Trial Judgement.
[97] *See The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, paras 286-287.

30. Having found that the evidence of Witness ABC1 was available at trial and could have been discovered at trial through the exercise of due diligence, the Appeals Chamber must determine whether the non-admission of the additional evidence would amount to a miscarriage of justice.

31. The Appellant claims that Witness ABC1's testimony in the *Bagosora et al.* case would have affected the Trial Chamber's findings as to the credibility of Prosecution Witnesses AHI, EB, AGX and Omar Serushago,[98] hence calling into question the findings of fact made by the Trial Chamber concerning the events in Gisenyi on the basis of the evidence given by those witnesses. The Appeals Chamber notes that, in the *Bagosora et al.* case, Witness ABC1 expressly affirmed that, on the morning of 7 April 1994, there was no meeting held at Samvura's place and that the Appellant was not present in [that] house.[99]

32. The relevant factual findings of the Trial Chamber in the present case appear to be made on the basis of evidence provided by Witness Serushago that the Appellant was transporting weapons on the morning of 7 April 1994[100] corroborated by the evidence of Witness EB that he saw the Appellant "on the morning of 7 April in a red taxi with a loudspeaker".[101] The Trial Chamber also took into account that Witness AHI saw the Appellant early in the morning that day "in military gear, carrying a gun" and that Witness AGX saw him at around 2:30 p.m. "passing by on the road in a vehicle with *Interahamwe* and *Impuzamugambi*, armed with different kinds of weapons and speaking through a megaphone, calling on the public to flush out the enemy and enemy accomplices".[102] Finally, the Trial Chamber noted, on the basis of evidence provided by Witness EB, that "[w]eapons were distributed from a central location, Samvura's house, where Witness EB saw the *Interahamwe* picking them up".[103] On these grounds, the Trial Chamber concluded that

> Hassan Ngeze ordered the *Interahamwe* in Gisenyi on the morning of 7 April 1994 to kill Tutsi civilians and prepare for their burial at the *Commune Rouge*. Many were killed in the subsequent attacks that happened immediately thereafter and later on the same day. [...] The attack that resulted in these and other killings was planned systematically, with weapons distributed in advance, and arrangements made for the transport and burial of those to be killed.[104]

The Appeals Chamber notes that the Trial Chamber considered that Omar Serushago's testimony was not consistently reliable and accepted it "with caution, relying on it only to the extent that it

[98] Motion of 4 July 2006, para. 5, referring to Trial Judgement, paras 812, 813, 824, 775.
[99] *Bagosora et al. case*, T. 13 June 2006, p. 10, l. 24-32 [closed session - REDACTED].
[100] Trial Judgement, para. 825.
[101] *Ibid.*, para. 825.
[102] *Id.*
[103] *Id.*
[104] *Ibid.*, para. 836. *See also* paras 955 and 977A concluding that the Appellant was guilty of genocide, pursuant to Article 6(1) of the Statute of the Tribunal.

[was] corroborated".[105] The testimony of Witnesses AHI, AGX and EB was, however, found to be credible.[106]

33. Witnesses AHI and AGX did not specifically testify to the fact that there had been a meeting in Samvura's house on the morning of 7 April 1994, or that the Appellant attended that meeting or participated in the distribution of arms that day.[107] Therefore, their testimony and/or credibility would not be affected by the evidence provided by Witness ABC1 in the *Bagosora et al.* case.[108] However, the Appeals Chamber agrees that the account given by Witness ABC1 can be interpreted as contradicting the testimony of Witness EB in the present case, in particular, when he stated that, on 7 April 1994, at around 07:00 a.m., he saw the Appellant going towards the house of Barnabé Samvura.[109] The same morning, he also saw other people go into the compound of Samvura's house and, thirty minutes later, he heard the Appellant speak through his loudspeaker, telling the *Interahamwe* to kill the Tutsi and that some of them should go to the *Commune Rouge* to dig pits. According to Witness EB, when coming out of Samvura's house, the *Interahamwe* carried nail-studded clubs, rifles and grenades, and the attacks started around 01:00 p.m.[110]

34. The fact that there had been a meeting held at Samvura's house on the morning of 7 April 1994 involving the Appellant and distribution of arms is not in itself decisive for the Trial Chamber's conclusion as to the Appellant's responsibility for killings of the Tutsi civilians in Gisenyi. In fact, the Trial Chamber concluded that there was no evidence that the Appellant was present during the killings of 7 April 1994[111] and that, on that morning, the Appellant ordered the *Interahamwe* to kill the Tutsi and to prepare graves in *Commune Rouge*.[112] Consequently, the principal issue is whether, should the Trial Chamber have had the benefit of hearing the testimony of Witness ABC1, it *would* have disbelieved Witness EB with respect to the events that took place

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[105] *Ibid.*, para. 824. *See also Ngeze* Decision on Additional Evidence, paras 26-27.
[106] *Ibid.*, paras 775, 813 and 812, respectively.
[107] Witness AHI testified that he saw the Appellant on the morning of 7 April in a military outfit accompanied by his bodyguards (T. 4 September 2001, p. 51 l. 13-17 and p. 69 l. 17-25; T. 10 September 2001, p. 17 l. 18-20 and p. 92 l. 17-22). Witness AHI referred to distribution of arms by Colonel Anatole Nsenigyumva on 7 April 1994, but specified that the Appellant was present at a meeting held on 8 April 1994 (T. 4 September 2001, p. 58 l. 7-9 and p. 60 l. 11-19); Witness AGX saw the Appellant in the afternoon of 7 April 1994 "passing by on the road in a vehicle aboard which were *Interahamwe* as well as *Impuzamugambi* of the CDR" (T. 11 June 2001, p. 39; T. 13 June 2001, p. 39; T. 14 June 2001, pp 40-42).
[108] The Appeals Chamber notes that Witness ABC1 also testified that there was no meeting with Anatole Nsengiyumva held in Samvura's house on 7 April 1994 and no distribution of weapons took place there (*Bagosora et al.* case, T. 13 June 2006 (closed session), p. 11 l. 34-35, p. 12 l. 29-31, p. 27 l. 16-18 and 26-31). Witness AHI referred to a meeting of MRND and CDR officials held on 8 April 1994 followed by distribution of weapons (T. 4 September 2001, pp 55-62) and Witness AGX testified that Colonel Nsengiyumva spoke in Gisenyi on 7 April 1994 around 10:00 a.m. saying that the President had been killed by enemies, adding that there were about two hundred people there (T. 11 June 2001, pp 34-39). Consequently, the Appeals Chamber concludes that the three witnesses were referring to different events and no flagrant contradiction affecting their credibility could reasonably be drawn from these accounts.
[109] T. 16 May 2001, pp 2-3.
[110] *Ibid.*, pp 5-8, 46; T. 17 June 2001, pp 108, 129-134.
[111] Trial Judgement, para. 825.
[112] *Id.*

on the morning of 7 April 1994. In the presence of contradictory accounts of the two witnesses, the Trial Chamber would have had to determine which of the accounts was reliable and, in light of evidence provided by Witness ABC1 in the *Bagosora et al.* case and the fact that [REDACTED], the Appeals Chamber is not satisfied that a reasonable trier of fact *would* have found this witness credible to the detriment of the account provided by Witness EB. Moreover, Witness ABC1 in the *Bagosora et al.* case only testified to the fact that the Appellant was not at [Samvura's] house that morning and that there was no meeting there. The mere fact that [Witness ABC1] did not witness or hear him ordering the killings does not mean that this could not have occurred.[113] The Appeals Chamber notes to this extent that Witness EB testified that the Appellant ordered the killing through a loudspeaker from his vehicle and not *during* the meeting at Samvura's house.[114] Consequently, and in light of the findings above concerning Witnesses AHI and AGX, the Appeals Chamber is not satisfied that the exclusion of the proffered additional evidence would amount to a miscarriage of justice inasmuch as, had it been adduced at trial, it would not have had an impact on the verdict.

C. Motion of 28 August 2006

Submissions of the Parties

35. In his Motion of 28 August 2006, the Appellant prays the Appeals Chamber to admit the Additional Statement of Witness EB purportedly affirming his Recantation Statement of April 2005.[115] The Appellant contends that this evidence is credible and relevant to the evidentiary hearing insofar as, if accepted, it "will clear the doubts of the Prosecution regarding the truthfulness of witness 'EB' [*sic*] first recanted statement".[116] He notes that this evidence, not available at trial, could not have been discovered through the exercise of due diligence, and its exclusion would amount to a miscarriage of justice.[117]

36. The Prosecution does not object to the Motion of 28 August 2006, acknowledging the relevance of the Additional Statement in light of the evidentiary hearing of Witness EB.[118] Nevertheless, it points out that the "agreement on the admissibility of this statement relates *only* to the actual admissibility of the statement, and not to the merits, that is, the reliability or credibility,

[113] *See Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para. 158.
[114] At the same time, the Appeals Chamber recalls that the credibility of Witness EB, the only witness to have testified to the ordering of the killings by the Appellant (the only relevant part of Omar Serushago's testimony that was considered corroborated by the Trial Chamber, and thus reliable, referred to the fact that the Appellant "was transporting arms in a red Hilux vehicle on the morning of 7 April 1994" but not the fact that he ordered that attack), is yet to be re-assessed on the basis of his testimony at the appeals hearing to the subject of his purported Recantation Statement.
[115] Motion of 28 August 2006, preambulary para. *See also* para. 6 *supra*.
[116] *Ibid., paras* 4, 6.
[117] *Ibid.*, paras 5, 7.
[118] Response to the Motion of 28 August 2006, para. 2.

of the contents of the document."[119] Furthermore, the Prosecution specifies that the admission of copies of the envelopes in which copies of this letter were received by the Office of the Prosecutor would be necessary.[120]

Discussion

37. The Appeals Chamber notes that in the Additional Statement, Witness EB purportedly states that the reason for this new statement is that after having sent his Recantation Statement, he "learned that officials from the Office of the Prosecutor who had come to see [him] at [his] home had submitted [his] statement to the [Tribunal]" and that "[t]hese employees of the Tribunal, who would usually meet [him] at the *Ubumwe* Hotel threatened [him], asking [him] why [he] had written to the Tribunal to announce [his] recantation". Since he was "annoyed by their threats, and in order to get rid of them, [he] told them the document containing [his] recantation did not come from [him], even though [he] was indeed the one who had written it". According to the Additional Statement, Witness EB met the "employees of the Tribunal" once more when they came back to confirm that he was the author of the Recantation Statement but had not heard from them ever since. Therefore, he decided to write the Additional Statement to confirm that both Recantation Statements of 5 and 27 April 2005 were written and signed by him. In addition to the information contained in Witness EB's purported original Recantation Statement, the Additional Statement specifies that, contrary to his testimony adduced at trial, he never saw the Appellant on 6-9 April 1994 in Gisenyi [REDACTED]. According to the Additional Statement, it was well known to the inhabitants of Gisenyi that the Appellant was arrested following President Habyarimana's death and remained in detention until 9 April 1994; besides, they also knew that the vehicle equipped with megaphones belonged to Hassan Gitoki from *Commune Rouge* and not to the Appellant. Finally, in the Additional Statement, Witness EB refers to the Prosecution Witness AFX who allegedly also falsely testified against the Appellant.

38. The Appeals Chamber considers that there is good cause for the late filing of the Motion of 28 August 2006, since, as explained above, the Appellant only received a copy the Additional Statement in August 2006.[121] For the reasons explained in the Ngeze Decision on Additional Evidence,[122] the Appeals Chamber finds that the proffered evidence was unavailable at trial and could not be obtained through the exercise of due diligence. The Appeals Chamber is equally satisfied that the tendered Additional Statement is *prima facie* credible and relevant.[123] Finally, the Appeals Chamber finds that the Additional Statement could have been a decisive factor in

[119] *Ibid.*, para. 2.
[120] *Ibid.*, para. 3.
[121] *See* para. 6 *supra*.
[122] *Ngeze* Decision on Additional Evidence, para. 23

concluding upon the Appellant's responsibility for the events that took place in Gisenyi on 7-9 April 1994.[124] The Appeals Chamber emphasizes that the above findings pertain strictly to the admissibility and not to the merits of the proffered additional evidence.[125]

39. For the foregoing reasons, the Appeals Chamber finds that the Additional Statement is admissible as additional evidence on appeal.

D. Motion of 7 September 2006

40. In its Motion of 7 September 2006, the Prosecution seeks admission of the envelopes containing copies of the Additional Statement as additional evidence on appeal for the purposes of the evidentiary hearing of Witness EB.[126] The Prosecution claims that the information on the envelopes is relevant to the issue of determining the authenticity of the Additional Statement, "which in turn is relevant to the issues [of] the oral hearing, whether EB is recanting his trial testimony or whether the recantation statement is a product of the Appellant['s] efforts to interfere with and suborn the testimony of witnesses".[127] It contends that "[t]he circumstances surrounding the receipt and timing of the letter [...] are suspicious and lead to the inference that someone associated with the Appellant, or at least someone other than EB, has manufactured the letter".[128] The Prosecution, being in the process of obtaining the originals of the envelopes, also seeks direction from the Appeals Chamber as to whether it ought to retain the originals until the evidentiary hearing or whether they should be filed immediately upon their receipt.[129] The Appellant did not respond to the Motion of 7 September 2006.

41. The Appeals Chamber recalls that, pursuant to Rule 115 of the Rules, motions for additional evidence on appeal must be directed towards the *contested* specific finding of fact made by the Trial Chamber. The Appeals Chamber recalls that, while the Rule itself does not expressly prohibit a party from seeking the admission of additional evidence to bolster challenged factual findings, in

[123] *See ibid.*, paras 19-22.
[124] Trial Judgement, paras 836-837. *See also Ngeze* Decision on Additional Evidence, paras 24-29.
[125] *See Ngeze* Decision on Additional Evidence, para. 28.
[126] Motion of 7 September 2006, para. 1.
[127] *Ibid.*, para. 5.
[128] *Ibid.*, para. 6. According to the Prosecution, several copies of the Additional Statement – and not the original – were sent to the offices of the ICTR in Arusha and Kigali, to two investigators and an interpreter from OTP, in June 2006, from Tanzania and Rwanda (paras 7-8). According to the Prosecution, "it would seem highly improbable that the date of the Appellant's Motion [of 19 June 2006], seeking admission of an additional statement received from Witness EB, is purely coincidental with the mailing of this letter" (paras 9-11, with reference to para. 3 of the Motion of 19 June 2006, in which the Appellant affirms that "the Prosecutor might have collected or *received* some material and/or statements from witness EB[...]") The Prosecution maintains that the fact that the Additional Statement was allegedly written in December 2005 but only posted in June 2006 militates for a conclusion that Witness EB may have written it under some duress or that the letters were manufactured by someone else (para. 11). It adds that it "is suspicious that a letter purporting to come from Witness EB, an indigent person living in Rwanda, was mailed from Tanzania and Rwanda", the only plausible explanation being that someone other than Witness EB posted several copies to several persons from several places in order to ensure that the letter was received by the Tribunal (para. 12).

the practice of this Tribunal, as well as that of the ICTY, "motions for additional evidence are directed towards supporting an argument of factual error, and if additional evidence is sought to be admitted in support of a factual finding, it is admitted as rebuttal material to that additional evidence admitted in support of a factual error".[130] The Prosecution has not appealed the Trial Judgement and is not, in the circumstances of the instant case, in a position to seek admission of additional evidence. Rather, it should have applied for admission of rebuttal material.

42. The Appeals Chamber finds that it is in the interests of justice to examine *proprio motu* whether the material tendered by the Prosecution in its Motion of 7 September 2006 can be admitted as rebuttal evidence on appeal. It has been well established by the jurisprudence that rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber[131] and, as such, has a different test of admissibility from additional evidence under Rule 115 of the Rules.[132] In light of its findings above with respect to the admissibility of the Additional Statement, the Appeals Chamber finds that copies of envelopes in which the copies of the Additional Statement were purportedly sent to various addressees within the Office of the Prosecutor are directly relevant to the issue of the authenticity of the Additional Statement and *a fortiori* that of the Recantation Statement. Therefore, the Appeals Chamber is satisfied that the proffered material affects the substance of the admitted additional evidence and is thus admissible as rebuttal evidence on appeal.

43. The Appeals Chamber emphasizes that it is highly desirable to have the originals of the said rebuttal evidence, as well as of the Recantation Statement and the Additional Statement, filed and available at the evidentiary hearing.

IV. DISPOSITION

44. For the forgoing reasons, the Appeals Chamber **DISMISSES** the Motion of 19 June 2006; **CONSIDERS** the Motion of 14 July 2006 to be **WITHDRAWN** by the Appellant's Counsel; **DISMISSES** the Motion of 4 July 2006; **GRANTS** the Motion of 28 August 2006 and **ADMITS** the Additional Statement as additional evidence on appeal; **DISMISSES** the Motion of 7

[129] Motion of 7 September 2006, para. 2.
[130] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.1, Decision on Stanišić's Application under Rule 115 to Present Additional Evidence in his Response to the Prosecution's Appeal, 3 December 2004, para. 14.
[131] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115, 3 March 2006 ("*Haradinaj* Decision"), para. 44; *Prosecutor v. Mirosław Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Motion to Adduce Rebuttal material, 12 March 2004 ("*Kvočka* Decision"), p. 3; *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5.
[132] *Haradinaj* Decision, para. 44; *Kvočka* Decision, p. 3.

September 2006. The Appeals Chamber *proprio motu* **ADMITS** as rebuttal evidence on appeal the copies of envelopes annexed to the Motion of 7 September 2006.

45. The Appeals Chamber **INSTRUCTS** the Registrar to provide the following material so far admitted into evidence on appeal with corresponding exhibit numbers:

- copy of the typed statement purportedly signed by Witness EB, index numbers 2223A-2220-A;

- Forensic Report, including the copy of the purported handwritten Recantation Statement, index numbers 3442/A-3413/A;

- copy of the Additional Statement in Kinyarwanda, as well as its translations into English and French, index numbers 8121A-8112/A

- copies of envelopes, index numbers 8183/A-8175/A.

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

Dated this 27th day of November 2006,
At The Hague, The Netherlands.

Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

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Case No / *No. de l'affaire:* ***ICTR-99-52-A*** | v. THE PROSECUTOR

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