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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
08 December 2006
(9144/H – 9126/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: 8 December 2006

ICTR Appeals Chamber
Date: 08 December 2006
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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 MOTIONS FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE PURSUANT TO RULE 115 OF THE RULES OF PROCEDURE AND EVIDENCE

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Mr. Neville Weston
Mr. Abdoulaye Seye
Ms. Linda Bianchi

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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 ("Appeals Chamber" and "Tribunal", respectively) is seized of five motions by the Appellant Jean-Bosco Barayagwiza ("Appellant"):

- "The Appellant Jean-Bosco Barayagwiza's Motion Giving Notice of the Further Delay in the Filing of the Motion for Additional Evidence Relating to Alison Des Forges, Pursuant to the Decision of 26 May 2006" filed on 26 June 2006 ("Motion Giving Notice of Delay");[1]

- "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed on 7 July 2006 ("First Rule 115 Motion");[2]

- "The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion Relating to the Appellant's Reply to the Prosecutor's Response to the Appellant's Motion for Leave to Present Additional Evidence (Rule 115) Dated 20th July 2006" filed on 31 July 2006 ("Corrigendum Motion");[3]

- "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed on 13 September 2006 ("Second Rule 115 Motion");[4]

- "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed on 14 November 2006 ("Third Rule 115 Motion").[5]

2. In the First Rule 115 Motion, the Appellant requests the Appeals Chamber to admit twelve pieces of additional evidence on appeal to support his allegation that Alison Des Forges, who testified as an expert witness at trial, was biased against the Appellant. The Motion Giving Notice of Delay and the Corrigendum Motion are ancillary to the First Rule 115 Motion. In the Second Rule 115 Motion, the Appellant seeks admission of three documents related to his role within the "*Coalition pour la Défense de la République*" ("CDR") as additional evidence on appeal. In the

[1] The Prosecution did not file a response to the Motion Giving Notice of Delay.

[2] The Prosecution filed the "Prosecutor's Response to ŽThe Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 17 July 2006 ("Response to the First Rule 115 Motion"). The Appellant filed "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to ŽThe Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 21 July 2006 ("Reply to the First Rule 115 Motion").

[3] The Prosecution did not file a reponse to the Corrigendum.

[4] The Prosecution filed the "Prosecutor's Response to ŽThe Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 22 September 2006 ("Response to the Second Rule 115 Motion"), and the Appellant filed "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to the ŽMotion for Leave to Present Additional Evidence (Rule 115)'" on 28 September 2006 ("Reply to the Second Rule 115 Motion").

[5] The Prosecution filed the "Prosecutor's Response to ŽThe Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 22 November 2006 ("Response to the Third Rule 115 Motion") and the Appellant filed confidentially "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to ŽThe Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" ("Reply to the Third Rule 155 Motion") on 30 November 2006. The Appeals Chamber notes that the Appellant gives no reason as to why the Reply to the Third Rule 115 Motion or the present decision need to be confidential and finds that there is no apparent reason for the confidential classification of the Reply to the Third Rule 115 Motion. Consequently, both the Reply to the Third Rule 115 Motion and the present decision should be public.

Third Rule 115 Motion, the Appellant requests the Appeals Chamber to admit two documents which, in his view, show that the testimony of Witness AGK, who testified at trial, was unreliable.

3. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[6] Pursuant to the decisions of 17 May 2005[7] and 6 September 2005,[8] the Appellant filed both his Notice of Appeal and his Appellant's Brief on 12 October 2005 ("Notice of Appeal" and "Appellant's Brief", respectively). The briefing with respect to the Appellant's appeal was completed on 12 December 2005.[9]

APPLICABLE LAW

4. The Appeals Chamber recalls that under 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*[10] and is not an opportunity for a party to remedy any "failures or oversights" made during the pre-trial and trial phases.[11] Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides for a mechanism to address "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".[12]

5. According to Rule 115, 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

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

[7] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").

[8] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Decision of 6 September 2005").

[9] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Reply Brief"). For a more detailed procedural background, the Appeals Chamber refers to its earlier decisions in the present case (Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006 ("Decision of 5 May 2006"), paras. 3-5; Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct His Appellant's Brief, 17 August 2006, paras. 5-8).

[10] *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 ("Decision of 23 February 2006"), para. 5; Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005 ("Decision of 4 October 2005"), p. 3; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177.

[11] Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005, p. 3; *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997, para. 15.

[12] Decision of 23 February 2006, para. 6; Decision of 4 October 2005, p. 4; *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.

hearing, cogent reasons, are shown for a delay.[13] Second, the Appeals Chamber must find "that the additional evidence was not available at trial and is relevant and credible".[14] When determining the availability at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown 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."[15] In this respect, the Appeals Chamber has held that

> 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" and that "[t]he 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.[16]

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 does not appear to be reasonably capable of belief or reliance, without prejudice to a determination of the weight to be afforded.[17]

6. 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."[18] To satisfy this requirement, 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.[19] Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.[20] Although Rule 115 of the Rules does not explicitly provide for this, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it *would* amount to a miscarriage of justice.

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[13] Rule 115(A) of the Rules as amended on 10 November 2006.
[14] Rule 115(B).
[15] *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 ("*Ntagerura et al.* Decision of 10 December 2004"), para. 9. (Internal references omitted).
[16] *Id.*
[17] Decision of 23 February 2006, para. 7; *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; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para. 63; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Decision of 31 October 2003"), p. 3; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 12.
[18] Rule 115 (B) of the Rules.
[19] *Zoran 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.

That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.[21]

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

THE MOTION GIVING NOTICE OF DELAY

8. As a preliminary matter, the Appeals Chamber turns to the Motion Giving Notice of Delay. The Appellant states that he wishes to notify the Pre-Appeal Judge of the necessity of delaying his motion for additional evidence relating to Alison Des Forges and the reasons for this delay.[23] He thereby requests that, in considering the admissibility of his future Motion for Additional Evidence, the Appeals Chamber recognizes the efforts he made to obtain the additional evidence.[24]

9. As recalled above, the time-limit for the filing of a motion to admit additional evidence is thirty days from the date for filing of the brief in reply, unless good cause is shown for delay.[25] The Appeals Chamber understands that through the Motion Giving Notice of Delay, the Appellant seeks to show good cause for the delayed filing of his First Rule 115 Motion. The Appeals Chamber notes that where arguments are made demonstrating good cause for a late filing after the filing deadline has passed, as a matter of practice, that showing is normally made as part of the Rule 115 motion itself with a request that the motion be recognized as validly filed. Thus, the Appeals Chamber will consider the arguments contained in the Motion Giving Notice of Delay when disposing of the Appellant's submissions concerning good cause for the late filing of his First Rule 115 Motion as follows.

[20] Decision of 23 February 2006, para. 8.
[21] *Juvénal Kajelijeli v. The 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. *See* also *Prosecution v. Rasim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 18; *Prosecution v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 16; *Krstić* Decision of 5 August 2003, p. 4; *Blaškić* Decision of 31 October 2003, p. 3.
[22] *Kajelijeli* Decision of 28 October 2004, para. 12; *Ntagerura et al.* Decision of 10 December 2004, para. 12. *See* also *Blaškić* Decision of 31 October 2003, p. 3; *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, *Confidential* Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 25.
[23] Motion Giving Notice of Delay, para. 2.
[24] *Ibid.*, para. 9.
[25] The Appeals Chamber notes that, under the provision applicable at the time of the filing of the Motion Giving Notice of Delay, the deadline was set to seventy-five days after the trial judgement.

THE FIRST RULE 115 MOTION

A. Submissions of the Parties

10. In the First Rule 115 Motion, the Appellant requests the admission of twelve documents as additional evidence on appeal,[26] which, he claims, show that Alison Des Forges, by instigating a civil suit in the New York District Court, "actively pursued the Appellant [...] to neutralize him and undermine the efforts of the Rwandan Interim Government to get support from the United Nations".[27] In addition, the Appellant argues, Alison Des Forges did not disclose her role in the civil suit until her cross-examination in the *Zigiranyirazo* case in March 2006, and the Prosecution, although aware of these facts, did not disclose them to the Appellant.[28] Moreover, documents in Annexes 7 through 11, the Appellant contends, "refute the propaganda disseminated by Alison Desforges [*sic*]"[29] about the intentions of the Interim Government and show that her statement given to the New York District Court was false.[30]

11. The Appellant submits that the evidence only became available to him in June 2006, because the Prosecution did not disclose the information about Alison Des Forges' involvement in the New York civil suit.[31] The Appellant argues that he was not aware of this suit. He admits that he had received a document from the court in 1994, but was not sure whether it was genuine, because it was not served on him by officials.[32]

12. The Prosecution responds that the documents proffered by the Appellant as new evidence do not satisfy the criteria of admissibility under Rule 115 of the Rules.[33] The Prosecution argues that the Appellant was aware of the New York lawsuit, that he sent a letter to the judge who decided the matter, and that he referred to the lawsuit in his book "*Rwanda, le Sang Hutu est-il rouge?*". He was

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[26] Statement of Alison Des Forges relating to the Civil Suit against the Appellant lodged in the New York District Court, and the Appellant's letter to the Judge Ceda Baum Spresiding over the caseĆ (Annex 1); Extract of the Prosecution's closing arguments on Civil Suits against the Appellant (Annex 2); Extract of the transcript of the cross-examination of Alison Des Forges on 14 June 2004 in the case *Prosecutor v. Casimir Bizimungu et al.* Case No. ICTR-99-50-T (Annex 3); Extract of the transcript of the cross-examination of Alison Des Forges on 1 March 2006 in the case *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T (Annex 4); Prosecution's Response to the Appellant's request for disclosure of the case file of the Civil Suit in the New York District Court, dated 22 March 2006 (Annex 5); Letter from the Appellant to the US Ambassador in Cameroon dated 12 April 1996 (Annex 6); five documents related to the activities of the Rwandan Interim Government with regard to the United Nations, taken from a publication "The United Nations and Rwanda 1993 to 1996" (Annexes 7 through 11); and a number of transcripts of interviews with the foreign minister of the Interim Government, Jerome Bicamumpaka in 1994 taken from the BBC summary of world broadcasts (Annex 12).
[27] First Rule 115 Motion, para. 16.
[28] *Id.*
[29] *Ibid.*, para. 17.
[30] *Ibid.*, paras 32-43.
[31] *Ibid.*, para. 19; Motion Giving Notice of Delay, paras 5-8.
[32] First Rule 115 Motion, para. 23.
[33] Response to the First Rule 115 Motion, para. 5.

therefore in the position to look for the documents from this lawsuit and use them at his trial.[34] In addition, the Prosecution argues that Counsel for the Appellant was aware of Alison Des Forges' involvement in the civil suit and cross-examined her about it at trial.[35] Furthermore, the Prosecution submits that Alison Des Forges is neither biased against the Appellant, nor gave any inconsistent or misleading information about her involvement in the civil suit.[36] Regarding the documents related to the policy of the Interim Government in 1994, the Prosecution submits that they are neither new, nor could they have influenced the trial.[37]

13. In reply, the Appellant submits that the Response to the First Rule 115 Motion should be expunged from the record because it exceeds the page limit of ten pages.[38] Regarding the Prosecution's arguments, he submits that he only became aware of the importance of the documents after Alison Des Forges' testimony in the *Zigiranyirazo* case, and that they were therefore not available at trial.[39]

B. Discussion

Preliminary Issues

14. At the outset, the Appeals Chamber notes that the Appellant filed the separate Corrigendum Motion to correct a clerical error in his Reply to the First Rule 115 Motion.[40] The Appeals Chamber recalls that "a party may, *without requesting leave* from the Appeals Chamber, file a corrigendum to their previously filed brief or motion whenever a minor or clerical error in said brief or motion is subsequently discovered and where correction of the error is necessary in order to provide clarification".[41] Although it was unnecessary for the Appellant to file a motion to this extent, the Appeals Chamber finds that the submitted amendment indeed corrects an obvious clerical error and does not amount to any substantial change of the Appellant's Reply to the First Rule 115 Motion. Therefore, the Appeals Chamber finds that the Appellant's Reply to the First Rule 115 Motion should be read in accordance with the amendments proposed by the Corrigendum Motion and allowed by the present decision.

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[34] *Ibid.*, paras. 7-8.
[35] *Ibid.*, para. 9.
[36] *Ibid.*, paras. 13-20.
[37] *Ibid.*, paras. 21-25.
[38] Reply to the First Rule 115 Motion, paras. 2-3.
[39] *Ibid.*, para. 7.
[40] Corrigendum Motion, para. 1.
[41] Decision on the Appellant Jean-Bosco Barayagwiza's Corrigendum Motions of 5 July 2006, 30 October 2006, p. 2, quoting *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005, p. 3.

15. Second, the Appellant takes issue with the length of the Prosecution's submission, which, in his view, "deliberately and manifestly" disregards a decision by the Pre-Appeal Judge denying a request for an extension of the page limits for the Prosecution's response to the Appellant's First Rule 115 Motion.[42] The Appeals Chamber notes that, in response to the Appellant's request for an extension of page limits for its First Rule 115 Motion, the Prosecution requested a reciprocal extension for its response. The Pre-Appeal Judge denied the Prosecution's request because she considered the request for an extension of the page limit for a potential response to a motion that had not yet been filed to be unsubstantiated and premature.[43] This decision did not prevent the Prosecution from requesting an extension once the actual motion had been filed, which it did in its Response to the First Rule 115 Motion.[44] Considering the length of the First Rule 115 Motion and the number and size of the documents proffered as additional evidence, the Appeals Chamber finds that the Prosecution has shown good cause for the filing exceeding the regular page limit, and accepts the Response to the First Rule 115 Motion as validly filed.

Late Filing of the First Rule 115 Motion

16. With respect to the Appellant's First Rule 115 Motion, the deadline for the filing of motions under Rule 115 of the Rules expired on 11 January 2006. Any Rule 115 motions filed by the Appellant at the present stage of the proceedings are therefore admissible only if the Appellant shows good cause for the late filing.[45] The Appeals Chamber recalls that "the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted".[46]

17. The Appeals Chamber notes that most of the documents proffered by the Appellant as additional evidence are more than one year old, the majority of them even dating back to the 1990s. The only argument advanced by the Appellant as explanation for the late filing of these documents is that he became aware of Alison Des Forges' involvement in the New York civil suit only in March 2006.[47]

[42] Reply to the First Rule 115 Motion, para. 3.
[43] Decision of 26 May 2006, p. 4.
[44] Response to the First Rule 115 Motion, paras. 3, 32.
[45] Rule 115(A) of the Rules.
[46] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Motion for Leave to File His Second Rule 115 Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005, p. 3.
[47] First Rule 115 Motion, para. 21; Motion Giving Notice of Delay, paras 5-8.

18. However, the Appeals Chamber finds that the Appellant knew as soon as 1994 that a civil action had been brought against him in New York. In his letter to Judge Ceda Baum of the New York District Court, he wrote that he had received a document containing a complaint against him, and asked the Judge to dismiss the claim stating "I am persecuted by a so-called human rights organisation which is in fact, an organisation committed to RPF criminal ambitions".[48] This shows that the Appellant was not only aware of the lawsuit but also attributed it to a political campaign against him orchestrated by a human rights organization.[49] During trial, Counsel for the Appellant cross-examined Alison Des Forges about her involvement in the lawsuit:

> Q. You did not meet Barayagwiza, but that did not stop you from testifying against him in the United States?
>
> A. I did not testify in any trial against Mr. Barayagwiza. I contributed documentation and witness testimonies to a civil proceeding which was heard without contest, and because there was no contest there was no trial.[50]

Even assuming *arguendo* that the Appellant was not aware of the extent of Alison Des Forges' involvement in this lawsuit, he had sufficient information to show that she was involved in one way or the other in the lawsuit, which he had already in 1994 characterized as a political campaign against him. Given that the relevant documents were all readily accessible, nothing prevented the Appellant from presenting them within the time limit of Rule 115 of the Rules.

19. The extract of the transcript of the *Zigiranyirazo* case dated 1 March 2006 is the only document proffered as additional evidence in the First Rule 115 Motion, which recently became available to the Appellant. However, the Appeals Chamber observes that the Appellant did not submit the relevant parts of this transcript with his First Rule 115 Motion.[51] Furthermore, the Appeals Chamber finds that this document does not reveal any information about the role of Alison Des Forges which would have been new to the Appellant. During her cross-examination in the *Zigiranyirazo* case, with respect to the New York civil suit, she explained that she had "played part in initiating this suit and bringing it to court" by "providing contextual information for the lawyers who prepared the suit in conjunction for the Rwandan plaintiffs"[52]. This is consistent with her testimony in the present case that she contributed documentation to a civil proceeding against the

[48] First Rule 115 Motion, Annex 1, "Appellant's Letter to Judge Ceda Baum".
[49] In addition, the documents submitted by the Appellant show that the complaint was served a second time upon the Appellant in Zaire in January 1995: Motion Giving Notice of Further Delay, Annex "U.S. District Court Southern District of New York (Foley Square), Civil Docket for Case#: 1-94-cv-03627-JSM", p. 2.
[50] T. 29 May 2002, p. 217.
[51] According to the list of documents attached to the motion, the extract should comprise pages 30-68 of the trial transcript. The actual extract submitted to the Appeals Chamber (Annex 4) comprises only pages 50-54.
[52] *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, T. 1 March 2006, p. 38.

Appellant.[53] In this context, the Appeals Chamber observes that nothing in the documents proffered by the Appellant supports his assertion that Alison Des Forges was the "driving force"[54] behind the civil suit. Considering that the other documents were earlier available to the Appellant and that the extract of Alison Des Forges' testimony in the *Zigiranyirazo* case presented no new information to the Appellant, the Appeals Chamber finds that it does not justify the late filing of the First Rule 115 Motion. In any case, the extract itself became available to the Appellant soon after the hearing in March 2006, because it was this transcript which occasioned his letter to the Prosecution of 12 March 2006,[55] and the Appellant has not shown good cause for seeking admission of this document as additional evidence more than four months after it became available to him.

20. In light of the above, the Appeals Chamber concludes that the Appellant has not shown good cause for the late filing of any of the documents proffered as additional evidence. The Appeals Chamber thus finds no need to consider the merits of the First Rule 115 Motion[56] and dismisses it in its entirety.

THE SECOND RULE 115 MOTION

A. Submissions of the Parties

21. In the Second Rule 115 Motion, the Appellant submits three documents which show, in his view, that the Trial Chamber erred in finding that he was President of the CDR at the national level.[57] The three documents are two messages by David Rawson, U.S. Ambassador to Rwanda in 1994,[58] and a letter from the CDR, signed by Théoneste Nahimana, the then first Vice-President of the CDR.[59] In the two messages from Ambassador Rawson, the Appellant is referred to as "CDR counselor" or "CDR deputy-designate", respectively. This shows, the Appellant argues, that someone as well-informed as the U.S. Ambassador did not consider the Appellant to be the CDR President.[60] Regarding the letter signed by Théoneste Nahimana, the Appellant argues that its content was so important that it would have been signed by the President of the CDR. The fact that

[53] T. 29 May 2002, p. 217.
[54] Reply to the First Rule 115 Motion, para. 17.
[55] Motion Giving Notice of Further Delay, para. 2.
[56] *Cf.* Decision of 5 May 2006, para. 27.
[57] Second Rule 115 Motion, paras 2-3.
[58] *Ibid.*, paras 8-11 and 15.
[59] *Ibid.*, paras 12-14.
[60] *Ibid.*, para. 11.

it was not signed by the Appellant therefore shows, in the Appellant's view, that he did not occupy this position.[61]

22. The Prosecution responds that the Appellant overstates the importance of the Trial Chamber's finding about his position in the CDR.[62] Regarding the documents proffered by the Appellant, the Prosecution argues that the Appellant has not demonstrated that the evidence was unavailable at trial in any form and could not have been discovered through the exercise of due diligence.[63] In fact, the Prosecution submits, the Appellant abuses the procedure provided by Rule 115 of the Rules to remedy the consequences of his tactics at trial and failings in this appeal.[64] The Prosecution argues that all the documents were available much earlier than July 2006 and that the Appellant accordingly has not shown good cause for the late filing of the motion. In addition, the Prosecution maintains that none of the documents *could* or *would* have been a decisive factor at trial.[65]

23. The Appellant replies that Defence Counsel imposed on him at trial was incompetent and grossly negligent and, as a result, he was not adequately represented. Therefore, he argues, even evidence which was available at trial, but was not properly used by his Counsel, should be considered as "new".[66]

B. Discussion

24. As with the First Rule 115 Motion, the Second Rule 115 Motion was filed eight months after the expiry of the time period stipulated under Rule 115(A) of the Rules. The Appellant submits that the documents proffered as additional evidence were obtained by him during the month of July 2006, when he received an electronic file called "Alchemy" from the "National Archive", a non-governmental research institute based in the United States which "collects and publishes declassified documents obtained through the Freedom of Information Act".[67] The Appeals Chamber is therefore satisfied that there is good cause justifying the late filing of the Second Rule 115 Motion.

25. With respect to availability of the proffered evidence at trial, the Appeals Chamber is not satisfied that the Appellant was unable to obtain it in spite of the exercise of due diligence. As, the Prosecution points out, the declassifying process of U.S. documents started in 1998 and many

[61] *Ibid.*, para. 13.
[62] Response to the Second Rule 115 Motion, para. 3.
[63] *Ibid.*, para. 7.
[64] *Ibid.*, paras. 4-6.
[65] *Ibid.*, paras 18-23.
[66] Reply to the Second Rule 115 Motion, para. 7.
[67] Second Rule 115 Motion, para. 8.

unclassified documents were accessible on the National Security Archive webpage in 2001.[68] The Appeals Chamber finds that the Appellant's reply to this argument, that the Prosecution failed to prove that the documents were declassified before his trial,[69] is misguided; it is for the Appellant to show that the documents were available to him only recently. On the contrary, the Appellant's own arguments seem to suggest that the documents were accessible earlier than 2003: the compilation of documents which the Appellant received is the result of research carried out between 1994 and 2003.[70]

26. In addition, the Appeals Chamber notes that both messages in their relevant parts refer to conversations between the Appellant and Ambassador Rawson.[71] The Appellant was therefore aware that these conversations had taken place. The point the Appellant wishes to make by proffering the messages is that the U.S. Ambassador "who was monitoring closely the political events in Rwanda, would have been among the first diplomats to be informed" about the Appellant's eventual appointment as CDR President and would have referred to him as such in his messages.[72] The Appellant's role in the CDR was clearly an issue at trial.[73] Given the Appellant's contacts with Ambassador Rawson, the Appellant could have attempted to contact Ambassador Rawson, either to learn about his reports to the U.S. government in 1994 as a reliable and independent source of political information on Rwanda, or with the objective to adduce his live testimony about the Appellant's role in the CDR at trial.

27. Regarding the letter signed by Théoneste Nahimana, the Appellant's submissions show that he was aware of the existence of this letter at trial. The Appeals Chamber also notes that the report by Ambassador Rawson dated 28 March 1994 suggests that the Appellant was at least involved in the drafting of the letter signed by Théoneste Nahimana, as he was informed about his content before it was signed and took suggestions from Ambassador Rawson as to its content.[74] Furthermore, it was the Appellant himself who gave a copy of this letter to Ambassador Rawson in 1994.[75] The Appeals Chamber notes that a number of CDR documents were adduced at trial on behalf of the Appellant.[76]

[68] Response to the Second Rule 115 Motion, para. 10.
[69] Reply to the Second Rule 115 Motion, para. 6.
[70] Second Rule 115 Motion, para. 8, fn. 7, referring to a statement by the "National Archive".
[71] *Ibid.*, Annex 1: "Message of the US Ambassador Rawson dated 31 March 1994", para. 2: "CDR Counselor, Jean Bosco Barayagwiza, telephoned ambassador about 10:30 PM [illegible word] of 3/30..."; Second Rule 115 Motion, Annex 3: "Message of the US Ambassador Rawson dated 28 March 1994", para. 14: "CDR Deputy-designate Jean-Bosco Barayagwiza called Ambassador morning 3/27..."
[72] Second Rule 115 Motion, para. 11.
[73] *Cf.* Trial Judgement, paras 258-277.
[74] Second Rule 115 Motion, Annex 3: "Message of the US Ambassador Rawson dated 28 March 1994", para. 15.
[75] *Ibid.*, para. 15.
[76] Response to the Second Rule 115 Motion, para. 16, referring to Exhibits 2D12 to 2D34.

The Appellant has thus not shown that the letter was unavailable to him at trial or that he had made efforts to obtain a copy thereof in the exercise of due diligence.

28. In light of the above, while the Appeals Chamber finds that the proffered evidence is *prima facie* relevant and credible, it will admit it as additional evidence on appeal only if it concludes that its exclusion would result in a miscarriage of justice, *i.e.* it *would* have had an impact on the verdict if it had been adduced at trial. The Appeals Chamber notes that the Appellant only suggests the proffered evidence *could* have been a decisive factor for the Trial Chamber's finding with respect to the Appellant's position in the CDR.[77]

29. Concerning the letter from the CDR Party to the Prime Minister, the Appellant argues that the letter was of such importance for the CDR that only the President could have signed it; thus, the Appellant claims, the fact that it was signed not by himself, but by Théoneste Nahimana, shows that he was not acting as the president.[78] However, the Appellant does not advance any support for his argument demonstrating why this letter should have been necessarily signed by the president. The Appeals Chamber recalls that Théoneste Nahimana was the first Vice-President of the CDR.[79] The Statute of the CDR, to which the Appellant refers, shows that the first Vice-President was the "first supplementary legal representative" ("*le premier Représentant Légal Suppléant*") of the CDR and was thus able to represent the party.[80] Considering the Trial Chamber's finding that the Appellant was seen as "working to some extent behind the scenes", the fact that the letter was signed by Théoneste Nahimana is not inconsistent with the Trial Chamber's conclusions. Therefore, the Appeals Chamber finds that this piece of evidence, had it been adduced at trial, would not have changed the verdict with regard to the Appellant's position.

30. As regards the messages sent by the U.S. Ambassador, Mr. David Rawson, the Appellant argues that these documents prove that he was not the CDR National President.[81] In light of the evidence adduced at trial, the Appeals Chamber is not satisfied that the Trial Chamber would have arrived at a different conclusion upon examination of the two messages in question. The Appellant has not shown that the Trial Chamber would necessarily opt for the evidence that he now proffers instead of the totality of the evidence that it chose to rely on to conclude that Barayagwiza held the

[77] Second Rule 115 Motion, paras 19, 23; *see also* para. 25: "The newly discovered evidence enhances the exculpatory value of the existing material and renders all the more obvious that the finding and the conviction against the Appellant, based on the fact that he succeeded Bucyana as the National President of CDR, are baseless and should be quashed."
[78] *Ibid.*, para. 13.
[79] *Ibid.*, para. 15.
[80] Article 19 of the CDR Statute, Second Rule 115 Motion, Annex 4(1), "CDR Statute (Exhibit 2D9)", p. 29.
[81] Second Rule 115 Motion, paras 11 and 15.

position of a superior in the CDR including that, after the assassination of Bucyana in February 1994, Barayagwiza succeeded him as President of the CDR at the national level.[82]

31. The Appeals Chamber also rejects the Appellant's argument in relation to the incompetence of his counsel at trial.[83] While it is true that, where the failure resulted solely from counsel negligence or inadvertence, the Appeals Chamber can permit admission of additional evidence to remedy for such negligence or inadvertence, this would only be allowed if the proffered evidence is of such substantial importance to the success of the appeal such as its exclusion would lead to a miscarriage of justice.[84] In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of counsel.[85] However, in light of the findings above, the Appeals Chamber is not satisfied that non-admission of the proffered evidence would amount to a miscarriage of justice.

32. Finally, with respect to the Appellant's arguments concerning the "already existing exculpatory material erroneously not taken into account by the [T]rial Chamber",[86] the Appeals Chamber notes that these arguments relate to specific grounds of appeal raised by the Appellant against the Trial Judgement and that they will be appropriately addressed by the Appeals Chamber in rendering its appeals judgement on the Appellant's main appeal.[87] Therefore, the Appeals Chamber will not dispose of them in the present decision.

33. In addition to his request for admission of additional evidence, the Appellant argues that the Prosecution failed to disclose the letter signed by Théoneste Nahimana to him under its obligations pursuant to Rule 68(A) of the Rules and that this failure "should be considered as an abuse of

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[82] *See, inter alia* Trial Judgement, para. 258 referring to Exhibit 2D9; para. 260 referring to Alison Des Forges' testimony and Exhibit P141; para. 261 referring to the testimony of Alison Des Forges, Omar Serushago, François-Xavier Nsanzuwera and Exhibits P142, P107/37; para. 263 referring to Witness B3; para. 264 referring to the testimony of Thomas Kamilindi, Alison Des Forges, Jean-Pierre Chrétien, Witness AHI, Witness EB, Witness AFX, Witness Omar Serushago; para. 266 referring to the testimony of Witness ABC, Witness LAG, Omar Serushago, Kamilindi, Kabanda and Alison Des Forges and that of Hassan Ngeze; para. 267 referring to Exhibit 2D35 (the book written by the Appellant "*Le Sang Hutu est-il rouge?*"; and paras 273, 276, 977.

[83] Second Rule 115 Motion, para. 16.

[84] *See, by analogy,* Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 12; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 9; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 8; *Blagojević* Decision of 14 October 2005, para. 8; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002, para. 5.

[85] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 12.

[86] Second Rule 115 Motion, para. 24 referring to Exhibits 2D9, 2D12, P203, P140 and P103/190C.

[87] Appeals Brief, paras 181-193 (Grounds 18-21).

process and a serious obstruction to a fair trial which deserves a sanction".[88] The Appeals Chamber first observes "that the Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory material is known to the Defence and if it is reasonably accessible through the exercise of due diligence".[89] As noted above, the document was known to the Appellant, and he has not demonstrated that the document was not reasonably accessible to him.

34. Second, the Appeals Chamber recalls that "material will fall within the ambit of Rule 68 if it tends to suggest the innocence or mitigate the guilt of the accused, or affects the credibility of Prosecution evidence".[90] The determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement made by and under the responsibility of the Prosecution.[91] Therefore, as noted previously, the Appeals Chamber will 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.[92] In this respect, the Appeals Chamber notes that, if an appellant wishes to show that the Prosecution is in breach of these obligations, he/she must identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecutor's custody or control of the materials requested.[93] Finally, even when the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber will still examine whether the

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[88] Second Rule 115 Motion, para. 14.

[89] *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, para. 15; *Prosecutor v. Tihomir Blaškic*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 296.

[90] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, para. 178.

[91] 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 Disclosure") para. 6; *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; *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; *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"), paras 31-32; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* 26 September 2000 Decision"), paras 38, 45.

[92] *Barayagwiza* Decision on Disclosure, para. 6; *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. 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.

Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.[94] The Appeals Chamber is neither satisfied that the document is of *prima facie* exculpatory nature, nor that the alleged Prosecution's failure to communicate it to the Appellant would have caused him any prejudice.[95]

35. For these reasons, the Appeals Chamber finds that the Appellant's argument that the Prosecution did not fulfil its obligations under Rule 68(A) of the Rules by not disclosing the letter, is unfounded.

THE THIRD RULE 115 MOTION

A. Submissions of the Parties

36. In the Third Rule 115 Motion, the Appellant submits another two messages from U.S. Ambassador Rawson, which he obtained from the same source as the two messages submitted in the Second Rule 115 Motion.[96] Both messages are dated 22 February 1994 and relate to a demonstration by CDR members outside the Ministry of Foreign Affairs in Kigali. The Appellant argues that both messages show that the testimony of Witness AGK at trial about the CDR demonstration is false and that, accordingly, the Trial Chamber's findings based on this evidence are unsafe.[97]

37. The Prosecution responds that the Appellant impermissibly tries to use the procedure of Rule 115 to remedy his failings at his trial and on appeal.[98] The Prosecution argues that the evidence proffered by the Appellant is not new and that he does not advance any argument that could constitute good cause for the late filing of the motion.[99] Finally, the Prosecution argues that the new evidence neither could nor would have been a decisive factor at trial.[100]

B. Discussion

38. As a preliminary matter, the Appeals Chamber observes that the Reply to the Third Rule 115 Motion was filed after the time-limit for its filing had expired. The Appeals Chamber notes the

[93] *Bralo* Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Brđanin* 7 December 2004 Decision, p. 3.
[94] *Bralo* Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153.
[95] *See also supra* at para. 29.
[96] Third Rule 115 Motion, para. 1.
[97] *Ibid.*, paras 6-16.
[98] Response to the Third Rule 115 Motion, paras. 4-7.
[99] *Ibid.*, paras. 8-10.
[100] *Ibid.*, paras. 19-22.

Appellant's explanation that he received the Prosecution's Response to the Third Rule 115 Motion only on 27 November 2006, and thus accepts it as validly filed.

39. The Appeals Chamber notes that the Appellant claims to have obtained the two documents attached to the Third Rule 115 Motion from the same compilation of documents, the "National Archive", as the two messages from Ambassador Rawson submitted in the Second Rule 115 Motion.[101] Considering that the Appellant received the material in August 2006 only, the Appeals Chamber is satisfied that the Appellant has shown good cause for the late filing of the Third Rule 115 Motion.

40. The Appeals Chamber is also satisfied that the proffered evidence is *prima facie* relevant and credible. However, the Appeals Chamber finds that the Appellant has failed to show that the evidence was not available to him at his trial or could not be obtained through exercise of due diligence. The Appeals Chamber recalls that the party adducing additional evidence must establish that the said evidence was not available at trial *in any form whatsoever*.[102] As in the Second Rule 115 Motion, the Appellant again merely asserts that the documents "have been declassified only recently" without giving any further details about the declassification process or any earlier attempts to access the material.[103] As the Prosecution points out, unclassified U.S. documents were available during the Appellant's trial, and the possibility to access classified documents through a Freedom of Information Act application also existed.[104] Further, the Appellant has not shown that he tried to contact Ambassador Rawson to adduce his live testimony at trial. Finally, the Appeals Chamber notes that the Appellant acknowledges that other evidence concerning the date of the demonstration, the most important point of the documents proffered as additional evidence, was available to him.[105]

41. Accordingly, the two documents proffered would be admissible as additional evidence only if they *would* have affected the verdict. According to the Appellant, the two messages from Ambassador Rawson show that Witness AGK's testimony at trial about a CDR demonstration was unreliable, because there are significant contradictions between Witness AGK's testimony and the

[101] Third Rule 115 Motion, para. 1. *See supra*, para. 24.
[102] *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Decision on "Requête en extrême urgence aux fins d'admission de moyen de preuve supplementaire en appel", 9 February 2006, para. 6.
[103] Third Rule 115 Motion, para. 17. *See supra*, para 25.
[104] Response to the Third Rule 115 Motion, para. 10, referring to T. 8 July 2002, p. 42 and T. 9 July 2002, pp. 42-44, 69, 75.
[105] Reply to the Third Rule 115 Motion, para. 18, referring to Response to the Third Rule 115 Motion, para. 12. The evidence in question includes transcripts from Radio Rwanda broadcasts of 21 February 1994.

two messages. The main discrepancies noted by the Appellant are the date of the demonstration and the presence of UNAMIR soldiers.[106]

42. As a preliminary matter, the Appeals Chamber notes that the documents proffered as additional evidence are immaterial to a number of arguments raised by the Appellant, for example, the Trial Chamber's reference to the term "*tubatsembatsembe*" or internal inconsistencies of Witness AGK's testimony.[107] With regard to the date of the demonstration and the presence of UNAMIR soldiers, the Appeals Chamber finds that the Appellant does not show that Witness AGK's testimony and the two messages from Ambassador Rawson relate to the same event. Although the Appellant asserts that there is no evidence that there was more than one demonstration,[108] the very discrepancies noted by the Appellant would suggest that Witness AGK and Ambassador Rawson refer to two different events.

43. Further, the Appeals Chamber notes that the Trial Chamber was aware of the alleged discrepancies in Witness AGK's testimony. The witness was cross-examined about the date he gave for the demonstration (May 1993). Counsel in particular asked the witness whether the demonstration took place before or after the signing of the Arusha accords[109] and explained that the witness referred to the presence of UNAMIR soldiers, which would have been impossible in May 1993 because UNAMIR was deployed only after the signing of the Arusha accords.[110] Nevertheless, the Trial Chamber was satisfied that "May 1993 was [Witness AGK's] recollection of the date" and accepted his testimony.[111] Finally, the Appeals Chamber notes that Witness AGK's evidence about the demonstration was only one of several bases for the Trial Chamber's findings regarding the Appellant's role in the CDR.[112]

44. In light of the above, the Appeals Chamber finds that the documents proffered as additional evidence with the Third Rule 115 Motion would not have been a decisive factor in the Trial Chamber's decision. Accordingly, the Appeals Chamber dismisses the Third Rule 115 Motion it in its entirety.

[106] Third Rule 115 Motion, para. 14.
[107] *Id.*
[108] Reply to the Third Rule 115 Motion, para. 20.
[109] T. 25 June 2001, pp. 28-29.
[110] *Ibid.*, p. 30.
[111] Trial Judgement, para. 710.
[112] *Ibid.*, paras 714-719.

DISPOSITION

45. For the foregoing reasons, the Appeals Chamber **GRANTS** the Corrigendum Motion; **DISMISSES** the Motion Giving Notice of Delay; and **DISMISSES** the First Rule 115 Motion, the Second Rule 115 Motion and the Third Rule 115 Motion in their entirety.

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

Dated this 8th day of December 2006.
At The Hague, The Netherlands

Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

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APPEALS CHAMBER – PROOF OF SERVICE
CHAMBRE D'APPEL – PREUVE DE NOTIFICATION

08December 2006

Case Name / *Affaire:* ***NAHIMANA ET AL.***

Case No / *No. de l'affaire*: ***ICTR-99-52-A***

Ferdinand NAHIMANA,
Jean-Bosco BARAYAGWIZA,
Hassan NGEZE
v.
THE PROSECUTOR

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✖ Ms Félicité Talon

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✖ Judge / Juge Theodor Meron

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

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