7382/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
20 June 2006
(7382/H – 7372/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: 20 June 2006

**Ferdinand NAHIMANA**
**Jean-Bosco BARAYAGWIZA**
**Hassan NGEZE**
***(Appellants)***

v.

**THE PROSECUTOR**
***(Respondent)***

ICTR Appeals Chamber
Date: 20 June 2006
Action: P.T.
Copied To: concerned Judge parties, St Orders, LOs, ALOs, LR

*Case No. ICTR-99-52-A*

# DECISION ON APPELLANT HASSAN NGEZE'S MOTIONS FOR APPROVAL OF FURTHER INVESTIGATIONS ON SPECIFIC INFORMATION RELATING TO THE ADDITIONAL EVIDENCE OF POTENTIAL WITNESSES

**Counsel for Hassan Ngeze**
Mr. Bharat B. Chadha

**Counsel for Ferdinand Nahimana**
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Mr. James Stewart
Mr. Neville Weston
Mr. Abdoulaye Seye

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NAME / NOM: KOFFI KUMELIO A. AFANDE
SIGNATURE: DATE: 20 June 2006

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 two motions filed by Appellant Hassan Ngeze ("Appellant"):

- "Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant)" filed on 6 January 2006 ("First Motion");

- "Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – the then Corporal Habimana" filed on 16 January 2006 ("Second Motion").

2. The Prosecution responded to the First and the Second Motions on 16 and 25 January 2006, respectively.[1] The Appellant's replies were filed on 26 and 30 January 2006, respectively.[2]

3. The Appeals Chamber notes that the Reply to the First Motion was filed by the Appellant six days late[3] and that no good cause has been shown for such delay. Accordingly, the Appeals Chamber will not consider the Reply to the First Motion.

## I. APPLICABLE LAW

4. The Appeals Chamber recalls that an appeal pursuant to Article 24 of the Statute of the Tribunal ("Statute") is not a trial *de novo*,[4] and cannot be viewed as an opportunity to remedy any

[1] "Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant)'", 16 January 2006 ("Response to the First Motion"); Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of further Investigation of the Specific Information relating to the Additional Evidence of Potential Witness – the then Corporal Habimana'", 25 January 2006 ("Response to the Second Motion").

[2] "'Reply to the Prosecutor's Response', to the Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant)", 26 January 2006 ("Reply to the First Motion"); "Appellant Hassan Ngeze's Reply to 'The Prosecutor's Response to Appellant Hassan Ngeze's to [*sic*] Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – the then Corporal Habimana", 30 January 2006 ("Reply to the Second Motion").

[3] *See* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002, para. 12, which provides, *inter alia*, that a reply must be filed within four days of the filing of the response.

[4] 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; 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 on Six Motions"), para. 5; *see* also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177.

"failures or oversights" by a party during the pre-trial and trial phases.[5] For these reasons, investigations should be carried out during the pre-trial and trial stages.[6]

5. Further, according to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), for additional evidence to be admissible on appeal, the following requirements must be met. 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 will be 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.[7]

With regard 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 admit evidence at this stage only if it appears to be reasonably capable of belief or reliance. Admission of the evidence is without prejudice to the later determination of the weight that the new evidence will be afforded.[8]

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."[9] To satisfy this, the evidence must be such that it *could* have had an impact on the verdict, *i.e.* it, in the case of a request by a defendant, it *could* have shown that a

[5] Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 ("Decision on Investigation"), p. 3; Decision on Six Motions, para. 5; *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997, para. 15.

[6] The Registrar generally does not fund investigations at the appeal stage (Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 ("Decision on Assistance"), para. 2; Decision on Investigation, p. 3; Decision of 4 October 2005, p. 4; Decision on Six Motions, para. 5). However, in an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be investigated further in order to avoid a miscarriage of justice, and that this specific information was not available at trial through the exercise of due diligence (Decision on Assistance, para. 3; Decision on Six Motions, para. 5).

[7] *Prosecutor v. 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].

[8] *See, e.g.*, Decision on Six Motions, para. 7; *Prosecutor v. 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.

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

conviction was unsafe.[10] Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.

7. The Appeals Chamber has considered that, where the additional evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the evidence may still be admitted if the moving party establishes that its exclusion *would* amount to a miscarriage of justice, inasmuch as, had it been adduced at trial, it *would* have had an impact on the verdict.[11]

8. The Appeals Chamber recalls that, whether the additional evidence was available at trial or not, it must always be assessed in the context of the evidence presented at trial, and not in isolation.[12]

## II. FIRST MOTION

9. In the First Motion, the Appellant requests the Appeals Chamber to "allow further investigation of the specific information in possession of the Appellant relating to the additional evidence of witness Jean Bosco Barayagwiza in order to avoid miscarriage of justice and enable him to file motion to present additional evidence of the potential witness Jean Bosco Barayagwiza which was not available at trial and could not have been discovered despite the exercise of due diligence".[13] The Prosecution opposes this request and submits that the First Motion should be dismissed in its entirety.[14]

### A. Submissions of the Parties

10. The Appellant submits that the new evidence that could be provided by Jean-Bosco Barayagwiza if the First Motion were granted, is crucial to the issue of conspiracy between the three co-Appellants in the present case, notably with regard to the Trial Chamber's finding that "the accused Jean-Bosco Barayagwiza acted as the lynchpin among the three Accused, collaborating

[10] Decision on Six Motions, para. 8; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 68; *Prosecutor v. 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; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Decision of 31 October 2003"), p. 3.

[11] Decision on Six Motions, para. 9; *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. *See* also *Prosecution v. Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 18; *Prosecution v. 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.

[12] Decision on Six Motions, para. 10; *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; *Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 25.

[13] First Motion, preambulary para.

closely both with Nahimana and Ngeze".[15] More specifically, he claims that Jean-Bosco Barayagwiza "is ready and willing to testify before the Appeals Chamber" and, if allowed to do so, would provide details and clarifications concerning his role in the CDR and the RTLM activities and thereby undermine the abovementioned finding of the Trial Chamber.[16] The Appellant further submits that this evidence is particularly relevant to the "Appellant's connection with the alleged criminal acts narrated by witness AHA" and would not only have an impact on the verdict but would also "have the effect of demolishing the credibility of the said witness AHA".[17]

11. The Appellant avers that this evidence was not available to him at trial and could not be obtained through the exercise of due diligence due to the "non accessibility" of Jean-Bosco Barayagwiza.[18] The Appellant requests the Appeals Chamber to authorize him to take a written statement of Jean-Bosco Barayagwiza with a view to filing a motion pursuant to Rule 115 of the Rules requesting the Appeals Chamber to summon Jean-Bosco Barayagwiza as a witness on appeal.[19] The Appellant affirms that such exercise would not result in any expenses to the Registry nor would it prejudice the Prosecution.[20]

12. The Prosecution responds that the First Motion does not meet the requirements that would justify the request for further investigation, in particular, because the Appellant has neither demonstrated the existence of exceptional circumstances, nor adequately addressed the "'specific information' to be further investigated".[21] According to the Prosecution, the First Motion suggests a "fishing expedition" since it is unclear what further investigation is requested, what information is sought, or, what is the source of such information.[22]

13. Further, the Prosecution submits that the alleged evidence is "neither credible nor reliable, nor *could* it or *would* it have any impact on the verdict under appeal".[23] It also argues that the Appellant has not demonstrated that the tendered evidence was not available at trial or was not discoverable through due diligence.[24] In particular, it points out that during the cross-examination by the Appellant's Counsel in November 2000, Witness AHA testified at length as to his relationship with the Appellant and Jean-Bosco Barayagwiza as well as about their positions in

[14] Response to the First Motion, paras 2 and 17.
[15] First Motion, paras 1 and 5 with reference to *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement"), paras 1050, 887-889, 938, 939, 943, 969, 1042, 1043, 1045-1047, 1049 and 1051-1055.
[16] First Motion, para. 1.
[17] *Ibid.*, paras 6 and 11.
[18] *Ibid.*, paras 2-4.
[19] *Ibid.*, para. 7.
[20] *Ibid.*, para. 13.
[21] Response to the First Motion, paras 2-4, 7.
[22] *Ibid.*, para. 7.
[23] *Ibid.*, paras 2, 5-6, 9-10.

RTLM, CDR and Kangura.[25] The Prosecution also refers to the fact that the Appellant has had access to and discussions with Jean-Bosco Barayagwiza, the purported source of the additional evidence.[26] Thus, the requested investigation cannot result in identifying any new and specific information that was not known to the Appellant during the trial.[27]

14. Moreover, the Prosecution submits that compelling one co-accused to testify for another co-accused in the same case would constitute a breach of the accused's right to silence in terms of Article 20(4)(g) of the Statute.[28] It concludes that it is a matter for Jean-Bosco Barayagwiza to decide whether he wishes to cooperate with the Appellant's Counsel and that the Appeals Chamber cannot compel him to do so.[29]

## B. Discussion

15. As a preliminary matter, the Appeals Chamber notes that the subject of the First Motion is not clear.[30] The Appeals Chamber will only examine the Appellant's request for obtaining a written statement from Jean-Bosco Barayagwiza, since only that request is explicitly formulated in the First Motion. Also, the Appeals Chamber considers that the Appellant's Counsel does not need the Appeals Chamber's authorization or an order from the Appeals Chamber to obtain a statement from Jean-Bosco Barayagwiza. In this regard, the Appeals Chamber notes the Appellant's submission that Jean-Bosco Barayagwiza is prepared to provide a written statement to him,[31] as well as the fact that Jean-Bosco Barayagwiza is a detainee in the United Nations Detention Facility in Arusha, not subject to any restrictive or protective measures that would preclude the Appellant's Counsel from taking a statement from him. Furthermore, the Appeals Chamber notes that the Appellant submits that taking the statement from Jean-Bosco Barayagwiza would not result in any expenses for the Registry of the Tribunal.

16. In any event, noting that the Appellant seeks to obtain Jean-Bosco Barayagwiza's statement with a view to seeking leave to present additional evidence, the Appeals Chamber recalls that under Rule 115(A) of the Rules, a motion for admission of additional evidence on appeal must be filed within seventy-five days from the date of the trial judgement, unless good cause is shown for the delay. The Appeals Chamber understands the Appellant to submit that good cause for the delay of

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[24] *Ibid.*, paras 13-15.
[25] *Ibid.*, para. 13.
[26] *Ibid.*, para. 15.
[27] *Id.*
[28] *Ibid.*, para. 11.
[29] *Id.*
[30] First Motion, paras 6-7: the use of the term "the said witness" with regard to both Witness AHA and Jean-Bosco Barayagwiza is confusing.
[31] *Ibid.*, para. 1.

such a filing more than two years after the Trial Judgement[32] is that, in light of Jean-Bosco Baraygwiza's refusal to participate in the trial, there was no accessibility to him until recently, even through his own counsel.[33] However, the Appeals Chamber notes that the Appellant has not indicated how and when he was first able to gain access to Jean-Bosco Barayagwiza for evidence or information. Even if Jean-Bosco Barayagwiza's absence during the trial were to be considered by the Appeals Chamber as justifying the fact that such evidence was neither available at trial nor could have been obtained through the exercise of due diligence, the Appellant has failed to show why such a request could not have been submitted in time during the appeals proceedings. In this regard, the Appeals Chamber notes that Jean-Bosco Barayagwiza has actively participated in the preparation of his own appeal since the beginning of the appeals proceedings in early 2004.

17. The Appeals Chamber is also not persuaded by the Appellant's argument that the information referred to in the First Motion was only first obtained partly through issues raised in the confidential "Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" of 28 December 2005 ("Barayagwiza's Rule 115 Motion").[34] The paragraphs of the said motion referred to by the Appellant[35] only address general issues with regard to Witness AHA's testimony at trial and Jean-Bosco Barayagwiza's potential testimony on appeal concerning *his* role in the events which occurred in Rwanda in 1990 – 1994. The Appeals Chamber considers that the Appellant has failed to establish that Barayagwiza's Rule 115 Motion contains new information pertinent for the Appellant's case that was unknown to the Appellant before the date on which it was filed, thereby preventing him from filing his First Motion until 6 January 2006. Therefore, the Appeals Chamber finds that the filing of Barayagwiza's Rule 115 Motion at the end of December 2005 also does not constitute good cause for the late submission of the First Motion.

18. In light of the findings above, the Appeals Chamber does not consider it necessary to address the other arguments made by the Appellant.

## II. SECOND MOTION

19. The Appellant requests the Appeals Chamber to authorize further investigation of information relating to "the additional evidence of potential witness Habimana in order to avoid miscarriage of justice and enable him to file motion to present additional evidence of the potential

[32] The Appeals Chamber recalls that the Trial Judgement in this case was rendered on 3 December 2003.
[33] First Motion, paras 3-4.
[34] First Motion, para. 2.
[35] "Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)", 28 December 2005, paras 80, 103 and 104. *Also see* Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence pursuant to Rule 115, 5 May 2006, para. 27 finding Jean-Bosco Barayagwiza's request to testify in his own case under Rule 115 of the Rules as being filed untimely without good reason shown for such delay.

witness Habimana",[36] which he cannot do without conducting further interviews of Habimana and obtaining a written statement from him with the leave of the Appeals Chamber.[37] He further requests the Appeals Chamber to allow him to interview former Defence investigators Joseph Nzakunda and Augustine Tumwesige.[38] The Prosecution objects to the Second Motion and prays the Appeals Chamber to dismiss it in its entirety.[39]

### A. Submissions of the Parties

20. The Appellant submits that he has "specific information" that the then Corporal Habimana informed the Appellant's former Defence investigators that he was now ready and willing to testify that "during the period between 6th April and 9th April 1994 while he was on duty as Corporal at the military camp at Gisenyi under the Command of the then Colonel Anatole Nsengiyumva, he witnessed [...] the Appellant in military custody at the said camp during the said dates".[40] The Appellant argues that such evidence would undermine the credibility of Prosecution Witnesses Serushago, EB and AHI, as well as impact the Trial Chamber's finding with regard to the Appellant's alibi.[41]

21. The Appellant submits that this information was neither available to him earlier nor could it have been obtained through exercise of due diligence, since "the said Corporal Habimana had left the country [] when the RPF took over, and was presumed to have died during [c]holera epidemic in Congo".[42] The Appellant argues that non-admission of such evidence would result in further miscarriage of justice.[43]

22. The Prosecution responds that in the Second Motion, the Appellant has not shown the existence of exceptional circumstances that would justify the request for further investigation.[44] It adds that no new and specific information that was unknown to the Appellant during his trial has been identified in the Second Motion as the Appellant submitted the same material allegation at trial through a number of witnesses and his own testimony.[45]

23. As to the reliability of the alleged information, the Prosecution asserts that it is incredible that "more than 10 years after the events, one Corporal Habimana, who has been allegedly living

[36] Second Motion, preambulary para.
[37] *Ibid.*, para. 5.
[38] *Ibid.*, para. 10.
[39] Response to the Second Motion, para. 2.
[40] Second Motion, para. 1.
[41] *Ibid.*, paras 3, 4 with references to the Trial Judgement, paras 775, 812, 824 and 829.
[42] *Ibid.*, para. 2.
[43] *Ibid.*, para. 7-8.
[44] Response to the Second Motion, paras 2, 4.
[45] *Ibid.*, paras 11-13.

outside Rwanda, [...] would now be able to recall the precise dates and time he saw the Appellant in military custody, among other detainees".[46] The Prosecution also notes that the purportedly new information had been collected by two former investigators of the Appellant who were dismissed from the case in February 2001, for dishonesty.[47]

24. It further argues that the "[p]urported evidence needs not be further investigated as it *could* and *would* not have any impact on the verdicts under appeal", but would rather add to the material inconsistencies found by the Trial Chamber.[48]

25. Finally, the Prosecution adds that the Second Motion "can only be understood as a request for approval to seek funding from the Registrar"[49] in order "to go out and verify what amounts to nothing more tangible than rumor and innuendo" and is thus framed to suggest a "fishing expedition"[50]. It insists that the "requested investigation would be redundant and a further waste of the time and resources of the Tribunal".[51]

26. The Appellant replies that he is not in possession of any more specific information with regard to his request and that is why he is seeking authorization to conduct a further investigation.[52] He adds that it was not possible for him to discover the information "until recently when the said potential witness expressed his wish to testify before the Appeals Chamber".[53] The Appellant claims that, if authorized, the requested investigation will be carried out by the existing and available members of the Defence team and would not entail, at this stage, any funding from the Tribunal.[54] Finally, he argues that "any discussion about the application of Rule 115 at this stage is premature, irrelevant and ought not to be taken into consideration for the purpose of the present motion".[55]

## B. Discussion

27. The Appeals Chamber first notes, as it did with the Appellant's First Motion, that generally, no authorization is needed for the Appellant's Counsel to contact potential witnesses with the view of obtaining written statements from them, unless any such witnesses are subject to specific protective measures. Since the Appellant neither requests any funding from the Registry of the

[46] *Ibid.*, para. 6 (footnotes omitted).
[47] *Ibid.*, paras 7-9.
[48] *Ibid.*, paras 2, 14-16.
[49] *Ibid.*, para. 3.
[50] *Ibid.*, para. 5.
[51] *Ibid.*, para. 16.
[52] Reply to the Second Motion, para. 2.
[53] *Ibid.*, para. 3.
[54] *Ibid.*, para. 1.
[55] *Ibid.*, para. 5.

International Tribunal for such "further investigation" nor justifies why his Counsel would be unable to collect such information on his behalf without intervention of the Appeals Chamber, there was no reason for the Appellant to seize the Appeals Chamber with such request at this stage.

28. Likewise, considering that the Appellant seeks in the Second Motion to obtain the potential witness' statement with a view to seeking leave to present additional evidence on appeal under Rule 115 of the Rules,[56] the Appeals Chamber finds it appropriate, as it did with the First Motion, to associate the request for further investigation with the requirements for timely filing of a motion under Rule 115.[57]

29. The Appeals Chamber notes that submission of the additional evidence that the Appellant seeks to obtain in the Second Motion would take place more than two years after the Trial Judgement was rendered, which makes the filing of the Second Motion untimely. The Appeals Chamber recalls that, in order to demonstrate that it was not able to comply with the time limit set in Rule 115 of the Rules for filing a motion for additional evidence within 75 days from the date of the rendering of the trial judgement, the moving party is required to demonstrate good cause for the delay and submit the motion in question "*as soon as possible* after it became aware of the existence of the evidence sought to be admitted".[58] The Appellant has failed to show that he has complied with these requirements.

30. In this regard, the Appeals Chamber considers that the Second Motion contains no indication as to how and when the Appellant was able to gain access to the purported information. Indeed, the Appellant contented himself with fairly general allegations as to unavailability of such information at earlier stages without specifying how, when and where the potential witness became available to the Appellant's former investigators or how such information was further transmitted to the Appellant and/or his counsel. Moreover, the Appeals Chamber reiterates that the relevant time is when the witness became available to give evidence to the moving party, and not when a witness statement was in fact taken.[59]

31. In light of the foregoing, the Appeals Chamber considers it unnecessary to address the remainder of the Appellant's arguments in his Second Motion.

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[56] Second Motion, preambulary para.

[57] *See* Section I on Applicable Law; *see also* para. 17 above. It is furthermore recalled that, when seized with motions for funding of investigation in appeal, it is relevant for the Appeals Chamber to consider whether it is likely that the evidence thereby obtained would meet the requirements for subsequent admission under Rule 115 (*Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-01-64-A, Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 13).

[58] *Kordić and Čerkez* Decision, p. 2.

[59] *Ibid.*, p. 3.

## III. DISPOSITION

32. For the foregoing reasons, the Appeals Chamber **DISMISSES** both the First and the Second Motions.

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

Dated this 20th day of June 2006,

At The Hague, The Netherlands.

Fausto Pocar
Presiding Judge

**[Seal of the Tribunal]**

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| 20 June 2006 | Case Name / *Affaire:* ***NAHIMANA ET AL.*** <br> Case No / *No. de l'affaire:* ***ICTR-99-52-A*** | Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE <br> v. <br> THE PROSECUTOR |
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