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**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

**ICTR-99-52-A
12 January 2007
(9698/H - 9688/H)**

P.T.

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Decision of: 12 January 2007

ICTR Appeals Chamber Date: 12 January 2007 Action: P.T. Copied To: concerned Judges Parties, LOS, LOS, LOS, LOS, Archives

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

v.

**THE PROSECUTOR
(Respondent)**

Case No. ICTR-99-52-A

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**DECISION ON APPELLANTS JEAN-BOSCO BARAYAGWIZA'S AND
FERDINAND NAHIMANA'S MOTIONS FOR LEAVE TO PRESENT
ADDITIONAL EVIDENCE PURSUANT TO RULE 115**

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International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS NAME / NOM: <i>Patrice Tchisadiamba</i> SIGNATURE: <i>[Signature]</i> DATE: <i>12/01/07</i>

Case No. ICTR-99-52-A

12 January 2007

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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 "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed by Appellant Jean-Bosco Barayagwiza on 7 December 2006 ("Barayagwiza's Motion" and "Barayagwiza", respectively), requesting the Appeals Chamber to admit a document "considered as a summary Report of a long investigation held by [French Judge Jean-Louis Bruguière] in relation to the assassination of President Habyarimana of Rwanda on 6th April 1994".¹ The Appeals Chamber is also seized of the "*Requête urgente de la Défense aux fins d'être autorisé à présenter un élément de preuve supplémentaire (article 115 RPP)*" filed by Appellant Ferdinand Nahimana on 14 December 2006 ("Nahimana's Motion" and "Nahimana", respectively), seeking to join Barayagwiza's request to admit the said material as additional evidence on appeal.²

2. The Prosecution responded to Barayagwiza's Motion on 14 December 2006, requesting that it be dismissed in its entirety.³ Barayagwiza replied on 22 December 2006.⁴ The Prosecution responded to Nahimana's Motion on 21 December 2006, requesting its dismissal,⁵ and Nahimana replied on 4 January 2007.⁶

3. The proffered material consists of the *Ordonnance de soit-communicé* issued on 17 November 2006 by the French *juge d'instruction* and *Premier Vice-Président au Tribunal de Grande Instance de Paris* Jean-Louis Bruguière submitting the results of his investigation to the Public Prosecutor (*Procureur de la République*) and recommending the issuance of international arrest warrants ("Bruguière's Order").⁷

¹ Barayagwiza's Motion, para. 2, Annex 1.

² Nahimana's Motion, para. 2.

³ Prosecutor's Response to "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)", 14 December 2006 ("Response to Barayagwiza's Motion").

⁴ The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution's Response to the "Appellant's Motion for Leave to Present Additional Evidence (Rule 115)", 22 December 2006 ("Barayagwiza's Reply").

⁵ Prosecutor's Response to the Appellant Nahimana "*Requête Urgente de la Défense aux fins d'être Autorisée à Présenter un Élément de Preuve [sic] Supplémentaire (article 115 RPP)*", 21 December 2006 ("Response to Nahimana's Motion").

⁶ *Réplique de la Défense à la Réponse du Procureur sur la « Requête urgente de la Défense aux fins d'être autorisé à présenter un élément de preuve supplémentaire (article 115 RPP) »*, 4 January 2007 ("Nahimana's Reply").

⁷ The Appeals Chamber notes that there are four Annexes to Barayagwiza's Motion, but declines to consider the material contained in Annexes 2-4 as tendered as additional evidence on appeal, since Barayagwiza only refers to these documents in support of his arguments for admission of Bruguière's Order and does not explicitly seek admission of the said three documents.

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I. PROCEDURAL BACKGROUND

4. Trial Chamber I rendered its Judgement in the present case on 3 December 2003.⁸ Barayagwiza filed a Notice of Appeal on 22 April 2004,⁹ which was amended on 27 April 2004.¹⁰ His Appellant's Brief was filed on 25 June 2004.¹¹ Pursuant to leave granted by the Appeals Chamber,¹² Barayagwiza filed the "Amended Notice of Appeal" and "Amended Appellant's Brief" on 12 October 2005 ("Barayagwiza's Notice of Appeal" and "Barayagwiza's Appellant's Brief", respectively). The briefing with respect to Barayagwiza's appeal was completed on 12 December 2005.¹³ Nahimana filed his Notice of Appeal on 4 May 2004 and his Appellant's Brief on 27 September 2004.¹⁴ The briefing with respect to Nahimana's appeal was completed on 21 April 2006.¹⁵

II. APPLICABLE LAW

5. The Appeals Chamber recalls that under the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia, an appeal pursuant to Article 24 of the Statute of the Tribunal is not a trial *de novo*¹⁶ and is not an opportunity for a party to remedy any

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

⁹ « Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) », 22 April 2004.

¹⁰ « Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' », 27 April 2004.

¹¹ « Mémoire d'Appel », 25 June 2004.

¹² 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 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.

¹³ The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Barayagwiza's 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).

¹⁴ « Acte d'appel », 4 May 2004 ; « Mémoire d'appel (révisé) », 27 September 2004 (confidential version) and 1 October 2004 (public version) ("Nahimana's Appellant's Brief").

¹⁵ « Réplique de la Défense », 21 April 2006 ("Nahimana's Reply Brief").

¹⁶ 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, 8 December 2006 ("Decision of 8 December 2006"), para. 4; 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; Decision on Appellant Hassan Ngeze's Motion for Approval of the Investigation at the Appeal Stage, 3 May 2005, p. 3 ("Decision of 3 May 2005"); *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177.

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“failures or oversights” made during the pre-trial and trial phases.¹⁷ 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”.¹⁸

6. 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 hearing, cogent reasons are shown for a delay”.¹⁹ Second, the Appeals Chamber must find “that the additional evidence was not available at trial and is relevant and credible”.²⁰

7. 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.²¹

8. Once it has been determined that the proffered material meets these conditions, the Appeals Chamber will determine whether the evidence “could have been a decisive factor in reaching the decision at trial.”²² 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.²³ Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.²⁴ 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

¹⁷ Decision of 8 December 2006, para. 4; Decision of 23 February 2006, para. 5; Decision of 4 October 2005, p. 3; Decision of 3 May 2005, p. 3; *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997, para. 15.

¹⁸ Decision of 8 December 2006, para. 4; 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.

¹⁹ Rule 115(A) of the Rules as amended on 10 November 2006.

²⁰ Rule 115(B) of the Rules.

²¹ Decision of 8 December 2006, para. 5; Decision of 23 February 2006, para. 7; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Confidential Decision on Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 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.

²² Rule 115 (B) of the Rules.

²³ Decision of 8 December 2006, para. 6; Decision of 23 February 2006, para. 8; *Kupreškić Appeal Judgement*, para. 68; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Applications 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.

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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. That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.²⁵

III. BARAYAGWIZA'S MOTION

A. Submissions of the Parties

9. Barayagwiza submits that the proffered evidence was unavailable at trial and could not have been produced earlier, since Bruguière's Order was signed only on 17 November 2006 and issued thereafter.²⁶ With reference to arguments contained in his motion of 28 December 2005,²⁷ Barayagwiza reiterates that Bruguière's Order is relevant to his appeal since the findings therein with respect to President Juvénal Habyarimana's assassination are "of direct consequence to the [present] case".²⁸ In particular, Barayagwiza refers to the following finding of the Trial Chamber:

The Defence contends that the downing of the President's plane and the death of President Habyarimana precipitated the killing of innocent Tutsi civilians. The Chamber accepts that this moment in time served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and CDR, before and after 6 April 1994.²⁹

According to Barayagwiza, Bruguière's Order "establishes a *prima facie* case that, contrary to the speculation of the Trial Chamber, the CDR party, RTLM and *Kangura* were not the bullets in the gun as that weapon of destruction in the form of the assassination was the sole responsibility of the RPF and President Kagame".³⁰ More specifically, Barayagwiza argues that the proffered evidence would undermine the Trial Chamber's conclusions that the *Coalition pour la Défense de la République* ("CDR") was an extremist party and that he held superior responsibility with regards to

²⁴ Decision of 8 December 2006, para. 6; Decision of 23 February 2006, para. 8.

²⁵ Decision of 8 December 2006; para. 6; *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.

²⁶ Barayagwiza's Motion, para. 4.

²⁷ *Ibid.*, para. 6 referring to "The Appellant Jean-Bosco Barayagwiza's Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed confidentially on 28 December 2005 (dismissed in its entirety by the Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006).

²⁸ Barayagwiza's Motion, para. 7.

²⁹ Trial Judgement, para. 953.

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it and its members.³¹ Further, he asserts that the proffered evidence could have had an impact on the Trial Chamber's perception of the CDR and its role in the events of 1994 because it shows that the CDR was not involved in the assassination of President Habyarimana.³² Therefore, he claims, "it is arguable there was no conspiracy to commit genocide or crimes against humanity against Tutsi in order to preserve the gains of [the] 1959 Revolution as asserted by the Trial Chamber".³³ Barayagwiza concludes that, on the basis of the conclusions contained in Bruguière's Order, all findings and convictions relating to his participation in a policy, ideology or plan aimed at exterminating the Tutsi must be reviewed by the Appeals Chamber, together with all other counts for which he was convicted at trial.³⁴

10. The Prosecution responds that the proffered material does not constitute new evidence and has no relevance to the issues in this appeal.³⁵ In particular, the Prosecution submits that "[e]vidence of allegations that RPF members are responsible of the downing of President Habyarimana's plane, on 6 April 1994, was available to [Barayagwiza]".³⁶ The Prosecution also argues that Barayagwiza has not demonstrated that the proffered evidence has probative value, since "a warrant of arrest, notwithstanding its form and content, cannot, in any way, be construed as conclusive proof of anything".³⁷ It further avers that the material is irrelevant since the issue of who was responsible for President Habyarimana's death is not relevant to Barayagwiza's convictions.³⁸ The Prosecution also mentions that the Trial Chamber explicitly stated that "evidence that would require a determination of the party responsible for the shooting down, *would not be relevant* in this case".³⁹ According to the Prosecution, the proffered material goes, at best, to the narrative context in which the material facts of the case arose,⁴⁰ but could or would not have been a decisive factor in the decision at trial.⁴¹

11. In reply, Barayagwiza reiterates that the proffered evidence is admissible under Rule 115 of the Rules, submitting, *inter alia*, that it is relevant to the Trial Chamber's findings pertaining to the

³⁰ Barayagwiza's Motion, para. 8.

³¹ *Ibid.*, para. 10 referring to the Trial Judgement, paras 106, 261, 308, 312, 323, 951, 977, 1054, 1055 and 1062.

³² *Ibid.*, paras 10, 15.

³³ *Ibid.*, para. 11 referring to the Trial Judgement, paras 951 and 967.

³⁴ *Ibid.*, para. 13.

³⁵ Response to Barayagwiza's Motion, paras 4-17.

³⁶ *Ibid.*, paras 5-6 referring, *inter alia*, to Exhibit 2D35 (Barayagwiza's book "Rwanda: Le Sang Hutu Est-il Rouge?" in which he maintained that the RPF was responsible for the downing of the plane) and Barayagwiza's closing arguments at trial (T. 19 August 2003, p. 31 lines 24-27).

³⁷ Response to Barayagwiza's Motion, paras 9-10.

³⁸ *Ibid.*, para. 11.

³⁹ *Ibid.*, para. 14 [emphasis in the original] referring to *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Urgent Motion to Bar the Ngcze Defence from Calling Wayne Madsen as Witness, 23 January 2003, paras 4-7 and to *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Expert Witnesses for the Defence, 24 January 2003, para. 9.

⁴⁰ Response to Barayagwiza's Motion, para. 16.

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CDR's role in the genocide in Rwanda. In this regard, he alleges that the Trial Chamber "was inherently biased against [him]" and that it rendered the Trial Judgement based on a perception that "both the CDR party and the RTLM [...] were the instruments of Hutu extremism [...] and definitively as the bullet for the weapon which was the trigger to the tragic events of 1994".⁴² Barayagwiza further advances that there is no evidence that he "would have had the ability, pre-knowledge or the access to intelligence necessary to be party to any [...] plan" involving the downing of President Habyarimana's plane or that he "was party to the re-programming of the RTLM in this manner".⁴³ Consequently, he asserts, "[t]he planning of what happened afterwards must have been largely in the hands of the RPF and any crimes against humanity or alleged genocide must have been a reaction to that event"⁴⁴ and therefore excludes his personal responsibility for those crimes.⁴⁵

B. Analysis

12. Considering that Bruguière's Order was issued on 17 November 2006, the Appeals Chamber is satisfied that Barayagwiza's Motion could not have been filed within the time limit prescribed by Rule 115(A) of the Rules and that the proffered material was unavailable at trial. The Appeals Chamber is also satisfied that this document could not have been obtained by Barayagwiza prior to 17 November 2006 through the exercise of due diligence.

13. The Appeals Chamber finds, however, that Bruguière's Order is not relevant to a material issue in the present case. According to Judge Bruguière, the CDR had no reason to make an attempt on President Habyarimana's life and the investigation did not confirm that the assassination could be attributable to Hutu extremists.⁴⁶ After having thoroughly examined the references to the Trial Judgement provided by Barayagwiza,⁴⁷ the Appeals Chamber concludes that the information

⁴¹ Response to Barayagwiza's Motion, paras 18-23.

⁴² Barayagwiza's Reply, paras 18-19 referring to the Trial Judgement, paras 953, 973, 977 and 1053.

⁴³ *Ibid.*, para. 20.

⁴⁴ *Ibid.*, para. 22.

⁴⁵ *Ibid.*, paras 25-28.

⁴⁶ Bruguière's Order, pp 12-13 (Barayagwiza's Motion, Annex 1).

⁴⁷ Indeed, para. 106 of the Trial Judgement cites *verbatim* the review of the historical context as described in *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras 80-106, which does not conclude on the possibility of President Habyarimana's aircraft crash being organized by the CDR or any of its members. In para. 118 the Trial Chamber found, *inter alia*, that while "a widespread and systematic attack against the Tutsi population commenced following the shooting down of the plane carrying President Habyarimana and his death on 6 April 1994", such attacks "formed part of a larger initiative, beginning in 1990, which systematically targeted the Tutsi population as suspect accomplices of the RPF". Para. 261 of the Trial Judgement simply addresses the evidence in relation to Barayagwiza's position within the CDR. Para. 308 relates Witness AFB's testimony with respect to CDR activities, including rallies at which its leaders would call for extermination of the Tutsis. Para. 312 refers to the testimony of Witness François-Xavier Nsanzuwera to the fact that the CDR was composed of Hutu extremists. Para. 323 conveys the evidence received from Witnesses AHA, ABE and ABC to the fact that, *inter alia*, the activities of the CDR could be characterised as extremist and were aimed at extermination of the Tutsis. In addition, none of the above-cited paragraphs contain any factual finding of the Trial Chamber. Furthermore, in paras 951 and 953 the Trial Chamber

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contained in Bruguière's Order is irrelevant to the Trial Chamber's findings since nothing in the Trial Judgement suggests that the CDR was involved in the death of President Habyarimana. The Trial Chamber simply considered that the death of President Habyarimana "served as a trigger for the events that followed".⁴⁸ Significantly, whether or not the CDR was involved in the death of President Habyarimana is irrelevant to the Trial Chamber's findings as to the CDR's role in the events for which Barayagwiza was convicted as a superior of its members. At the same time, nothing in Bruguière's Order could be read to indicate, contrary to Barayagwiza's submissions, that the CDR did not play any role in the conspiracy to commit genocide or in its actual commission, or that it was not composed of Hutu extremists. Finally, the Appeals Chamber declines to consider Barayagwiza's arguments with respect to the alleged relevance of Bruguière's Order to other cases pending before the Tribunal⁴⁹ or to the "environment" in which he was convicted,⁵⁰ since these arguments are irrelevant to the admissibility of additional evidence on appeal.

14. In summary, because this material is irrelevant to any material issue in the present case, it could not have had an impact on the Trial Chamber's conclusions in the Trial Judgement.

IV. NAHIMANA'S MOTION

A. Submissions of the Parties

15. With reference to Barayagwiza's Motion, Nahimana submits that Bruguière's Order was obviously unavailable at trial and that it is incontestably credible.⁵¹ Nahimana further argues that the proffered material is relevant to the Trial Chamber's findings that the events in Rwanda were triggered by President's Habyarimana death on 6 April 1994 and that the directors and journalists of the *Radio Télévision Libre des Mille Collines* ("RTLM") were in conspiracy with those involved in the downing of Habyarimana's plane.⁵² In his view, the conclusions contained in Bruguière's Order would confirm the contents and legitimacy of the information transmitted by the RTLM, particularly in the broadcast of 3 April 1994, in which journalist Noël Hitimana forecast an imminent RPF attack and which, according to the Trial Chamber, "gave credibility to the 'reign of

concluded on the role of the CDR in the killing of Tutsi and Hutu political opponents in 1994. Para. 967 concluded on Barayagwiza's "commitment to the destruction of the Tutsi population as a means by which to protect the political gains secured by the Hutu majority from 1959". In paras 973 and 977 the Trial Chamber found Barayagwiza guilty of genocide, pursuant to Article 6(3) of the Statute with respect to his role and engagement in the activities of the RTLM and the CDR. Finally, para. 1053 concludes on "several triangular links" among the *Kangura*, RTLM and CDR "effectively controlled by the three Accused". More particularly, in that paragraph, the Trial Chamber concluded that "CDR provided an ideological framework for genocide, and the two media institutions formed part of the coalition that disseminated the message of CDR that the destruction of the Tutsi was essential to the survival of the Hutu".

⁴⁸ Trial Judgement, para. 953.

⁴⁹ Barayagwiza's Motion, para. 9.

⁵⁰ *Ibid.*, para. 15.

⁵¹ Nahimana's Motion, paras 3-6.

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rumour' on the basis of the fear shared by all at the time owing to the nullification of the Arusha Accords".⁵³ Finally, similar to Barayagwiza, Nahimana argues that the proffered material is of general importance to the cases before the Tribunal since, as Prosecutor Carla Del Ponte stated in 2000, "[i]f it is the RPF that shot down the plane, the history of the genocide must be rewritten".⁵⁴

16. In its Response to Nahimana's Motion, the Prosecution relies on all of the submissions made in its Response to Barayagwiza's Motion and opposes the relief sought by Nahimana.⁵⁵ It reiterates that the proffered document could not be binding on a Chamber of the Tribunal and should not be entitled to any weight in these proceedings.⁵⁶ It adds that Bruguière's Order neither could nor would have had any impact on the Trial Chamber's findings, particularly because the conspiracy in which Nahimana was found to have participated does not include the downing of the presidential plane.⁵⁷ According to the Prosecution, the proffered evidence is thus irrelevant to the findings pertaining to Nahimana's personal role and responsibilities in the RTLM's activities before and after 6 April 1994, as well as the genocide and crimes against humanity of which he was convicted.⁵⁸

17. Nahimana replies that in the framework of the French legal system, Bruguière's Order should be regarded as an extremely important procedural act and incontestably credible material.⁵⁹ Nahimana underlines that the alleged attack of 6 April 1994 is of such importance for triggering the crimes with which the Tribunal is seized, that the refusal to consider the elements of proof referred to therein would inevitably lead to serious errors in appreciation of those crimes.⁶⁰

B. Analysis

18. In light of the findings made above with respect to the unavailability of Bruguière's Order at trial,⁶¹ the Appeals Chamber will proceed to examine Nahimana's arguments pertaining to whether the proffered material is relevant to a material issue in Nahimana's appeal.

19. The Appeals Chamber has already found that Bruguière's Order is irrelevant to the Trial Chamber's conclusions in paragraph 953 of the Trial Judgement.⁶² With respect to the Trial

⁵² *Ibid.*, paras 7-8 referring to the Trial Judgement, para. 953.

⁵³ *Ibid.*, paras 10-11 referring to the Trial Judgement, paras 375-376, 380-381, 384-387 and 388-389.

⁵⁴ *Ibid.*, paras 13-14 referring to Annex 4 to Barayagwiza's Motion citing a report by Gunmar Willum og Bjørn Willum of 17 April 2000 in *Aktuelt* (Denmark).

⁵⁵ Response to Nahimana's Motion, para. 2.

⁵⁶ *Ibid.*, para. 4.

⁵⁷ *Ibid.*, para. 5.

⁵⁸ *Ibid.*, para. 7.

⁵⁹ Nahimana's Reply, para. 8.

⁶⁰ *Ibid.*, paras 10-12.

⁶¹ See *supra*, para. 12.

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Chamber's findings concerning RTLM broadcasts before 6 April 1994, the Appeals Chamber notes that the paragraphs referred to by Nahimana⁶³ contain descriptions of evidence on the basis of which the Trial Chamber concluded that these broadcasts

[...] engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the enemy. The enemy was identified as the RPF, the Inkotanyi, the Inyenzi, and their accomplices, all of whom were effectively equated with [the] Tutsi ethnic group by the broadcasts [...]

Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. [...]

[...] The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group.⁶⁴

20. The Appeals Chamber finds that the conclusion contained in Bruguière's Order on the RPF's possible involvement in President Habyarimana's plane crash is irrelevant to the above-mentioned conclusions by the Trial Chamber with respect to the information broadcast by the RTLM. Even if the Appeals Chamber were to hold that the proffered material is relevant to the fact that the Trial Chamber referred to the broadcast of 3 April 1994 predicting an imminent attack by the RPF, it is not satisfied that this could be considered as a material issue in this case, since it would still be irrelevant to Trial Chamber's conclusions that the RTLM broadcasts were directed against the Tutsi ethnic group as such.

V. Disposition

21. For the foregoing reasons, the Appeals Chamber **DISMISSES** Barayagwiza's and Nahimana's Motions in their entirety.

⁶² See *supra*, para. 13.

⁶³ In paras 375-376 of the Trial Judgement, the Trial Chamber noted that many of the RTLM broadcasts publicly named individuals as RPF accomplices while referring to civilians (the Trial Chamber particularly examined the broadcast of 15 March 1994 in which Noël Hitimana reported on his "investigation" with respect to "people allied with the Inkotanyi" – Exhibits C7, CD 126, K0146968-69) and concluded that such information was vague and highly speculative, especially in light of the absence of any apparent connection with military activity. In paras 380-381, the Trial Chamber noted some other broadcasts transmitted between 1 and 3 April 1994, in which Noël Hitimana referred to certain individuals as Inkotanyi accomplices. In paras 384-387, the Trial Chamber referred to a broadcast of 3 April 1994 by Kantano Habimana highlighting a meeting of Tutsi in Cyangugu, as well as to the testimonies of Chrétien and Nahimana, on the basis of which the Trial Chamber concluded that the only indication of why this meeting was referred to as an RPF meeting consisted in ethnic references. Finally, in paras 388-389, the Trial Chamber discussed a broadcast of 3 April 1994 in which Noël Hitimana forecast an imminent RPF attack that, according to Chrétien, gave credibility to the "reign of rumour".

⁶⁴ Trial Judgement, paras 486-488.

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

Dated this 12th day of January 2007.
At The Hague, The Netherlands



[Seal of the Tribunal]

A handwritten signature in dark ink, appearing to read "Fausto Pocar", is written over a horizontal line.

Fausto Pocar
Presiding Judge

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