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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-96-3-R
10th July 2009
{675/H - 664/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Iain Bonomy

ICTR Appeals Chamber
Date: 10th July 2009
Action: R. Turner
Copied To: Concerned Judges,

Registrar: Mr. Adama Dieng

Parties, Judicial Archives,
LOs, LSS
[Signature]

Decision of: 10 July 2009

Georges Anderson Nderubumwe RUTAGANDA

v.

THE PROSECUTOR

Case No. ICTR-96-3-R

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JUDICIAL ARCHIVES
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DECISION ON RUTAGANDA'S APPEAL CONCERNING ACCESS TO CONFIDENTIAL MATERIALS IN THE *KAREMERA ET AL.* CASE

The Appellant:
Mr. Georges A. N. Rutaganda, *pro se*

Office of the Prosecutor:
Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Mr. George William Mugwanya
Ms. Inneke Onsea

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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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an "Appeal Against the Trial Chamber Decision on Rutaganda's Motion for Access to Witness 'AWE' Confidential Materials in *Karemera et al.*, 24 March 2009", filed on 8 April 2009 ("Appeal").

I. BACKGROUND

2. In its Judgement of 26 May 2003, the Appeals Chamber confirmed Georges Rutaganda's ("Appellant") convictions for genocide and extermination as a crime against humanity, entered an additional conviction for serious violations of Article 3 common to the Geneva Conventions, and upheld his sentence of life imprisonment.¹ In upholding the Trial Chamber's convictions, the Appeals Chamber affirmed its findings that the Appellant distributed weapons and aided and abetted killings in Cyahafi sector; ordered, committed, and aided and abetted crimes committed in the area of the Amgar garage; participated in the massacres at *École Technique Officiel* ("ETO"); and participated in the forced diversion of refugees to Nyanza and the subsequent massacre there.²

3. On 8 December 2006, the Appeals Chamber denied the Appellant's requests for reconsideration, clarification, and review of the Appeal Judgement, and denied his request for assignment of counsel under the Tribunal's legal aid system.³

4. On 4 March 2009, the Appellant filed a motion before Trial Chamber III of the Tribunal ("Trial Chamber") requesting access to closed session transcripts and sealed exhibits relating to the testimony of Witness AWE in the case of *The Prosecutor v. Édouard Karemera, Matthieu Ndirumpatse and Joseph Nzirorera* ("*Karemera et al.* case").⁴ On 24 March 2009, the Trial Chamber denied the Motion.⁵ The Appellant now requests the Appeals Chamber to set aside the

¹ *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda Appeal Judgement*"), paras. 490-507; *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 December 1999 ("*Rutaganda Trial Judgement*"), Disposition. The Appeals Chamber also overturned a conviction for murder as a crime against humanity. See *Rutaganda Appeal Judgement*, para. 506.

² *Rutaganda Appeal Judgement*, paras. 294-489.

³ See *Georges A. N. Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006.

⁴ Rutaganda's Motion for Access to Closed Session Testimony and Sealed Exhibits of Witness "AWE" in *Karemera et al.* (ICTR-97-31-T), 4 March 2009 ("Motion").

⁵ Decision on Rutaganda's Motion for Access to Closed Session Testimony and Sealed Exhibits of Witness "AWE", 24 March 2009 ("Impugned Decision").

Impugned Decision, and to order the disclosure of the requested materials.⁶ The Appellant also requests an order assigning him counsel.⁷ In response, the Prosecution argues that the Impugned Decision should not be reversed, that the Appellant should not be granted access to the requested closed session materials, and that he should not receive the assistance of counsel at the expense of the Tribunal.⁸

5. On 14 April 2009, Joseph Nzirorera filed "Joseph Nzirorera's Brief on Appeal" in which he "joins" in the Appeal.⁹ He submits that the Trial Chamber erred in denying the Appellant access to the closed session materials.¹⁰ Joseph Nzirorera argues that this was not the first time that the Trial Chamber failed to undertake a proper analysis of access to testimony, and requests the Appeals Chamber to encourage the Trial Chamber to be "more diligent" in its decisions.¹¹ On 23 April 2009, the Appellant filed his reply.¹²

II. PRELIMINARY ISSUES

6. Prior to addressing the substance of the Appeal, the Appeals Chamber will consider whether Joseph Nzirorera has standing to participate in the Appeal as well as preliminary issues relating to the timeliness of filing the Response and Reply. Joseph Nzirorera submits that as a party to the case from which disclosure is sought, he has standing to participate in the Appeal and cites a decision in the *Niyitegeka* case in this regard.¹³ In the *Niyitegeka* Decision, the Appeals Chamber took into account Joseph Nzirorera's submission that he had an interest in Eliézer Niyitegeka's appeal because the Trial Chamber in the *Karemera et al.* case had taken judicial notice of adjudicated facts from the *Niyitegeka* case.¹⁴ In that case, the Appeals Chamber directed the Registrar to cross-file Eliézer Niyitegeka's appeal in the *Karemera et al.* case and permitted Joseph Nzirorera and his co-accused to file briefs in response to Eliézer Niyitegeka's appeal.¹⁵ In the present case, Joseph Nzirorera submits that he is privy to the contents of the closed session testimony which is the

⁶ Appeal, para. 33.

⁷ Appeal, para. 33.

⁸ Prosecutor's Response to Rutaganda's Appeal Concerning Access to Confidential Material in the *Karemera et al.* Case, 17 April 2009 ("Response"), para. 2.

⁹ Joseph Nzirorera's Brief on Appeal, 14 April 2009 ("Nzirorera's Brief"), para. 1.

¹⁰ Nzirorera's Brief, para. 11.

¹¹ Nzirorera's Brief, para. 12.

¹² Rejoinder to the "Prosecutor's Response to Rutaganda's Appeal Concerning Access to Confidential Material in the *Karemera et al.* case", 23 April 2009 ("Reply").

¹³ Nzirorera's Brief, para. 2, citing *Éliezer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Joseph Nzirorera's Motion for Re-Classification and Suggestion for Appointment of Counsel, 25 July 2008 ("*Niyitegeka* Decision").

¹⁴ *Niyitegeka* Decision, para. 8.

¹⁵ *Niyitegeka* Decision, para. 13.

subject of the Appeal and that he is thus in a unique position to contribute to rectifying the Impugned Decision.¹⁶ Joseph Nzirorera does not demonstrate an interest relevant to his defence that would warrant a cross-filing of the Appeal in the *Karemera et al.* case and permit him to joint the Appeal. Consequently, Joseph Nzirorera's filing will not be taken into account when ruling on the merits of the Appeal.

7. The Appellant claims that the Response was filed out of time and that it should therefore not be considered by the Appeals Chamber when ruling on the Appeal.¹⁷ The Appeals Chamber notes that in an appeal, such as the present one, a response must be filed within ten days of the filing of the appeal.¹⁸ The Appeals Chamber notes that the Appeal and the Response were filed on 8 April 2009 and 17 April 2009, respectively.¹⁹ Consequently, the Appeals Chamber finds that the Response was filed within the prescribed time-limit.

8. Finally, the Appeals Chamber notes that the Reply was filed outside the prescribed time-limit.²⁰ However, the Response, which was filed on 17 April 2009, was only served on the Appellant on 20 April 2009.²¹ The Appeals Chamber also notes that the Tribunal's Detention Facility received the Reply during office hours on 22 April 2009, but only filed it on 23 April 2009.²² In view of these circumstances, the Appeals Chamber considers the Reply to be validly filed.

III. STANDARD OF REVIEW

9. Rule 75(J) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), provides that decisions under paragraph (G) are subject to appeal directly to a full bench of the Appeals Chamber by either party.

10. The Appeals Chamber recalls that where protective measures have been ordered in any proceedings before the Tribunal, they continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless and until they are rescinded, varied or augmented.²³ A party

¹⁶ Nzirorera's Brief, para. 2.

¹⁷ Reply, paras. 10, 11.

¹⁸ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal ("Practice Direction"), para. 2.

¹⁹ See Appeal, p. 1; Response, cover page.

²⁰ See Practice Direction, paras. 7, 16. A reply must be filed within four days from the filing of the response.

²¹ See Registry Records, Appeals-Proof of Service-By Fax, 17 April 2009.

²² See the date and time stamps on the cover page of the Reply.

²³ Rule 75(F)(i) of the Rules.

is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case.²⁴

11. The protection of victims and witnesses is part of the day-to-day management of trial proceedings, and, as such, the Impugned Decision is a discretionary decision to which the Appeals Chamber must accord deference.²⁵ Where such a decision is appealed, the issue is whether the Trial Chamber correctly exercised its discretion and “not whether the decision was correct, in the sense that the Appeals Chamber agrees with[*it*]”.²⁶ Consequently, the Appeals Chamber will only reverse an impugned decision where it is demonstrated that a Trial Chamber committed a discernible error, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the impugned decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.²⁷

IV. DISCUSSION

A. Alleged Errors of the Trial Chamber

12. The Appellant contends that the Trial Chamber erred: (1) by issuing the Impugned Decision without enquiring into whether he was served with the Response to the Motion²⁸ and whether he waived his right to reply;²⁹ (2) by imposing a new requirement of a pending case for access to confidential materials;³⁰ (3) by finding that no nexus existed between the requested materials and

²⁴ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A. N. Rutaganda’s Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, (“*Rutaganda Decision*”) para. 7, citing *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Eliézer Niyitegeka’s Appeal Concerning Access to Confidential Materials in the *Muhimana* and *Karemera et al.* Cases, 23 October 2008 (“*Niyitegeka Decision of 23 October 2008*”), para. 21; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décisions sur les requêtes de Ferdinand Nahimana aux fins de divulgation d’éléments en possession du procureur et nécessaires à la défense de l’appelant et aux fins d’assistance du greffe pour accomplir des investigations complémentaires en phase d’appel*, 8 December 2006 (“*Nahimana et al. Decision*”), para. 12.

²⁵ *See, e.g., The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 (“*Karemera et al. Decision of 23 January 2008*”), para. 7, citing *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007 (“*Karemera et al. Decision of 5 October 2007*”), para. 7; *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi’s Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 (“*Ndayambaje et al. Decision of 21 August 2007*”), para. 10.

²⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj’s Interlocutory Appeal Against the Trial Chamber’s Decision on Form of Disclosure, 17 April 2007, para. 14.

²⁷ *Karemera et al. Decision of 23 January 2008*, para. 7, citing *Karemera et al. Decision of 5 October 2007*, para. 7; *Ndayambaje et al. Decision of 21 August 2007*, para. 10.

²⁸ Prosecutor’s Response to Rutaganda’s Motion for Access to Closed Session Testimony and Sealed Exhibits of Witness “AWE” in *Karemera et al.* (ICTR-97-31-T), 11 March 2009 (“*Response to the Motion*”).

²⁹ Appeal, paras. 13, 14.

³⁰ Appeal, paras. 15-20.

the Appellant's case after concluding that a legitimate forensic purpose has been established;³¹ and (4) by assessing the nexus between the Appellant's case and the requested material solely on the basis of his responsibility for distributing weapons and thus failing to consider other relevant facts for which he was held responsible.³²

13. The Appeals Chamber recalls that where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose for accessing it must be demonstrated.³³ Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.³⁴ Such a factual nexus may be established, for example, "if the cases stem from events alleged to have occurred in the same geographic area at the same time,"³⁵ although this may not always be necessary or sufficient.³⁶ A case-specific analysis is required in each instance.³⁷ A Trial Chamber must be satisfied that the requesting party has established that this material is likely to assist its case materially or that there is at least a good chance that it would.³⁸

14. Once it is determined that confidential material filed in another case may materially assist a requesting party, the Chamber shall determine which protective measures shall apply to the material, as it is within the Chamber's discretionary power to strike a balance between the rights of the requesting party to have access to material to prepare its case, and guaranteeing the protection and integrity of confidential information.³⁹ Failure by the Trial Chamber to apply this approach amounts to a discernible error based on an incorrect interpretation of the governing law.⁴⁰

³¹ Appeal, paras. 21-24.

³² Appeal, paras. 25-30.

³³ *Nahimana et al.* Decision, para. 12.

³⁴ *Rutaganda Decision*, para. 10, citing *Niyitegeka Decision* of 23 October 2008, para. 21.

³⁵ See *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case, 18 January 2006 ("*Blagojević and Jokić Decision*"), para. 4 (internal quotations and citations omitted); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galić Case, 16 February 2006, para. 3.

³⁶ *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder, and Balaj Motion for Access to Confidential Materials in the *Limaj Case*, 31 October 2006 ("*Limaj et al. Decision*"), para. 7, citing *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002 ("*Blaškić Decision*"), paras. 15, 16.

³⁷ *Limaj et al.* Decision, para. 7.

³⁸ *Rutaganda Decision*, para. 10, citing *Niyitegeka Decision* of 23 October 2008, para. 21.

³⁹ *Rutaganda Decision*, para. 12, citing *Niyitegeka Decision* of 23 October 2008, para. 21.

⁴⁰ *Rutaganda Decision*, para. 12, citing *Niyitegeka Decision* of 23 October 2008, para. 23.

15. The Appeals Chamber is satisfied that the Appellant has identified the material sought with sufficient particularity in the Motion.⁴¹ The Appeals Chamber observes that it is only possible for the Appellant to make a *prima facie* demonstration of the existence of a legitimate forensic purpose for accessing Witness AWE's confidential material, since the said testimony was heard in closed session and, therefore, the Appellant presumably has virtually no knowledge of its content.⁴² The Appeals Chamber notes that the Appellant submitted before the Trial Chamber that there is a nexus between his case and the *Karemera et al.* case, as both cases stem from events alleged to have occurred in the same geographical area, Cyahafi sector, at the same time, April to July 1994.⁴³ The Appeals Chamber will examine the Appeal in this context.

1. The Trial Chamber allegedly erred by not enquiring whether the Appellant was served with the Response to the Motion and whether he waived his right to reply

16. The Appellant submits that the Trial Chamber took into account the Prosecution's Response to the Motion without this filing being served on him and without giving him the opportunity to reply to it.⁴⁴ He asserts that the Trial Chamber ought to have established whether the Response to the Motion was served on him and whether he waived his right to reply.⁴⁵ The Appellant argues that this caused him prejudice as he was prevented from addressing the arguments raised by the Prosecution.⁴⁶ He claims that this constitutes an abuse of the Trial Chamber's discretion, which renders the Impugned Decision unreasonable.⁴⁷

17. The Prosecution responds that it was within the Trial Chamber's discretion to issue the Impugned Decision without taking into account any reply.⁴⁸ It argues that a Trial Chamber is entitled to render its decision in the interests of justice, without considering a possible reply, as long as it does not prejudice an applicant.⁴⁹ The Prosecution asserts that in the present case, the Appellant has not shown any prejudice and has not established that the Impugned Decision was so unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁵⁰

⁴¹ See Motion, para. 5.

⁴² *Rutaganda* Decision, para. 12.

⁴³ See Motion, para. 10.

⁴⁴ Appeal, paras. 13, 14.

⁴⁵ Appeal, para. 14.

⁴⁶ Appeal, para. 13.

⁴⁷ Appeal, para. 14.

⁴⁸ Response, para. 12.

⁴⁹ Response, para. 12.

⁵⁰ Response, para. 12.

18. The Appeals Chamber notes that the Prosecution's Response to the Motion was not served on the Appellant before the Impugned Decision was rendered.⁵¹ This denied him the opportunity of filing a reply. While a Trial Chamber has the discretion to issue its decision without considering a reply, it should refrain from doing so where it may cause prejudice to a party. A party denied the opportunity of filing a reply, can show prejudice on appeal by demonstrating that it could have raised arguments in its reply to address those submissions contained in an opposing party's response. However, in this case, the Registry's delay in serving the Response to the Motion on the Appellant prevented him from demonstrating on appeal that he suffered prejudice because when he filed the Appeal he was not aware of the arguments raised by the Prosecution in its Response to the Motion. In fact, the Response to the Motion was only provided to the Appellant twenty days *after* he filed his Appeal.⁵² In the circumstances, the Appeals Chamber could have opted to grant additional time to the Appellant in order for him to substantiate his claim of prejudice. However, in light of the outcome of the present Decision which grants other grounds of appeal, the Appeals Chamber considers it in the interest of the Appellant to pronounce on the merits of the Appeal. The Appeals Chamber is particularly concerned by the Registry's failure to expeditiously serve the Response to the Motion on the Appellant, since he is unrepresented and is in the custody of the Tribunal.⁵³

2. The Trial Chamber allegedly imposed a new criterion

19. The Appellant submits that the Trial Chamber erred by imposing a new requirement that he must have a pending case before the Tribunal in order for him to be granted access to confidential material.⁵⁴ He argues that the Trial Chamber's reasoning points to him not being granted access to the requested confidential materials since he has no pending case before the Tribunal.⁵⁵ The Appellant claims this approach contravenes the Tribunal's jurisprudence, which recognizes that convicted persons should have access to confidential material in other cases, even if they do not have a case pending before the Tribunal.⁵⁶

⁵¹ The Response to the Motion was served on the Appellant on 27 April 2009, more than a month after the Impugned Decision was issued and weeks after he filed the Appeal (*See* Registry Records, Proof of Service to Detainees, 27 April 2009, Name of Detainee: Rutaganda).

⁵² The Appeal was filed on 7 April 2009 (*See* Appeal, p. 1) and the Response to the Motion was served on the Appellant on 27 April 2009 (*See* Registry Records, Proof of Service to Detainees, 27 April 2009, Name of Detainee: Rutaganda).

⁵³ The Registry is responsible for "the expeditious, management, filing, reproduction, and distribution of documents" to the parties (Directive for the Registry of the International Criminal Tribunal for Rwanda, 14 March 2008, Article 11).

⁵⁴ Appeal, paras. 15-20.

⁵⁵ Appeal, para. 15.

⁵⁶ Appeal, paras. 15, 16.

20. The Prosecution responds that the Trial Chamber did not create an additional requirement of a pending case, as it did not require the Appellant to have a pending case to grant him access to the confidential materials.⁵⁷ It argues that on the contrary, the Trial Chamber explicitly acknowledged that requests for access to confidential material from another case could be granted to applicants who no longer have a case before the Tribunal.⁵⁸

21. The Appeals Chamber notes that the Trial Chamber observed that the Appellant has no case pending before the Tribunal and then stated that "the only legitimate purpose to seek disclosure would be in relation to a request for review of his judgement pursuant to Rule 120 of the Rules".⁵⁹ The Trial Chamber then concluded that the "significant factual, geographic and temporal overlap" between the Appellant's case and the *Karemera et al.* case established a legitimate forensic purpose for the requested materials.⁶⁰ The Trial Chamber examined the requested materials and found that a nexus did not exist between these materials and the Appellant's case.⁶¹

22. The Appeals Chamber considers that the Appellant misapprehends the Trial Chamber's reasoning, as it did not impose an additional requirement that a party requesting access to confidential material in another case should have a case pending before the Tribunal. By observing that the only legitimate purpose for the Appellant to seek disclosure of the confidential materials would be in relation to a request for review of his judgement, the Trial Chamber merely placed the Motion in context. The Appellant fails to show any error on the part of the Trial Chamber in this regard.

3. The Trial Chamber allegedly erred in concluding that no nexus existed between the requested materials and the Appellant's case

23. The Appellant submits that once the Trial Chamber found that the legitimate forensic purpose requirement was satisfied, the required legal standard for access to the confidential materials was fulfilled.⁶² He argues that the Trial Chamber should not have gone further by examining whether a nexus existed between the requested confidential materials and his case, as this is not required by the governing law.⁶³ The Appellant further argues that the nexus he was

⁵⁷ Response, para. 16.

⁵⁸ Response, para. 16.

⁵⁹ Impugned Decision, para. 6.

⁶⁰ Impugned Decision, para. 7.

⁶¹ Impugned Decision, para. 7.

⁶² Appeal, para. 21.

⁶³ Appeal, para. 22.

required to establish is not between the materials requested and his case, but between his case and the *Karemera et al.* case from which the materials are sought.⁶⁴

24. The Prosecution responds that it was within the Trial Chamber's discretion to find that a nexus did not exist between the requested materials and the Appellant's case even though the Trial Chamber had found that there was a legitimate forensic purpose.⁶⁵ It also submits that the criterion of showing a nexus between an applicant's case and the case from which the confidential material is sought is neither "determinative nor exhaustive".⁶⁶ The Prosecution argues that a case-specific analysis is required in each instance, which the Trial Chamber undertook when it considered the nexus between the requested material and the Appellant's case.⁶⁷

25. The Appeals Chamber notes that the Trial Chamber held that the "significant factual, geographic and temporal overlap" between the Appellant's case and the *Karemera et al.* case established a legitimate forensic purpose for the requested materials.⁶⁸ As this requirement was established, the Trial Chamber should have been satisfied that the requested material was likely to assist the Appellant materially, or that there was a good chance that it would. Therefore, the Appellant was entitled to access the requested materials, subject to appropriate protection measures. By undertaking a further enquiry and arriving at a definitive conclusion that the confidential material "would not materially assist" the Appellant,⁶⁹ the Trial Chamber applied a higher standard than that established by the Tribunal's jurisprudence. In this regard, the Trial Chamber committed a discernible error.

4. The Trial Chamber allegedly erred by only taking into account the Appellant's responsibility for distribution of weapons

26. The Appellant submits that the Trial Chamber only took into account his conviction for the distribution of weapons in Cyahafi sector.⁷⁰ He argues that the Trial Chamber failed to consider that he was also convicted for mass killings and for ordering, committing, and aiding and abetting crimes in the area around the Amgar garage in Cyahafi sector.⁷¹

27. The Prosecution responds that it was within the Trial Chamber's discretion to conclude that the requested materials shed no light on the Appellant's conduct, which it summarized as

⁶⁴ Appeal, para. 23.

⁶⁵ Response, para. 22.

⁶⁶ Response, para. 22.

⁶⁷ Response, para. 22.

⁶⁸ Impugned Decision, para. 7.

⁶⁹ Impugned Decision, para. 7.

⁷⁰ Appeal, paras. 25, 26.

⁷¹ Appeal, paras. 25, 26.

distribution of weapons, and that these materials would not materially assist him.⁷² It argues that this conclusion does not demonstrate a discernible error warranting the Appeals Chamber's intervention.⁷³

28. The Appeals Chamber notes that the Trial Chamber reasoned that the Appellant's conviction in relation to Cyahafi sector concerns distribution of weapons and concluded that the requested information does not shed any light on the Appellant's conduct in this regard.⁷⁴ However, in the Motion, the Appellant asserted that he seeks the requested information not just for the distribution of weapons, but also for his involvement in "Tutsi mass killings" in relation to the "1994 Cyahafi events".⁷⁵ The Appellant did not specifically mention Amgar garage in his arguments before the Trial Chamber. However, since Amgar garage was found to have been in Cyahafi sector,⁷⁶ the Trial Chamber ought to have considered crimes for which the Appellant was held responsible in the area around the Amgar garage.⁷⁷ By failing to take into account the full extent of the Appellant's criminal conduct in Cyahafi sector, the Trial Chamber committed a discernible error.

B. Request for Legal Assistance

29. The Appellant requests the assignment of counsel.⁷⁸ He argues that if counsel is not assigned to him, he would not be treated in accordance with Article 20 of the Tribunal's Statute.⁷⁹ In response, the Prosecution argues that there are no proceedings in this case for which counsel can be assigned in accordance with the Tribunal's legal aid system.⁸⁰

30. The Appeals Chamber recalls that review of a final judgement is an exceptional remedy and that an indigent applicant is only entitled to assigned counsel at the Tribunal's expense if the Appeals Chamber authorizes the review or if it deems it necessary in order to ensure the fairness of the proceedings at the preliminary examination stage.⁸¹ The Appellant has already made detailed

⁷² Response, para. 24.

⁷³ Appeal, para. 24.

⁷⁴ Impugned Decision, para. 7.

⁷⁵ Motion, para. 9.

⁷⁶ Amgar garage was located at the "boundary" of Cyahafi sector, in the Nyarugenge Commune, Préfecture of Kigali-ville. See Trial Judgement, paras. 204, 225, 228.

⁷⁷ See, e.g., Trial Judgement, paras. 387, 388, 405, 410, 428, 432.

⁷⁸ Appeal paras. 31, 32.

⁷⁹ Appeal, para. 32.

⁸⁰ Response, para. 26.

⁸¹ *Rutaganda* Decision, para. 31, referring to *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-R, Decision on Request for Assignment of Counsel, 27 February 2009, pp. 2, 3; *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndinabahizi's Motion for Assignment of Counsel and the Prosecution's Request to Place the Motion Under Seal, 24 September 2008, p. 2; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza's Motion of 6 March 2008, 11 April 2008, p. 3; *Hassan*

submissions with regard to his request for access to the confidential materials of Witness AWE, and the Appeals Chamber is not satisfied that additional submissions would be of assistance to the present inquiry. In such circumstances, the Appeals Chamber considers that the assignment of counsel under the auspices of the Tribunal's legal aid scheme, is not warranted. The Appeals Chamber therefore dismisses the request.

V. DISPOSITION

31. For the foregoing reasons, the Appeals Chamber:

GRANTS the Appeal in part;

REMANDS the matter to the Trial Chamber;

DIRECTS the Trial Chamber to consider whether the requested material is likely to materially assist the Appellant's case taking into account the full extent of the Appellant's criminal conduct in Cyahafi sector for which he was convicted;

ORDERS the Registrar, pursuant to Rule 33(B) of the Rules, to provide a report to the Appeals Chamber identifying the reasons why the Prosecution Response was not served on the Appellant until twenty days after he filed his appeal.⁸²

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

Done this 10 day of July 2009,
at The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Patrick Robinson
Presiding

Ngeze v. The Prosecutor, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motion To Obtain Assistance From Counsel, 28 February 2008, p. 2; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008, para. 12.

⁸² See *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Order Regarding Communication of Documents, 16 December 2008, p. 3.