UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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: 22 April 2009

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

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

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 filed by Georges A.N. Rutaganda ("Appellant") on 24 February 2009[1] appealing a decision rendered by Trial Chamber I of the Tribunal ("Trial Chamber") on 3 April 2008 in the case of *The Prosecutor v. Tharcisse Renzaho*.[2]

I. BACKGROUND

2. In its Judgement of 26 May 2003, the Appeals Chamber confirmed the Appellant's 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.[3] The Appeals Chamber upheld the Trial Chamber's convictions, affirming 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.[4]

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.[5]

4. On 6 February 2008, the Appellant filed a motion before the Trial Chamber[6] requesting access to the closed session testimony and sealed exhibits of Witness AWE, who testified in the *Renzaho* trial before the Tribunal in January 2007. In its Impugned Decision, the Trial Chamber

[1] Rutaganda's Appeal Motion Against the Trial Chamber Decision on Request for Closed Session Testimony and Sealed Exhibits of Witness "AWE" in Renzaho, dated 3 April 2008, filed on 24 February 2009 ("Appeal").
[2] *See The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31, Decision on Request for Closed Session Testimony and Sealed Exhibits, 3 April 2008 ("Impugned Decision").
[3] *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, 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.
[4] *Rutaganda* Appeal Judgement, paras. 294-489.
[5] *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 ("Decision of 8 December 2006").
[6] *Requête urgente aux fins d'obtenir les transcrits de la déposition à huis clos et des pièces produites sous scellés du témoin « AWE » dans l'affaire Tharcisse Renzaho*, filed on 6 February 2008.

denied the Appellant's motion.[7] On 17 April 2008, the Appellant filed a request for reconsideration or, alternatively, certification to appeal the Impugned Decision, which the Trial Chamber dismissed on 13 November 2008.[8] On 22 January 2009, the Appeals Chamber found that the Appellant was entitled to appeal the Impugned Decision.[9] The Appellant filed his appeal on 24 February 2009, and the Prosecution responded on 6 March 2009.[10] The Appellant replied on 13 March 2009[11] and filed an addendum to his Reply on 18 March 2009.[12] The Prosecution responded to the addendum on 20 March 2009.[13]

II. PRELIMINARY ISSUE

5. Prior to addressing the substance of the Appeal, the Appeals Chamber will consider whether the Reply and Addendum to the Reply were validly filed. The Appeals Chamber recalls that in its Decision of 16 February 2009, it ordered that the Appellant file any reply within four days of the filing of the Prosecution Response.[14] Accordingly, the Appellant's Reply was due by Tuesday, 10 March 2009. However, the Appellant has explained that he was not served the Prosecution's Response until 16:30 on 9 March 2009.[15] The Appeals Chamber has received confirmation of this late service from the Registry.[16] Since the Reply needed to be filed within four days of the filing of the Response according to the time limits prescribed,[17] in view of the late service of the Response, the Appeals Chamber considers the Reply as validly filed. However, the Appeals Chamber notes

[7] Impugned Decision, p. 4.
[8] *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31, Decision on Rutaganda's Motion for Reconsideration or Alternatively, Certification to Appeal the Decision of 3 April 2008 on Request for Closed Session Testimony and Sealed Exhibits, 13 November 2008 ("Decision of 13 November 2008").
[9] *Georges A.N. Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Order to the Registrar Concerning Georges Rutaganda's Access to Documents, 22 January 2009 ("Order of 22 January 2009"). *See also* Decision on Georges A.N. Rutaganda's Motion of 3 April 2008 For Leave to File an Appeal Against the Against the Trial Chamber's Decision of 3 April 2008 and an Extension of Time, 16 February 2009 ("Decision of 16 February 2009"), p. 3 (wherein the Appeals Chamber set time limits for filing briefings in this appeal); Rutaganda's Motion for Leave to File an Appeal Against the Trial Chamber Decision of 3 April 2008 on Rutaganda's Request for Closed Session Testimony and Sealed Exhibits of Witness "AWE" and, for the Extension of the Time Limit, filed on 11 December 2008; Rutaganda's Reaction to [the] Registry's Submission under Rule 33 (B) of the Rules on 'Order to the Registrar Concerning Georges Rutaganda's Access to Documents of 22 January 2009', filed on 9 February 2009; Decision on Georges Rutaganda's Appeal Concerning Access to Closed Session Testimony and Sealed Exhibits, 11 November 2008.
[10] Prosecutor's Response to Rutaganda's Appeal Concerning Access to Confidential Material in the *Renzaho* Case, filed on 6 March 2009 ("Response").
[11] Rutaganda's Rejoinder to "Prosecutor's Response to Rutaganda's Appeal Concerning Access to Confidential Material in the *Renzaho* Case", filed on 13 March 2009 ("Reply"). The Appeals Chamber notes that whereas the Appellant refers to this motion as a "rejoinder" it is in fact a reply, and it will be referred to as such.
[12] *See also* Rutaganda's Very Urgent and Confidential Addendum to Rutaganda's Rejoinder of 13 March 2009, filed on 18 March 2009 ("Addendum to Reply").
[13] Prosecutor's Response to Rutaganda's Addendum to Appeal Concerning Access to Confidential Material in the Renzaho Case, 20 March 2009 ("Response to the Addendum").
[14] *See* Decision of 16 February 2009, p. 3.
[15] Reply, para. 2.
[16] Proof of Service – Arusha, indicating that the Appellant was served, and signed for, the Prosecution's Response on 9 March 2009 at 16:30.

that the Appellant's Addendum to the Reply was filed four days later. The only justification that the Appellant provides for this late filing is that he did not read the trial transcripts of Witness SHA's testimony in the *Setako* case until 16 March 2009, three days after filing his Reply.[18] The Appeals Chamber observes that the trial transcript in question relates to a session which occurred nearly one month earlier, on 20 February 2009. The Appeals Chamber further notes that the Appellant provides no evidence to suggest that he was unable to access the said trial transcript until that date, nor does he make any submission to this effect. Accordingly, the Appeals Chamber does not consider as warranted the admission of the Addendum to the Reply. The Appeals Chamber will therefore not consider the Appellant's Addendum to the Reply in this decision.

III. STANDARD OF REVIEW

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

7. 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.[19] A party is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case.[20]

8. 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.[21] 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

[17] Decision of 16 February 2009, p. 3.
[18] *See* Addendum to Reply, para. 2.
[19] *See* Rule 75(F)(i) of the Rules.
[20] *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.
[21] *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, referring to *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, para. 10.

that the Appeals Chamber agrees with" it.[22] 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.[23]

IV. DISCUSSION

9. The Appellant contends that the Trial Chamber erred: 1) in finding that he had not established a legitimate forensic purpose for the requested disclosure since he had no "ongoing case" before the Tribunal and he had not obtained the consent of Witness AWE to access the confidential materials before making his request (Ground 1);[24] 2) in requiring that the Appellant demonstrate a "sufficient factual overlap" between his own case and the *Renzaho* case in order to establish that a legitimate forensic purpose exists for granting him access to the confidential materials (Ground 2);[25] 3) in denying him access to the materials, notwithstanding that the Appellant had complied with the "governing law", and despite the fact that the Trial Chamber "admitted" having granted similar requests in other cases (Ground 3);[26] and 4) in making *ultra petita* findings on the Prosecution's obligations under Rule 68 of the Rules (Ground 4).[27] Finally, the Appellant requests that counsel be assigned to assist him in preparing further submissions in this matter.[28] The Prosecution opposes the Appeal.[29]

10. 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.[30] 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.[31] Such a

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[22] *Prosecutor v. Vojislav [e{elj*, Case No. IT-03-67-AR73.5, Decision on Vojislav [e{elj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.
[23] *Karemera et al.* Decision of 23 January 2008, para. 7, referring to *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.
[24] Appeal, paras. 26-31.
[25] Appeal, paras. 32-38.
[26] Appeal, paras. 39-42.
[27] Appeal, paras. 43-45.
[28] Appeal, paras. 47-51, 52 (iv).
[29] *See* Response, para. 2.
[30] *Nahimana et al*. Decision, para. 12.
[31] *See Niyitegeka* Decision of 23 October 2008, para. 21, referring to *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"), para. 15.

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,"[32] although this may not always be necessary or sufficient.[33] Rather, a case-specific analysis is required in each instance.[34] A 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.[35]

11. Once it is determined that confidential material filed in another case may materially assist an applicant, 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 a party to have access to material to prepare its case, and guaranteeing the protection and integrity of confidential information.[36] Failure by the Trial Chamber to apply this approach amounts to a discernible error based on an incorrect interpretation of the governing law.[37]

12. The Appeals Chamber is satisfied that the Appellant has identified the material sought with sufficient particularity in the present case. The Appeals Chamber observes from the outset 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.[38] It follows that the Appellant's submissions as to the purported nexus between the requested material and his own case are necessarily limited to the assertion that both cases stem

[32] *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 Gali}*, Case No. IT-98-29-A, Decision on Momcilo Perisi}'s Motion Seeking Access to Confidential Material in the Gali} Case, 16 February 2006, para. 3.

[33] *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 *Blaškić* Decision, paras. 15, 16.

[34] *Limaj et al*. Decision, para. 7.

[35] *Niyitegeka* Decision of 23 October 2008, referring to *Blaškić* Decision Decision, para. 15. For discussion of the circumstances which would be relevant to establishing the requisite nexus, *see, e.g., Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Motion by Mićo Stanišić for Access to All Confidential Material in the *Krajišnik* Case, 21 February 2007, p. 5; *Blagojević and Jokić* Decision, para. 5; *Blaškić* Decision, para. 16; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the Martić Case, 22 February 2008, para. 10.

[36] *See Niyitegeka* Decision of 23 October 2008, para. 21, citing *Prosecutor v. Mladen Naletili} et al*., Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletili} and Martinovi}*" and "Jadranko Prli}'s Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, p. 7; *Blagojevi} and Joki}* Decision, para. 7.

[37] *Niyitegeka* Decision of 23 October 2008, para. 23.

[38] *See* Reply, para. 9. *See also id.* paras. 18, 19.

from events alleged to have occurred in the same geographical area (Cyahafi) during the same period (April-July 1994).[39] The Appeals Chamber will examine the Appeal in this context.

A. Whether the Trial Chamber erred in imposing additional requirements for accessing confidential materials related to Witness AWE (Ground 1)

13. The Appellant submits that the Trial Chamber erred in finding that he should not have access to confidential materials related to Witness AWE, on the basis that there was no protected witness from the *Renzaho* proceedings due to testify in the Appellant's own proceedings since the Appellant's case had concluded.[40] He contends that in so finding, the Trial Chamber in effect imposed an additional requirement which is inconsistent with the Appeals Chamber's reasoning in the *Blagojević and Jokić* and *Niyitegeka* cases,[41] namely, that the party requesting access to the confidential materials be the subject of ongoing proceedings before the Tribunal.[42] The Appellant submits that this error is both an incorrect interpretation of the "governing law", and an abuse of the Trial Chamber's discretion, and should therefore be reversed.[43]

14. The Prosecution responds that the Appellant's contention that the Trial Chamber required him to be the subject of an "ongoing case" is "misconceived and unfounded".[44] It points out that the Trial Chamber expressly recognized that access to confidential materials was possible to applicants who no longer have a case before the Tribunal, when it stated that the only legitimate forensic purpose that the requested disclosure could have is in relation to a request for review of the Appeal Judgement pursuant to Rule 120 of the Rules.[45]

15. The Appeals Chamber observes that the Trial Chamber noted that the Appellant "has no case before the Tribunal [and that] [t]he only legitimate forensic purpose that the requested disclosure could have is in relation to a request for review of the [J]udgement…[under] Rule 120 [of the Rules]".[46] The Trial Chamber thus considered, albeit implicitly, that a legitimate forensic purpose at the post-appeal phase would only be demonstrated if it were established that the requested material contained a "new fact" capable of constituting the basis of a request for review of the Appeal Judgement under Rule 120 of the Rules. This conclusion is confirmed by the fact that the Trial Chamber then went on to examine the requested materials before concluding that the

[39] Appeal, paras. 33, 35. *See also id.* paras. 36, 37.
[40] Appeal, paras. 21, 26.
[41] Appeal, paras. 27, 29. *See also id.* para. 23.
[42] Appeal, paras. 21, 27, referring to Impugned Decision, paras. 4, 5. *See also* Reply, paras. 11-14.
[43] Appeal, paras. 28, 31. *See also* Reply, para. 17.
[44] Response, para. 16.
[45] Response, paras. 15, 16.

sealed evidence "sheds no light" on the Appellant's convictions with regard to the distribution of weapons in Cyahafi.[47]

16. In light of the foregoing, the Appeals Chamber considers that the Appellant misapprehends the Trial Chamber's reasoning on this issue. The Trial Chamber did not impose an additional requirement that the party requesting access to the confidential materials be the subject of ongoing proceedings before the Tribunal. By noting that the only legitimate forensic purpose that the requested disclosure could have is in relation to a request for review of the final judgement, the Trial Chamber merely placed the request in its proper context. The Appeals Chamber finds no error in this reasoning.

17. The Appellant further contends that, contrary to the reasoning of the Appeals Chamber in the *Blagojević and Jokić* case[48] the Trial Chamber also imposed an additional requirement that the protected witness in question must consent to the disclosure of the materials to the applicant.[49]

18. The Prosecution disputes the Appellant's submission, and argues that the Trial Chamber merely differentiated the Appellant's request from other cases where access was granted after consent was obtained from the witnesses whom the moving party intended to call.[50] The Prosecution submits that, contrary to the Appellant's assertion, the Trial Chamber in fact denied the Appellant's request because the Appellant had not demonstrated a legitimate forensic purpose for the requested disclosure.[51] The Prosecution argues that it was within the Trial Chamber's discretion to make this finding, and that the Appellant does not demonstrate a discernible error.[52]

19. The Appeals Chamber notes that in a footnote in its Impugned Decision, the Trial Chamber referred to two decisions from the *Bagosora et al.* case in support of its statement that "a significant factual geographic and temporal overlap" between cases can constitute a legitimate forensic purpose for the materials requested.[53] It was in this context that the Trial Chamber observed that in those cases, the witnesses whom the moving party intended to call had given their consent, whereas

[46] Impugned Decision, para. 5.
[47] Impugned Decision, para. 6.
[48] Appeal, para. 30.
[49] Appeal, para. 30, referring to Impugned Decision, fn. 8. *See also* Reply, paras. 15, 16.
[50] Response, para. 17, citing Impugned Decision, fn. 8.
[51] Response, para. 18.
[52] Response, para. 18
[53] *See* Impugned Decision, para. 6, *id*., fn. 8, citing *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bizimungu Defence Second Request for Disclosure of Closed Session Testimony and Exhibits Placed Under Seal, 13 June 2007, para. 3; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bizimungu Defence Request for Disclosure of Closed Session Testimony and Exhibits Placed Under Seal, 15 May 2007, para. 7.

there was no indication that Witness AWE had consented to the release of his confidential material.[54]

20. The Appeals Chamber considers that the Trial Chamber's said observation was by way of further explanation and that, contrary to the Appellant's contention, it does not have the effect of imposing an "additional criterion" of prior consent from the protected witness. The Appeals Chamber therefore dismisses this ground of appeal.

B. Whether the Trial Chamber erred in finding that the Appellant had to establish a significant factual overlap between his case and the *Renzaho* case (Ground 2)

21. The Appellant submits that the Trial Chamber applied an incorrect legal standard when requiring that he show a "significant factual" overlap between the *Renzaho* and *Rutaganda* cases in order to establish that a legitimate forensic purpose exists for granting him access to the confidential materials.[55] He contends that this error amounts to an abuse of discretion, which must be reversed.[56] The Appellant argues that according to the case law, he need only establish a nexus between his case and the case from which the material is sought.[57] Indeed, the Appellant contends, had the Trial Chamber considered that both cases stem from events in the same area (Cyahafi) during the same period (April-July 1994), instead of focusing only on his conviction for distribution of weapons in Cyahafi, this nexus requirement would have been met.[58] If the Trial Chamber considered that the evidence of Witness AWE did not make any reference to him, the Appellant submits, it should have been considered as "other relevant material" - if not "exculpatory" - and thus likely to materially assist his case, and should have been disclosed to him on this basis.[59] He contends that there is no indication that the Trial Chamber assessed whether there was any information in the evidence of Witness AWE which might be considered as exculpatory under Rule 68 of the Rules.[60]

22. The Prosecution responds that the Appellant has failed to show any discernible error by the Trial Chamber.[61] It argues that the Trial Chamber correctly understood and applied the law when determining the existence of a legitimate forensic purpose, and in particular the test for assessing whether there was a nexus between the Appellant's case and the *Renzaho* case.[62] The Prosecution

[54] *See* Impugned Decision, para. 6, fn. 8.
[55] Appeal, paras. 33-35 (emphasis omitted). *See also* Reply, para. 21.
[56] Reply, para. 33.
[57] Appeal, para. 33 referring to Appeal, para. 23.citing *Blagojević and Jokić*, 18 January 2006, para. 4.
[58] Appeal, para. 35.
[59] Appeal, para. 37. *See also* Reply, para. 31.
[60] Reply, para. 30.
[61] Response, para. 23.
[62] Response, paras. 20-24.

submits that it was within the Trial Chamber's discretion to examine Witness AWE's evidence, and to conclude that it sheds no light on the Appellant's conduct for which he was convicted, and therefore is of no material assistance to him.[63]

23. In its Impugned Decision, the Trial Chamber noted that "a significant factual, geographical and temporal overlap" between the cases constitutes a legitimate forensic purpose.[64] The Appeals Chamber emphasises that a requesting party is not required to establish a "significant" overlap between the cases - be it factual, geographic or temporal - in order to demonstrate a legitimate forensic purpose. However, the Appeals Chamber further notes that the Trial Chamber, having reviewed the requested material, went on to conclude that the Appellant's conviction in relation to Cyahafi concerned the distribution of weapons, and that since the requested material shed no light on the Appellant's conduct in this regard, it was unlikely to materially assist him.[65] The Appeals Chamber is satisfied with the Trial Chamber reasoning in this respect. Moreover, the Appeals Chamber is not persuaded by the Appellant's contention that the lack of reference to him in the evidence of Witness AWE in and of itself makes this evidence exculpatory within the meaning of Rule 68 and is therefore of "material assistance" to his case. The Appeals Chamber accordingly finds that the Trial Chamber did not abuse its discretion and dismisses this ground of appeal.

C. Whether the Trial Chamber discriminated against the Appellant when it denied his request for access to the confidential material of AWE (Ground 3)

24. The Appellant submits that the Trial Chamber erred in refusing his request since: 1) he had complied with the governing law; and 2) the Trial Chamber "admitted having granted the same material to other accused".[66] He contends that its failure to do so in his case amounts to discrimination under Article 20(1) of the Statute of the Tribunal.[67] The Prosecution responds that the Appellant misrepresents the deliberations of the Trial Chamber,[68] whose findings accord with the jurisprudence on this issue.[69]

25. The Appeals Chamber finds that the Appellant misapprehends the Trial Chamber's findings. Contrary to the Appellant's contention, the Trial Chamber did not "admit" having granted the same material to other accused. Rather, the Trial Chamber pointed out that the authorities which the

[63] Response, para. 23.
[64] Impugned Decision, para. 6 (internal citations omitted).
[65] Impugned Decision, para. 6, referring to Trial Judgement, paras. 174 *et seq. See also Rutaganda* Appeal Judgement, paras. 294-341, 589 and Disposition.
[66] Appeal, para. 40. *See also* Appeal, para. 39, citing Impugned Decision, para. 4, and fn. 6.
[67] Appeal, para. 41. *See also* Reply, paras. 34, 35.
[68] Response, para. 27.
[69] Response, para. 26.

Appellant relied on concerned requests to vary protective measures in one case which were granted in order to enable disclosure of materials to parties in another proceeding, where that witness was due to testify in the second proceeding. The Trial Chamber also explained that such a situation differed from that of the Appellant, since his trial and appeal proceedings were complete.[70] The Appeals Chamber therefore dismisses this ground of appeal.

D. Whether the Trial Chamber erred in finding that the Prosecution's failure to disclose the confidential material of Witness AWE did not amount to a violation of its disclosure obligations pursuant to Rule 68 of the Rules (Ground 4)

26. The Appellant submits that the Trial Chamber, *proprio motu*, found that the failure by the Prosecution to disclose the confidential material of Witness AWE did not amount to a violation of its disclosure obligations under Rule 68 of the Rules, and that this finding was *ultra petita*, since the Appellant had not raised the issue of disclosure violations.[71] He submits that this finding demonstrates that the Trial Chamber was not impartial,[72] and that it should be reversed.[73]

27. The Prosecution contends that the Trial Chamber's findings on this issue were in fact in response to the Appellant's own submission that the Prosecution had violated its Rule 68 disclosure obligations, and that in the absence of any apparent nexus between the confidential material and the Appellant, there is no discernible error in the Trial Chamber's reasoning.[74] It rejects the Appellant's allegations as frivolous and without merit.[75]

28. The Appeals Chamber recalls that there is a presumption of impartiality which attaches to the Judges of the Tribunal which cannot be easily rebutted.[76] It is for the party challenging the impartiality of a Judge to adduce reliable and sufficient evidence to rebut this presumption of

[70] *See* Impugned Decision, para. 4.
[71] Appeal, paras. 43-45. *See also* Reply, paras. 37, 39.
[72] Appeal, para. 45.
[73] Appeal, para. 46.
[74] Response, para. 30.
[75] Response, para. 31.
[76] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 48; *Prosecutor v. Stanislav Gali}*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Gali}* Appeal Judgement"), para. 41; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 para. 55; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 91; *Prosecutor v. Zejnil Delalić et al*., Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 707; *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furund`ija* Appeal Judgement"), paras. 196, 197.

impartiality.[77] The Appeals Chamber will consider, *inter alia*, whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[78]

29. The Appeals Chamber finds that the Appellant makes generalized allegations that are unsupported by any evidence which would lead a reasonable observer to apprehend bias on the part of the Trial Chamber with regard to its findings related to disclosure. The Appeals Chamber further observes that the Trial Chamber's findings on this issue were in fact in response to a submission on this issue which the Appellant made in his original motion.[79] The Appeals Chamber therefore dismisses this ground of appeal.

E. Whether the assignment of Counsel is necessary to ensure the fairness of the proceedings

30. The Appellant submits that it is in the interests of fairness of the proceedings under Article 20 of the Statute that the Appeals Chamber assign counsel to assist him "in order to file subsequent submissions to the present Appeal Motion II".[80] The Prosecution responds that: 1) there are no proceedings in this case for which counsel can be assigned under the Tribunal's legal aid system; and 2) if the Appellant seeks counsel to assist him in a potential request for review of his Appeal Judgement, the granting of such an exceptional remedy is not warranted in this case, since the Trial Chamber held that there is no nexus between Witness AWE's evidence and the Appellant's case, and therefore this potential ground of review is not available to the Appellant.[81]

31. 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.[82] The Appellant has already made detailed

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[77] *Nahimana et al.* Appeal Judgement, para. 48; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 13; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 45; *Akayesu* Appeal Judgement, para. 91; *Čelebići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, para. 197.

[78] *Nahimana et al.* Appeal Judgement, para. 49(B)(ii), citing *Akayesu* Appeal Judgement, para. 203. *See also id.* paras. 47, 48, 50; *Furundžija* Appeal Judgement, para. 189; *Galić* Appeal Judgement, paras. 38, 39; *Rutaganda* Appeal Judgement, para. 39; *Čelebići* Appeal Judgement, para. 682.

[79] *See* Rutaganda's Urgent Motion to Obtain Transcripts of the Closed Session Testimony and the Exhibits Under Seal of witness "AWE" in the Case of Tharcisse Renzaho (ICTR-97-31-T) of 5 February 2008, para. 7.

[80] Appeal, paras. 50, 51. *See also* Reply, paras. 40, 41.

[81] Response, para. 33.

[82] *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 Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndindabahizi'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 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*, Decision on Third Request for Review, 23 January 2008, para. 12. The Appeals Chamber recalls that

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

32. For the foregoing reasons, the Appeals Chamber:

DISMISSES the Appeal in its entirety.

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

Done this 22nd day of April 2009,
at The Hague,
The Netherlands.

_____
Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

it has rejected a previous request from the Appellant to have counsel assigned under the Tribunal's legal aid scheme to assist him in the post-appeal phase. *See* Decision of 8 December 2006, paras. 40-42.