

205/H



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-01-71-AR75
19th June 2009
{205/H - 196/H}

IN THE APPEALS CHAMBER

Before:

Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *KOFFI... KUMELIO... A... AFANRE...*
SIGNATURE: *[Signature]* DATE: *19 June 2009*

Registrar:

Mr. Adama Dieng

Decision of:

18 June 2009

Emmanuel Ndindabahizi

v.

THE PROSECUTOR

Case No. ICTR-01-71-R75

ICTR Appeals Chamber
Date: *19th June 2009*
Action: *R. Jansen*
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PUBLIC REDACTED VERSION

**DECISION ON EMMANUEL NDINDABAHIZI'S APPEAL OF DECISION
OF 13 NOVEMBER 2008 CONCERNING ACCESS TO PROTECTED
MATERIALS**

The Appellant:

Mr. Emmanuel Ndindabahizi, *pro se*

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Mr. George Mugwanya
Ms. Inneke Onsea

JUDICIAL ARCHIVES
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204/H

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 Emmanuel Ndingabahizi ("Appellant") on 5 March 2009¹ appealing a decision rendered by Trial Chamber I of the Tribunal ("Trial Chamber") on 13 November 2008 in the case of *The Prosecutor v. Emmanuel Ndingabahizi*.²

I. BACKGROUND

2. On 15 July 2004, the Trial Chamber convicted the Appellant of genocide and extermination and murder as crimes against humanity,³ and sentenced him to life imprisonment.⁴ On 16 January 2007, the Appeals Chamber vacated the Appellant's conviction for genocide and his conviction for murder as a crime against humanity in relation to the events at Gaseke roadblock, but affirmed his conviction for genocide and extermination as a crime against humanity concerning events at Gitwa Hill.⁵ The Appeals Chamber affirmed the sentence imposed by the Trial Chamber.⁶

3. On 5 March 2008, the Trial Chamber denied the Appellant's motion for disclosure of closed session testimony and sealed exhibits of protected witnesses who testified in his trial for use in proceedings [REDACTED].⁷ The Appellant sought this disclosure following an allegedly successful compensation claim against him by one of these witnesses, Witness [REDACTED], before a [REDACTED] court in [REDACTED].⁸ On 19 March 2008, the Appellant requested reconsideration of the 5 March 2008 Decision or certification to appeal.⁹ While that motion was

¹ Motion to Appeal Trial Chamber I Decision of 13 November 2008 on the Request for Reconsideration or Certification to Appeal the Decision of 5 March 2008, filed on 5 March 2009 ("Appeal").

² *The Prosecutor v. Emmanuel Ndingabahizi*, Case No. ICTR-2001-71, Decision on Ndingabahizi's Motion for Reconsideration or Certification to Appeal Decision of 5 March 2008 on Disclosure of Closed Session Testimony, 13 November 2008 ("Impugned Decision").

³ *The Prosecutor v. Emmanuel Ndingabahizi*, Case No. ICTR-2001-71-I, Judgement, 15 July 2004, para. 495 ("Ndingabahizi Trial Judgement").

⁴ Ndingabahizi Trial Judgement, para. 511.

⁵ *Ndingabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007 (Ndingabahizi Appeal Judgement), p. 48.

⁶ *Ibid.*

⁷ *The Prosecutor v. Emmanuel Ndingabahizi*, Case No. ICTR-01-71-R75, Decision on Disclosure of Closed Session Testimony of Witnesses CGE, CGX, CGF, CGB and CGH, 5 March 2008 ("5 March 2008 Decision"), p. 3.

⁸ *Requête de Ndingabahizi Emmanuel pour utilisation des transcriptions à huis clos des témoignages des témoins CGE, CGX, CGF, CGB et CGH ainsi que des pièces déposées sous scellées, à cette occasion, Article 75 du Règlement de preuve et de procédure*, filed on 2 October 2007, paras 2, 6, 8.

⁹ *Requête de Ndingabahizi Emmanuel demandant à la Chambre de Première Instance I de reconsidérer sa Decision du 5 mars 2008 sur les témoignages sous scellés des témoins CGE, CGX, CGB, CGF et CGH, ou à défaut lui accorder la certification d'appel*, filed on 19 March 2008.

203/H

pending, the Appellant filed an appeal against the 5 March 2008 Decision,¹⁰ which the Appeals Chamber denied on the ground that it was not properly seized of the matter.¹¹ The Trial Chamber then issued the Impugned Decision on 13 November 2008, denying the Appellant's request for reconsideration or certification to appeal the 5 March 2008 Decision.¹²

4. On 22 January 2009, the Appeals Chamber held that the Appellant was entitled to appeal the Impugned Decision as of right.¹³ The Appellant filed his Appeal on 5 March 2009 and the Prosecution responded on 16 March 2009.¹⁴ The Appellant replied on 23 March 2009.¹⁵

II. SUBMISSIONS

5. The Appellant claims that the Trial Chamber erred by considering that it "was not seized of any request from national authorities for access to closed session testimony" because Rule 75 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), which governs amendments to witness protection measures, does not require involvement by national authorities.¹⁶ The Appellant also contends that the Trial Chamber erred by considering that he "has no ongoing proceedings before either the Trial or Appeals Chamber, and that the only future proceedings for which disclosure could be of relevance are review proceedings pursuant to Rule [sic] 120, which are not mentioned in this motion".¹⁷ In support of this proposition, the Appellant cites a decision by the President of the Tribunal, which held that the Tribunal "retains jurisdiction to vary its protective orders, whether the case has ended or not."¹⁸ The Appellant claims that this interpretation "has been consistently applied in the jurisprudence of the Tribunal whenever the President has appointed a Trial Chamber to address such a motion".¹⁹ The Appellant also relies on a decision by the Appeals Chamber,

¹⁰ *Requête rappelant celle du 14 mars 2008 intitulée : « Requête de Ndingabahizi Emmanuel demandant à la Chambre de première instance I de reconsidérer sa décision du 5 mars 2008 sur les témoignages sous scellés des témoins CGE, CGX, CGB, CGF et CGH, ou à défaut lui accorder la certification d'appel - Articles 73(B) et 75 du Règlement de procédure et de preuve »* filed on 10 July 2008.

¹¹ *Emmanuel Ndingabahizi v. The Prosecutor*, Case No. ICTR-01-71-R75, Decision on Emmanuel Ndingabahizi's Application Concerning Variation of Protective Measures, 9 September 2008.

¹² Impugned Decision, p. 5.

¹³ *Emmanuel Ndingabahizi v. The Prosecutor*, Case No. ICTR-01-71-R75, Order to the Registrar Concerning Emmanuel Ndingabahizi's Access to Documents, 22 January 2009. The Appeals Chamber established time-limits for briefing in this case on 19 February 2009. See *Emmanuel Ndingabahizi v. The Prosecutor*, Case No. ICTR-01-71-R75, Decision on Emmanuel Ndingabahizi's Motion for Leave to File an Appeal against the Trial Chamber's Decision of 13 November 2008 and an Extension of Time, 19 February 2009.

¹⁴ Prosecutor's Response to Ndingabahizi's Urgent Motion and Prosecutor's Request for Remedial Measures in Response to a Violation of Witness Protection Order, filed on 16 March 2009 ("Prosecutor's Response").

¹⁵ *Réplique à la Réponse du Procureur a «L'Appel de Ndingabahizi de la décision rendue le 13 novembre 2008 par la Chambre de première instance.»*, filed on 23 March 2009 ("Reply").

¹⁶ Appeal, para. 11, p. 5.

¹⁷ Appeal, para. 12, p. 5.

¹⁸ *Ibid.* (internal quotations omitted)

¹⁹ Appeal, para. 12, citing *The Prosecutor v. Emmanuel Ndingabahizi*, ICTR-01-71-0298/1, Designation of a Trial Chamber to Consider Emmanuel Ndingabahizi's Motion for Disclosure of the Closed Session Transcripts, 19 February 2008.

202/H

which held that an applicant is entitled to seek "to rescind, vary, or augment protective measures in respect of a victim or witness ordered in his or her own case, pursuant to Rules 69 and 75 of the Rules."²⁰

6. The Appellant also argues that the Trial Chamber erred when it considered that it "lacked precise and reliable information both as to the nature of the national proceedings for which the requested material was sought, and the purpose of seeking the disclosure".²¹ He claims that a reply, which he filed on 21 January 2008, "provided sufficient information of the nature of the case brought by Witness [REDACTED] before the [REDACTED] Court", and that it "clearly pointed out" the inconsistency between the witness's testimony during the Appellant's trial before the Tribunal and his complaint against the Appellant before the [REDACTED] Court.²² Although the Appellant acknowledges that the reply was not considered in the Impugned Decision because the Trial Chamber claimed that it never received it, he claims that he submitted the reply at the United Nations Detention Facility ("UNDF") on 21 January 2008, and that it would be unfair for him to be punished because of a clerical error committed by the UNDF.²³

7. Additionally, the Appellant asserts that the Trial Chamber erred when it considered that it had properly exercised its discretion in denying disclosure of closed session evidence to pending claims before [REDACTED].²⁴ The Appellant contends that the Trial Chamber's exercise of discretion in this regard was unfair, unreasonable and unlikely to bring about reconciliation among the people of Rwanda because Witness [REDACTED] was protected to the detriment of the Appellant's right to a fair trial in another jurisdiction.²⁵ The Appellant claims that the Trial Chamber improperly balanced "the right of the convicted person to access potentially exculpatory material and the need to guarantee the protection of victims and witnesses" when it denied his motion to vary protective measures.²⁶

8. Finally, the Appellant argues that the Trial Chamber erred when it considered that it was not aware of any instance in which witness protection measures were amended in the absence of witness consent and when it took this into account in denying his motion to vary protective measures.²⁷ The Appellant claims that the requirement of witness consent is unrealistic in this

²⁰ Appeal, para. 12, quoting *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R75, Order to the Registrar Concerning Emmanuel Ndindabahizi's Access to Documents, 22 January 2009, (internal quotations omitted).

²¹ Appeal, paras. 13-20, p. 6.

²² Appeal, para. 17.

²³ Appeal, para. 16. The Appellant has also attached a copy of the reply as *Annexe 3* to the Appeal.

²⁴ Appeal, para. 21.

²⁵ *Ibid.*

²⁶ Appeal, paras. 22, 23, p. 9.

²⁷ Appeal, para. 24.

201/H

instance because Witness [REDACTED], as his accuser before the [REDACTED] Court, would never consent to such variation of protective measures.²⁸

9. The Prosecution responds that the Appeal is without merit and that it should be dismissed.²⁹ It claims that “[the] Trial Chamber correctly noted that it was not seized of a request by any national authority” for access to the closed session testimony.³⁰ The Prosecution argues that since the Appellant sought to use the material before a [REDACTED] Court in [REDACTED] instead of before the Tribunal, it was within the discretion of the Trial Chamber to refer to case-law which established that such material could be provided to national authorities upon their specific request.³¹ The Prosecution also claims that the Trial Chamber did not err in noting that the Appellant has no ongoing proceedings before the Tribunal and, therefore, that the only future proceeding for which disclosure could be of relevance is review pursuant to Rule 120 of the Rules.³²

10. The Prosecution further contends that the Trial Chamber did not err in finding that it lacked precise and reliable information both as to the nature of the national proceedings for which the material was sought, and the purpose of seeking disclosure because it never received the reply which the Appellant claims to have filed on 21 January 2008.³³ Moreover, the Prosecution points out that the Trial Chamber generously considered filings made by the Appellant, which pre-dated the 5 March 2008 Decision.³⁴

11. Additionally, the Prosecution argues that the Trial Chamber did not err by considering that the need to guarantee Witness [REDACTED] protection outweighed the Appellant’s need to access potentially exculpatory material because it was within the Trial Chamber’s discretion to strike this balance.³⁵ Finally, the Prosecution claims that it was within the Trial Chamber’s discretion to note that it was unaware of any instance in which disclosure of such testimony was granted in the absence of witness consent or in spite of the witness’s objection.³⁶ The Prosecution states that the Appellant has not demonstrated that the Trial Chamber committed a discernible error in either regard.³⁷

12. The Prosecution also requests the Appeals Chamber to order the Registrar to place the Appellant’s *Annexe 2* to the Appeal under seal or, alternatively, to order the Registrar or the

²⁸ *Ibid.*

²⁹ Prosecutor’s Response, para. 2.

³⁰ Prosecutor’s Response, para. 12.

³¹ *Ibid.*

³² Prosecutor’s Response, para. 13.

³³ Prosecutor’s Response, para. 15.

³⁴ *Ibid.*

³⁵ Prosecutor’s Response, para. 16.

³⁶ Prosecutor’s Response, para. 18.

200/H

Applicant to redact the particulars of Witness [REDACTED] in the annex because it appears to reveal the identity of the witness.³⁸

13. In his Reply, the Appellant states that the Trial Chamber's conclusion that the protection of Witness [REDACTED] outweighs his need to use potentially exculpatory material in his defence is arbitrary and unsupported by the Rules.³⁹ The Appellant argues that it is illogical for Witness [REDACTED] to have felt threatened while testifying before the Tribunal but not when he accused the Appellant publicly, [REDACTED] before a [REDACTED] Court.⁴⁰ The Appellant claims that justice will suffer if protected witnesses from Rwanda would know that their testimony before the Tribunal cannot be used to contradict them before [REDACTED] courts.⁴¹

14. The Appellant also seems to oppose the Prosecution's request to place *Annexe 2* under seal on the ground that this document was prepared by [REDACTED] Court judges and does not violate any protective measures established by the Trial Chamber.⁴²

III. STANDARD OF REVIEW

15. The protection of victims and witnesses is part of the day-to-day management of trial proceedings. Therefore, an impugned decision under Rule 75 of the Rules is a discretionary decision, to which the Appeals Chamber must accord deference.⁴³ 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.⁴⁴ 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

³⁷ *Ibid.*

³⁸ Prosecutor's Response, para. 19.

³⁹ Reply, para. 5.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *George 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. 8. See also *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("Karemera et al. Decision"), para. 7, referring to *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7; *The Prosecutor v. Élie Ndayumbaje 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.

⁴⁴ *Rutaganda Decision*, para. 8; *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.

199/H

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.⁴⁵

IV. DISCUSSION

A. Whether the Trial Chamber Committed Discernible Error

16. The Appeals Chamber notes that Rule 75 of the Rules does not specifically address whether a convicted person in the post-appeal stage may move to vary protective measures for a witness who testified in his or her case so that protected information related to this witness can be communicated to third parties for use in another jurisdiction.

17. In previous cases, Trial Chambers of the Tribunal have, upon request by the Prosecution, authorised the disclosure of material subject to protective measures to national authorities under certain conditions.⁴⁶ For example, Trial Chamber I held that while Rule 75 of the Rules does not provide for rescission of protective orders for use in cases not before the Tribunal, the interests of justice require a broad interpretation of Rule 75(F)(i) of the Rules for variation of protective orders even when the second case is before another jurisdiction and the request has been made by a person who was never a party before the Tribunal.⁴⁷

18. Although the text of Rule 75 of the Rules is silent on the matter, the Appeals Chamber recognizes that, as in the instant case, a convicted person could seek a variation of protective measures ordered in his or her case before the Tribunal, with the aim to disclose the protected information before a national jurisdiction. If such a variation is granted, the protective measures, as amended, would continue to have effect *mutatis mutandis* in the proceedings before the national jurisdiction. When addressing such a request for variation, a Trial Chamber has to balance the interest of the convicted person to disclose protected information and the need to guarantee the protection of victims and witnesses.⁴⁸ This evaluation is discretionary.⁴⁹

⁴⁵ *Rutaganda* Decision, para. 8; *Karemera et al.* Decision, para. 7.

⁴⁶ See *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76, Decision on Disclosure of Closed Session Testimony of Witness YC, 22 March 2007; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-C, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness HF, 26 March 2007; *The Prosecutor v. Mkaeli Muhimana, Eliezer Niyitegeka and Elizaphan Ntakirutimana*, Case No. 95-1B-R75, Decision on Prosecution Motion to Unseal and Disclose Closed Session Testimony of Witnesses BI, AT, GGO and GG, 4 March 2008.

⁴⁷ *The Prosecutor v. Aloys Simba*, ICTR-01-76-R75, Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal, 9 April 2008, para. 5.

⁴⁸ See *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, para. 14 ("*Niyitegeka* Decision on Motion for Clarification"). See also *Prosecutor v. Enver Hadžihanović et al.*, Case No. IT-01-47-AR73, Decision on Application for Leave to Appeal, 1 February 2002, p. 2.

⁴⁹ See *Niyitegeka* Decision on Motion for Clarification, para. 14. See also *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Eliézer Niyitegeka's Appeal Concerning Access to Confidential Materials in the

198/H

19. To successfully move for a variation of protective measures, the moving party must, at a minimum, have a pending case before a national jurisdiction and demonstrate that it has been authorized by the national jurisdiction to seek this variation.⁵⁰ It must also demonstrate a legitimate forensic purpose for disclosing the protected information⁵¹ and show that the protected witness has been heard regarding the variation.⁵² Finally, it must demonstrate that the protective measures, as amended, will be guaranteed before the national jurisdiction.⁵³

20. In the 5 March 2008 Decision, the Trial Chamber denied the Appellant's motion for variation of protective measures on the ground that it was not seized of a request by any [REDACTED] authority in connection with the prosecution of crimes.⁵⁴ The Trial Chamber also noted that there was no information that the Tribunal's witness protection orders would apply *mutatis mutandis* in such proceedings, if any, or that the witness had consented to the disclosure of the prior closed session testimony before the Tribunal.⁵⁵ In confirming the 5 March 2008 Decision, the Impugned Decision further noted that the Appellant had no ongoing proceedings before the Tribunal; that the only future proceedings for which disclosure could be of relevance were review proceedings pursuant to Rule 120 of the Rules, which were not mentioned in the motion; that it lacked precise and reliable information both as to the nature of the national proceedings for which the requested material was sought, and the purpose of seeking disclosure; and that irrespective of whether witness consent is an indispensable pre-requisite to variation of witness protection

Muhimana and Karemera et al. Cases, 23 October 2008, paras. 21, 23. *Prosecutor v. Mladen Naletilić et al.*, Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Plić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, p. 7.

⁵⁰ The Appeals Chamber notes that Rule 75(H) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") allows for such a communication on the condition that the convicted person receives authorization from "an appropriate judicial authority" in the other jurisdiction. ICTY Rule 75(H) provides as follows: "A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal (...)" IT/32/Rev. 42, 4 November 2008. See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Prosecutor's Applications for Variation of Protective Measures Submitted on Behalf of the Prosecutor's Office of Bosnia and Herzegovina, 4 March 2008, para. 7. See also *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Milić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Decision on Motion Pursuant to Rule 75(H), 9 November 2007, pp. 1, 2.

⁵¹ See *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 Pursuant to Rule 75(G)(i), 22 February 2008, para. 9.

⁵² See *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on the Request of the Court of Bosnia and Herzegovina for Variation of Protective Measures Pursuant to Rule 75(H), 13 December 2007, para. 7 ("*Blagojević and Jokić Decision*").

⁵³ See *Blagojević and Jokić Decision*, para. 13; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on the Request of the Court of Bosnia and Herzegovina for Variation of Protective Measures Pursuant to Rule 75(H), 13 December 2007, para. 4.

⁵⁴ 5 March 2008 Decision, para. 3.

⁵⁵ *Ibid.*

197/H

measures in all circumstances, the Trial Chamber was clearly entitled to take into account the risks posed to witnesses.⁵⁶

21. The Appeals Chamber is not satisfied that the Appellant has demonstrated that the Trial Chamber erred in the approach taken. The Trial Chamber focused on balancing the interest of the Appellant to produce protected information with the need to maintain the protection of the witnesses who had testified at the Tribunal.⁵⁷ In striking this balance, it took into account several relevant factors,⁵⁸ which it considered in a reasonable exercise of its discretion. When it considered each of these factors, the Trial Chamber noted either that the Appellant did not provide the necessary material, or that his interests did not outweigh those of the protected witnesses.⁵⁹

22. For example, the Trial Chamber found that it lacked precise and reliable information both as to the nature of the national proceedings for which the requested material was sought, and the purpose of seeking disclosure.⁶⁰ It also found that the Appellant had not provided any guarantee that the protective measures would remain in place *mutatis mutandis* before the [REDACTED] Court, or that the witnesses had consented to the disclosure requested.⁶¹ Indeed, the Appellant has not demonstrated that he is actually a party to a pending proceeding in [REDACTED], a fact which is not sufficiently evidenced by the document produced by the Appellant in *Annexe 2* of his Appeal.⁶² Furthermore, the Appeal does not state that the [REDACTED] Court will enforce the protective measures established for the witnesses at issue, or that they have been heard regarding the request for disclosure. Accordingly, the Appeals Chamber is satisfied that, on the basis of the material placed before it, the Trial Chamber did not commit a discernible error when it considered that the reasons for disclosure presented by the Appellant did not justify the disclosure sought.

23. With respect to the reply which the Appellant claims to have filed on 21 January 2008, the Appeals Chamber agrees that, in principle, a moving party should not be punished for a clerical error that is not attributable to it, which causes a submission to be lost or filed out of time. However, despite reciting the contents of the reply in his Appeal, the Appellant has not shown that the outcome of the 5 March 2008 Decision would have been any different, upon a consideration of *all* the necessary factors, if the Trial Chamber had considered the 21 January 2008 reply.

⁵⁶ 13 November 2008 Decision, para. 9.

⁵⁷ Impugned Decision, para. 6, fn. 15.

⁵⁸ Impugned Decision, paras. 8-10.

⁵⁹ *Ibid.*

⁶⁰ Impugned Decision, para. 8.

⁶¹ 5 March 2008 Decision, para. 3.

⁶² The Appeals Chamber notes that "*Annexe 2*" is a poor quality one-page photocopy of a document that has not been translated into the official languages of the Tribunal.

196/H

B. Prosecution's Request to Have *Annexe 2* Placed Under Seal or Redacted

24. The Appeals Chamber notes that, according to the Appellant's own assertion, the name of Witness [REDACTED] appears on the document contained in *Annexe 2*. Therefore, it should be placed under seal as it reveals the identity of a protected witness.⁶³

25. Moreover, the Appeals Chamber considers *proprio motu* that the Appeal, Prosecutor's Response, Reply and *Annexe 1* to the Appeal also have the potential to reveal the identity of Witness [REDACTED] because they mention his pseudonym in relation to a case brought against the Appellant in Rwanda. Accordingly, these documents should also be placed under seal as they reveal the identity of a protected witness.⁶⁴

IV. DISPOSITION

26. For the foregoing reasons, the Appeals Chamber:

DENIES the Appeal; and

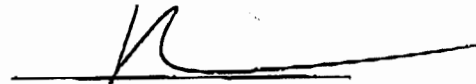
DIRECTS the Registry to place the Appeal, Prosecutor's Response, Reply and *Annexes 1 and 2* under seal.

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

Done this 18th day of June 2009,
at The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Patrick Robinson
Presiding

⁶³ See *The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-I, Order for Non-Disclosure, 10 July 2001; *The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-I, Order for Non-Disclosure, 3 October 2001.

⁶⁴ *Ibid.*