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UNITED NATIONS
NATIONS UNIESTribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-01-66-A

6 June 2007

(223/H - 216/H)

P.T.

BEFORE THE APPEALS CHAMBER

Before:

Judge Mohamed Shahabuddeen, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar:

Mr. Adama Dieng

6 June 2007

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY MS COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS NAME / NOM: <i>Patrice Thériault</i> SIGNATURE: <i>[Signature]</i> DATE: <i>6/06/07</i>	Decision of:
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THE PROSECUTOR

v.

Athanase SEROMBA

Case No. ICTR-2001-66-A

ICTR Appeals Chamber

Date: 6 June 2007

Action: P.T.

Copied To: *concerned Judges, Parties, SCS, LSC, ALCS, LSC*

Archives

**DECISION ON "MOTION ACCOMPANYING ATHANASE SEROMBA'S
APPELLANT'S BRIEF" AND "PROSECUTOR'S URGENT MOTION
OBJECTING TO THE FILING OF ATHANASE SEROMBA'S
APPELLANT'S BRIEF"**

Counsel for the ProsecutionMr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Amanda ReichmanCounsel for the AppellantMr. Patrice Monthe
Ms. Sarah N. Bibegué

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1. **THE APPEALS CHAMBER** of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by both parties¹ against the Judgement of Trial Chamber III in this case, rendered orally on 13 December 2006 and in writing on 19 December 2006 ("Judgement").

2. The Appeals Chamber is currently seized of the "*Requête accompagnant le mémoire d'appel du Père Athanase Seromba*" ("Motion Accompanying the Appellant's Brief"), filed by Appellant Athanase Seromba ("Seromba") on 5 April 2007. The Prosecution has not filed a response to this motion.

3. The Appeals Chamber is also seized of the "Prosecutor's Urgent Motion Objecting to the Filing of Athanase Seromba's Appellant's Brief" ("Motion Objecting to the Appellant's Brief"), filed by the Prosecution on 20 April 2007. Seromba responded to the Motion Objecting to the Appellant's Brief on 14 May 2007,² having been granted an extension of time in which to do so.³ The Prosecution filed a reply to Seromba's Response on 16 May 2007.⁴

I. SUBMISSIONS

4. The motions presently before the Appeals Chamber in this case concern the status of Seromba's "*Mémoire d'appel*" ("Appellant's Brief"), which was filed confidentially on 3 April 2007.

5. In his Motion Accompanying the Appellant's Brief, Seromba acknowledges that the Appellant's Brief does not comply with paragraph B of the Practice Direction on the Length of Briefs and Motions on Appeal ("Practice Direction on Length"),⁵ which provides in relevant part that "[a]n average page should contain fewer than 300 words".⁶ He submits, however, that "this impediment does not affect the admissibility of the Appellant's Brief of the Defence for Athanase

¹ See *Acte d'appel d'Athanase Seromba*, 19 January 2007 ("Notice of Appeal"); Prosecutor's Notice of Appeal, 11 January 2007.

² *Requête en réponse de la Défense à la requête du Procureur tendant à faire rejeter le mémoire d'appel d'Athanase Seromba*, 14 May 2007 ("Response").

³ Decision on "Requête de la Défense aux fins de prorogation du délai de dépôt de la réponse à la requête du Procureur intitulée « Prosecutor's Urgent Motion Objecting to the Filing of Athanase Seromba's Appellant's Brief » sur le fondement des articles 116 du Règlement de procédure et de preuve et 20.4 du Statut du Tribunal", 8 May 2007.

⁴ *Réplique du Procureur à la "Requête en réponse de la Défense à la requête du Procureur tendant à faire rejeter le mémoire d'appel d'Athanase Seromba"*, 16 May 2007 ("Reply").

⁵ Seromba relies on the prior version of the Practice Direction on Length amended on 16 September 2002, rather than the current version, which was amended on 8 December 2006 and was thus applicable at the time of the filing of Seromba's Appellant's Brief. The Appeals Chamber will consider Seromba's submissions in relation to the current Practice Direction on Length.

⁶ Motion Accompanying the Appellant's Brief, para. 8; see Practice Direction on Length, para. (B).

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Seromba, in that as to format and length the Brief complies with the requirements set forth in the Practice Direction [on Length].⁷ Seromba requests the Appeals Chamber to find that the Appellant's Brief was timely filed, complies with the Practice Direction on Length, and is therefore admissible.⁸

6. In its Motion Objecting to the Appellant's Brief, the Prosecution objects to the filing of Seromba's Appellant's Brief in its present form. It submits that the Appellant's Brief impermissibly includes new grounds and sub-grounds of appeal that were not set out in Seromba's Notice of Appeal. In particular, it contends that the arguments contained in Chapter 3, Chapter 5, and Chapter 6(2)(LD) of the Appellant's Brief constitute new grounds or sub-grounds of appeal.⁹ The Prosecution further submits that the Appellant's Brief fails to comply with paragraph 4 of the Practice Direction on Formal Requirements for Appeals from Judgement ("Practice Direction on Formal Requirements")¹⁰ in that it differs substantially in order, numbering, structure, and content from the Notice of Appeal.¹¹ The Prosecution requests the Appeals Chamber to reject Seromba's alleged new grounds of appeal and order that he re-file the Appellant's Brief in accordance with the requirements of the Practice Direction on Formal Requirements.¹²

7. In his Response, Seromba submits that the Prosecution fails to specify the new grounds of appeal allegedly introduced in the Appellant's Brief or the prejudice it has suffered as a result.¹³ He asserts that, absent such a showing of prejudice, the Appellant's Brief should be allowed.¹⁴ Seromba further submits that the alleged changes to the order, structure, and numbering of his grounds of appeal and argument reflect "value judgements" and cannot cause the Prosecution such prejudice as to warrant dismissal of the Appellant's Brief on the ground of non-compliance with the Practice Direction on Formal Requirements.¹⁵ Finally, Seromba submits that if the Appeals Chamber finds that the Appellant's Brief impermissibly contains new grounds of appeal, it should nonetheless allow those grounds under Articles 19(1) and 20(2) of the Statute of the Tribunal and Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), so as not to deprive him of his arguments and grounds of defence.¹⁶

8. The Prosecution replies that it has clearly identified the alleged new grounds of appeal as Chapter 3, Chapter 5, and Chapter 6(2)(LD) of the Appellant's Brief.¹⁷ It submits that while the

⁷ Motion Accompanying the Appellant's Brief, para. 10.

⁸ *Ibid.*, p. 3.

⁹ Motion Objecting to Appellant's Brief, para. 3.

¹⁰ 4 July 2005.

¹¹ Motion Objecting to the Appellant's Brief, para. 8.

¹² *Ibid.*, para. 11.

¹³ Response, para. 9.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 15.

¹⁶ *Ibid.*, para. 16, p. 5.

¹⁷ Reply, para. 4.

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Appeals Chamber may grant leave to amend the grounds of appeal pursuant to Rule 108 of the Rules upon good cause being shown, Seromba's argument that the contested grounds of appeal do not constitute new grounds does not demonstrate good cause.¹⁸ The Prosecution reiterates that changes in order, structure, and numbering in the Appellant's Brief in relation to the Notice of Appeal constitute a flagrant violation of paragraph 4 of the Practice Direction on Formal Requirements.¹⁹ It adds, however, that if the Appeals Chamber grants its request to strike the alleged new grounds of appeal, it will not be necessary to order that the Appellant's Brief be re-filed, in the interest of avoiding additional delays in the pre-appeal proceedings.²⁰ Accordingly, the Appeals Chamber understands the Prosecution to have abandoned its request for an order directing Seromba to re-file his Appellant's Brief in accordance with the requirements of the Practice Direction on Formal Requirements.

II. DISCUSSION

A. Motion Accompanying the Appellant's Brief

9. Seromba timely filed his Appellant's Brief on 3 April 2007, in accordance with Rule 111 of the Rules.²¹ The Appellant's Brief consists of 93 pages and 29,951 words, or an average of 322 words per page. In this respect, it does not fully comply with paragraph B of the Practice Direction on Length, which provides that "an average page [of a brief or motion filed on appeal] should contain fewer than 300 words".²² Nonetheless, the Appellant's Brief is within the 30,000-word limit for appellant's briefs²³ and meets the requirements for paper size, format, typeface and line spacing set out in the Practice Direction on Length.²⁴ Moreover, the Prosecution has not responded to the Motion Accompanying the Appellant's Brief, nor has it otherwise objected to the Appellant's Brief on the ground of non-compliance with the Practice Direction on Length. The Appeals Chamber considers that the Appellant's Brief substantially complies with the Practice Direction on Length and that it should not be struck out or re-filed on the basis of its divergence from paragraph B.

B. Motion Objecting to the Appellant's Brief

10. The Appeals Chamber next turns to consider the Prosecution's submission that the arguments contained in Chapters 3, 5, and 6(2)(I.D) of the Appellant's Brief constitute new grounds of appeal that were not included in Seromba's Notice of Appeal. In Chapter 3 of the Appellant's

¹⁸ *Ibid.*, para. 5.

¹⁹ *Ibid.*, paras 6-8.

²⁰ *Ibid.*, para. 9.

²¹ See also Order Concerning the Filing of the Notice of Appeal, 22 March 2007, p. 3 (reminding Seromba that the time limit for the filing of his Appellant's Brief would expire on 4 April 2007).

²² Practice Direction on Length, para. B.

²³ *Ibid.*, para. (C)(1)(a).

²⁴ *Ibid.*, paras (A) - (B).

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Brief, Seromba claims that the Prosecution failed to disclose to the Defence, or to disclose to it in one of the working languages of the Tribunal, the complete files of certain Prosecution witnesses who testified in proceedings in Rwanda.²⁵ In Chapter 5, he asserts that the Trial Chamber erred by failing to define his functions and duties as a "priest responsible for Nyange parish" or to explain the nature of his individual civil and criminal responsibility.²⁶ In Chapter 6(2)(LD), Seromba submits that the Trial Chamber erred in fact in concluding that Seromba attended meetings with commune authorities and in finding that he supervised attacks on Tutsi refugees that took place on 15 April 1994.²⁷ The Appeals Chamber considers that these arguments constitute new grounds and sub-grounds of appeal which were not included in the Notice of Appeal.

11. Under Rule 108 of the Rules, the Appeals Chamber "may, on good cause shown by motion, authorise a variation of the grounds of appeal" contained in a notice of appeal.²⁸ In general, a request to vary the grounds of appeal "must, at least, explain precisely what amendments are sought and why, with respect to such amendment, the 'good cause' requirement of Rule 108 is satisfied".²⁹ In this case, Seromba has not filed a motion to vary his grounds of appeal pursuant to Rule 108 of the Rules. The Appeals Chamber has previously declined to consider an argument that is raised for the first time in an appellant's brief, without the appellant first having sought leave to amend the notice of appeal.³⁰ Likewise, in this case, the new arguments advanced in Chapters 3, 5, and 6(2)(LD) of the Appellant's Brief fail to be rejected.

12. In his Response, Seromba invokes, *inter alia*, Rule 108 of the Rules and submits that any new grounds of appeal should be allowed so as not to deprive him "of arguments and grounds of defence pursuant to Article 19(1) of the Statute".³¹ The Appeals Chamber need not decide whether this submission constitutes a valid motion to vary the grounds of appeal contained in the Notice of Appeal because, in any event, Seromba's vague assertions do not establish good cause within the meaning of Rule 108 of the Rules. Seromba's argument that the Prosecution has failed to specify how it will be prejudiced by the new grounds of appeal overlooks the fact that, as the ICTY³²

²⁵ Appellant's Brief, paras 18-28.

²⁶ *Ibid.*, paras 53-63.

²⁷ *Ibid.*, paras 114-143.

²⁸ See also Practice Direction on Formal Requirements, para. 2 ("Any party applying to vary the grounds of appeal must do so by way of motion in accordance with the Rules").

²⁹ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 ("Nahimana Decision"), para. 9.

³⁰ *Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 338 (declining to consider the Prosecution's argument regarding the respondent's liability for aiding and abetting genocide where the argument had not been included in the Notice of Appeal but only in the Appellant's Brief); see also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 78 (declining to consider arguments advanced in the appellant's appeal brief and reply brief which went beyond the scope of the Notice of Appeal). But see *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 47 (considering an argument raised in appeal brief but not included in the notice of appeal where the Prosecution did not object to the inclusion of the argument and responded fully to it).

³¹ Response, p. 5.

³² International Criminal Tribunal for the Former Yugoslavia, Case No. ICTR-2001-66-A.

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Appeals Chamber has explained, "the purpose of an appellant setting forth the grounds of appeal pursuant to Rule 108 of the Rules is to provide notification to the Respondent of the scope of the appeal from the time of the filing of the Notice of Appeal".³³ Accordingly, it is the Appellant's burden, in seeking leave to amend a notice of appeal, to demonstrate that each proposed amendment should be permitted pursuant to Rule 108 of the Rules.

13. The Appeals Chamber notes, however, that this Decision is without prejudice to Seromba seeking to amend his Notice of Appeal by way of motion pursuant to Rule 108 of the Rules. Any such motion must explain precisely what amendments are being sought and show with respect to each amendment that the good cause requirement is satisfied.³⁴

14. The Appeals Chamber further finds that the Appellant's Brief does not conform to the Practice Direction on Formal Requirements. The arguments in the Appellant's Brief are not set out and numbered in the same order as in Seromba's Notice of Appeal, and no variation was sought.³⁵ However, the Appeals Chamber considers that its rejection of the identified new grounds of appeal will significantly ameliorate the structural inconsistencies since, with the exception of the identified new grounds of appeal, the order of the grounds and sub-grounds of appeal is largely the same as that in the notice of appeal. It is further noted that the Prosecution has abandoned its request for an order directing Seromba to re-file his Appellant's Brief. In view of these circumstances and in light of the need for fair and expeditious proceedings, the Appeals Chamber does not consider it necessary to order Seromba to re-file the Appellant's Brief in accordance with paragraph 13 of the Practice Direction on Formal Requirements.

C. Extension of Time

15. On 11 May 2007, the Pre-Appeal Judge in this case granted the "Prosecutor's Extremely Urgent Application for Directions Regarding the Filing of the Prosecutor's Respondent's Brief", which was filed on 10 May 2007, and varied the time limit for the filing of the Prosecution's Respondent's Brief until the decision of the Appeals Chamber on the Motion Objecting to the Appellant's Brief.³⁶ The Pre-Appeal Judge noted that any further variation of the time limit for the

³³ *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Prosecution's Motion for an Order Striking Defence Notice of Appeal and Requiring Refiling, 3 October 2006, p. 4. See also *Prosecution v. Bagilishema*, Case No. ICTR-95-1A-A, *Décision (Requête tendant à voir déclarer irrecevable l'acte d'appel du Procureur)*, 26 October 2001, p. 3.

³⁴ See, e.g., *Tharcisse Muvunyi v. the Prosecutor*, Case No. ICTR-2000-55A-A, Decision on "Accused Tharcisse Muvunyi's Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal" and "Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal'" ("Muvunyi Decision"), 19 March 2007, para. 18; *Nahimana* Decision, para. 9. See also Practice Direction on Formal Requirements, para. 2, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, para. 12. The good cause requirement encompasses both good reason for including the proposed new grounds of appeal and good reason why those grounds were not included (or were not correctly articulated) in the original notice of appeal. See *Muvunyi* Decision, para. 18.

³⁵ Practice Direction on Formal Requirements, para. 4.

³⁶ Decision on "Prosecutor's Extremely Urgent Application for Directions Regarding the Filing of the Prosecutor's Respondent's Brief", 11 May 2007, p. 3.

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filing of the Prosecution's Respondent's Brief would be set out in this decision.³⁷ In view of today's decision and the extension of time that has already been granted, the Appeals Chamber finds that a further extension of time of one week is warranted, in order to enable the Prosecution to finalise its response to the remaining grounds of appeal set out in Seromba's Appellant's Brief.

D. Confidentiality of the Appellant's Brief

16. As noted above, Seromba's Appellant's Brief was filed confidentially. Under Rules 78 and 107 of the Rules, all proceedings before the Appeals Chamber shall be public unless there are exceptional reasons for keeping them confidential.³⁸ The Appeals Chamber recalls that in view of the public character of appeal proceedings, it is the practice of the Tribunal that parties shall file public redacted versions of all confidential briefs filed on appeal from a Trial Chamber's judgement.³⁹ Accordingly, the Appeals Chamber *proprio motu* considers that Seromba should file a public version of the Appellant's Brief, excluding the Chapters or sub-Chapters struck out by this Decision, wherein all confidential information is duly redacted.

III. DISPOSITION

17. For the foregoing reasons, the Appeals Chamber **GRANTS**, in part, the Motion Accompanying the Appellant's Brief; **GRANTS** the Motion Objecting to the Appellant's Brief; and **STRIKES** Chapters 3, 5, and 6(2)(I.D) of the Appellant's Brief. The Appeals Chamber further **ORDERS** Seromba to file a public version of the Appellant's Brief, wherein all confidential information is duly redacted, within two weeks of the date of this Decision; and **VARIES** the time limit for the filing of the Prosecution's Respondent's Brief until one week from the date of this Decision.

³⁷ *Id.*

³⁸ See, e.g., Rules 75 and 79 of the Rules. Cf. *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3 ("Naletilić Decision").

³⁹ See *Mikaël Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Decision on Prosecutor's Motion Requesting the Appellant to File a Non-Confidential Appeal Brief, 14 August 2006, p. 1; *Naletilić Decision*, pp 3-4. See also *Mikaël Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Order Concerning the Notice of Appeal, 22 February 2006, p. 4.

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

Dated this 6th day of June 2007,
At The Hague,
The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Mohamed Shahabuddeen".

Mohamed Shahabuddeen
Presiding Judge