International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 21 August 2007

THE PROSECUTOR
v.
Élie NDAYAMBAJE
Joseph KANYABASHI
Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO

Case No. ICTR-98-42-AR73

Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List

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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 "Joseph Kanyabashi's Appeal of Trial Chamber II's Decision of 21 March 2007 (pursuant to Rule 73(B) and (C))" filed on 9 May 2007 ("Appeal" and "Appellant").

2. On 14 May 2007, Élie Ndayambaje filed his response, supporting the Appeal;[1] on 16 May 2007, Arsène Shalom Ntahobali filed his response, partly supporting the Appeal;[2] on 17 May 2007, the Prosecution filed its response, opposing the Appeal;[3] on 21 May 2007, the Appellant separately replied to the responses of Mr. Ntahobali and the Prosecution;[4] on 22 May 2007, Mr. Ntahobali filed a rejoinder;[5] and on 28 May 2007, the Appellant filed a supplemental reply to Ntahobali's rejoinder.[6]

I. BACKGROUND

3. The Appellant is being jointly tried with Élie Ndayambaje, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana and Alphonse Nteziryayo. The trial of the Appellant and his co-accused commenced on 12 June 2001. On 5 October 2006, Trial Chamber II ("Trial Chamber") issued a Scheduling Order which noted that the presentation of the Defence case for each of the accused was to be completed by "mid-2007" and that all efforts should be made to ensure the efficient conduct of the proceedings to comply with that deadline. It ordered the Appellant, Mr.

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[1] Élie Ndayambaje's Response and Submissions Relating to Joseph Kanyabashi's Notice of Appeal Entitled: Joseph Kanyabashi's Appeal Against the Chamber's Decision of 21 March 2007 (Pursuant to Rule 73 Paragraph (B) and (C) of the Rules of Procedure and Evidence, Filed on 9 May 2007, 14 May 2007 ("Ndayambaje's Response").

[2] Arsène Shalom Ntahobali's Response to Kanyabashi's Appeal Against the Trial Chamber's Decision of 21 March 2007, 16 May 2007 ("Ntahobali's Response").

[3] Prosecution Response to the '*Appel de l'accusé Joseph Kanyabashi de la Décision de la Chambre de première instance II du 21 mars 2007 (en vertu de l article 73 para B et C)'*, 17 May 2007 ("Prosecution's Response").

[4] Appellant Joseph Kanyabashi's Reply to Arsène Shalom Ntahobali's Response Relating to the Appeal of Trial Chamber II's Decision of 21 March 2007 (Pursuant to Rule 73 (B) and (C), 21 May 2007 ("Reply to Ntahobali's Response") and *Réplique de l'appelant Joseph Kanyabashi à la Réponse du Procureur concernant l'appel de la decision de la Chambre de première instance II du 21 mars 2007 (en vertu de l' article 73 para B et C),* 21 March 2007 ("Reply to the Prosecution's Response").

[5] Arsène Shalom Ntahobali's Rejoinder to the Appellant's Reply to his Response to Accused Kanyabashi's Appeal of Trial Chamber II's Decision of 21 March 2007, 22 May 2007. The Appeals Chamber notes that no provision of the Tribunal's Rules of Procedure and Evidence ("Rules") or of its Practice Directions authorize a party to file rejoinders or supplemental replies. This filing is therefore inadmissible and will not be considered by the Appeals Chamber.

[6] Appellant Joseph Kanyabashi's Supplemental Reply to Arsène Shalom Ntahobali's *Duplique* Relating to the Appeal of the Trial Chamber II Decision of 21 March 2007 (Rule 73 (B) and (C), 28 May 2007. This filing is inadmissible and will therefore not be considered.

Ndayambaje and Mr. Nteziryayo to significantly reduce the number of their respective witnesses, particularly those witnesses who were being called to prove the same facts, by 6 November 2006.[7] At the time of the issuing of the Scheduling Order, the Appellant had listed 110 factual witnesses and seven expert witnesses, and no action was taken by the Appellant to comply with the Scheduling Order and reduce that number. On 9 November 2006, the Trial Chamber issued a second Scheduling Order, in which it considered that the Appellant should have been in a position to reduce the number of his witnesses and to file a revised list of witnesses and ordered that this be done by 4 December 2006.[8] The Appellant subsequently indicated that he intended to call forty-nine witnesses from the original list and, additionally, call twenty-three new witnesses.[9] Following this indication, the Trial Chamber issued a further Scheduling Order on 13 December 2006 in which it ordered the Appellant to further reduce the number of witnesses and file a final list of witnesses by 31 January 2007. The Appellant failed to comply with this order and additionally brought three motions seeking to vary his list of witnesses.

4. In a motion filed on 22 December 2006, the Appellant requested leave to drop sixty-one witnesses and to add twenty-two witnesses to his list of witnesses.[10] In the second motion, filed on 7 February 2007, the Appellant requested leave to drop twelve witnesses and to add seven witnesses to his list of witnesses.[11] Finally, in the third motion, filed on 5 March 2007, the Appellant requested leave to drop nine witnesses from his list of witnesses.[12] In a decision rendered on 21 March 2007, the Trial Chamber denied the Appellant leave to expand his witness list and ordered him to file a "revised list of witnesses containing not more than 30 witnesses" by 5 April 2007.[13]

5. The Appellant sought leave to appeal the Impugned Decision and, on 3 May 2007, the Trial Chamber granted his request for certification to appeal, pursuant to Rule 73 (B) of the Rules.[14]

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[7] Scheduling Order, 5 October 2006, p. 2.
[8] Scheduling Order, 9 November 2006, pp. 2, 3.
[9] Impugned Decision, para. 4.
[10] *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-T,, Motion to Vary the List of Joseph Kanyabashi's Defence Witnesses Pursuant to Rule 73*ter*, 22 December 2007.
[11] *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-T, Second Motion to Vary the List of Joseph Kanyabashi's Defence Witnesses, 7 February 2007.
[12] *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-T, *Requête de Joseph Kanyabashi en vertu de l' article 73 ter demandant de retirer neuf témoins*, 5 March 2007.
[13] *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006, 21 March 2007 ("Impugned Decision"), p. 9.
[14] *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motion for Certification to Appeal the Decision of 21 March 2007, 3 May 2007 ("Decision on Certification"), paras. 10, 23, 24, p. 6. The Trial Chamber denied Mr. Ndayambaje's request for certification. *See id.* para. 21.

II. SUBMISSIONS

6. The Appellant requests that the Impugned Decision be quashed and that the matter be remitted to the Trial Chamber for reconsideration.[15] In support of this request, he submits that (1) the Trial Chamber disregarded the "*audi alteram partem* rule" when it rendered the Impugned Decision, as he was not given the opportunity to make any submissions on the number of witnesses necessary for his defence;[16] (2) his motions to vary his witness list were denied without being considered on their merits[17] and the Trial Chamber failed to provide a reasoned opinion for the denial;[18] (3) in rendering the Impugned Decision, the Trial Chamber committed a discernible error in exercising its discretion;[19] (4) the Impugned Decision contravenes his right to provide a "full answer and defence" to the case against him;[20] and (5) the Impugned Decision affects the fairness of his trial, as it violated the right to equality.[21]

7. Mr. Ndayambaje submits that he supports the Appellant's submissions that refer to and concern him, and has no comments or objections to those submissions that relate solely to the Appellant.[22] He argues that the Impugned Decision should be quashed because (1) it affects the fairness of the trial;[23] (2) it violates his right to present a full answer in defence;[24] and (3) the Trial Chamber failed to provide a legal basis for the exercise of its discretion in limiting the number of witnesses he may call.[25]

8. As far as Mr. Ntahobali is concerned, he contests in part the grounds of appeal and the relief sought.[26] He disagrees with the Appellant's arguments relating to the "*audi alteram partem* rule"[27] and submits that the Trial Chamber erred "in an obvious and unreasonable manner" in the exercise of its discretion and had not examined all the facts and submissions brought to its attention.[28]

9. The Prosecution responds that the arguments advanced by the Appellant and Mr. Ndayambaje are similar and therefore addresses them jointly.[29] The Prosecution submits that (1)

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[15] Appeal, para. 63.
[16] Appeal, paras. 30 – 38.
[17] Appeal, paras. 30, 39 – 42.
[18] Appeal, paras. 30, 43 - 45.
[19] Appeal, paras. 54 – 57.
[20] Appeal, paras. 30, 45 – 57.
[21] Appeal, paras. 30, 58 – 62.
[22] Ndayambaje's Response, para. 14.
[23] Ndayambaje's Response, paras. 16 – 31.
[24] Ndayambaje's Response, paras. 31 – 40.
[25] Ndayambaje's Response, para. 41.
[26] Ntahobali's Response, para. 4.
[27] Ntahobali's Response, para. 6.
[28] Ntahobali's Response, para. 16.
[29] Prosecution's Response, para. 3.

there was no breach of the Appellant's right to be heard as there is no requirement that a Trial Chamber invites parties to make further submissions in respect of an issue on which it has already received submissions;[30] (2) the Trial Chamber heard and considered the Appellant's submissions and provided reasons for its finding that the number of the Appellant's intended witnesses was excessive;[31] and (3) the Impugned Decision does not violate the Appellant's right to make a full answer in defence nor does it violate the principle of equality before the Tribunal.[32] In response to Mr. Nadayambaje's argument that the Trial Chamber had not clearly indicated the legal basis for its decision to limit the number of witnesses, the Prosecution submits that Rules 54, 73*bis* and 90 (F) of the Rules recognize the authority of a Trial Chamber to control the proceedings, including limiting the numbers of witnesses.[33]

III. DISCUSSION

A. Standard of Review

10. The Appeals Chamber considers that it is well-established in the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") that Trial Chambers exercise discretion in relation to the conduct of proceedings before them.[34] In the present case, the Impugned Decision to reduce the number of witnesses who may testify on behalf of the Appellant was a decision taken within the discretion of the Trial Chamber, to which the Appeals Chamber accords deference. This deference is based on the Appeals Chamber's recognition of the Trial Chamber's familiarity with the day-to-day conduct of the parties and practical demands of the case.[35] The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.[36] The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently

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[30] Prosecution's Response, para. 18.
[31] Prosecution's Response, para. 24.
[32] Prosecution's Response, para. 34.
[33] Prosecution's Response, paras. 35, 36.
[34] *See, e.g., The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 3 *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("*Prlić* Decision on Reduction of Time") para. 8, referring to Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić* Decision on Cross-Examination"), p. 3.
[35] *See, e.g., Prlić* Decision on Reduction of Time, para. 8.
[36] *See, e.g., The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 3.

incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.[37]

B. The admissibility of Ndayambaje's Response and Ntahobali's Response

11. As a preliminary matter, the Appeals Chamber considers whether Mr. Ndayambaje's Response and Mr. Ntahobali's Response are admissible. The Appeals Chamber notes that in the *Blaškić* case, the Appeals Chamber of the ICTY considered that "the purpose of a response is to give a full answer to the issues raised in a motion by the moving party".[38] While the Practice Direction does not specifically provide for the possibility for a co-accused to file submissions in appeal proceedings initiated by another co-accused, this may be allowed in the circumstances of a given case, particularly where such co-accused has a specific interest in the matter and where considering such filing as valid would be in the interests of justice and of no prejudice to other parties.[39]

12. Mr. Ndayambaje submits that any ruling by the Appeals Chamber which allows the Appellant's submissions is equally applicable to him.[40] He argues that his response is justified because the presentation of his defence "cannot be subject to rules and principles that are different from those which dictate the conduct" of the Appellant's case,[41] and contends that the fact that he chose not to request certification to appeal the Impugned Decision should not be construed as a waiver of his right to "make full answer and defence".[42] Most of the submissions in Mr. Ndayambaje's Response relate solely to his case and challenge the Impugned Decision with regard to its order to him to file a revised witness list containing a maximum of thirty witnesses.[43] The Appeals Chamber finds that these arguments are inadmissible with respect to the appeal of the Appellant as they are not made in response to that appeal. For Mr. Ndayambaje to raise these arguments on his own behalf with respect to the restriction on the number of witnesses he is permitted to call, he needs to have obtained certification. He cannot attempt to appeal the Impugned Decision with the objective of having the Trial Chamber's reduction of the number of his witnesses reversed by filing a response to a certified appeal of a co-accused.

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[37] *See, e.g., The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 3.
[38] *Prosecutor v. Tihomir Blaški},* Case No. IT-95-14-R, Decision on the Prosecution's Motion Seeking a Declaration, p. 4; *Prosecutor v. Ante Gotovina et al*, Case No. IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, para. 12 ("*Gotovina* Decision").
[39] *Gotovina* Decision, para. 12.
[40] Ndayambaje's Response, para. 10.
[41] Ndayambaje's Response, para. 11.

13. In the case of Mr. Ntahobali, the Appeals Chamber notes that in his Response, he submits that in rendering the Impugned Decision, the Trial Chamber erred, "in an obvious and unreasonable manner", in the exercise of its discretion,[44] and that it failed to examine all the facts and submissions brought to its attention.[45] Accordingly, Mr. Ntahobali's Response challenges the Impugned Decision and the Trial Chamber's use of its discretion.[46] The Appeals Chamber considers that, as Mr. Ntahobali did not seek and was not granted certification to appeal from the Impugned Decision, his arguments in this regard are inadmissible before the Appeals Chamber.

14. The Appeals Chamber holds that to grant an accused, who has not obtained the required certification, the standing to challenge a Trial Chamber decision on appeal in his response to an appeal filed by a co-accused would open the interlocutory appeal process to abuse. Where certification in accordance with Rules 73 (B) and (C) of the Rules is required, parties must obtain such certification if they intend to appeal a decision. Consequently, the Appeals Chamber considers that it will only take into consideration those arguments made by Mr. Ndayambaje and Mr. Ntahobali that are legitimately made in response to the certified appeal of the Appellant.

C. The alleged failure to hear the Appellant on why he required more than thirty witnesses for his defence

15. The Appellant submits that the Trial Chamber failed to comply with the *audi alteram partem* rule when it ordered a reduction in the number of his witnesses to a maximum of thirty, as he was not granted an opportunity to address the Trial Chamber on the number of witnesses necessary for the presentation of his defence, prior to the Impugned Decision being rendered.[47] He argues that Article 20(2) of the Tribunal's Statute ("Statute") confers on an accused the right to a fair and public hearing and imposes an obligation on the Trial Chamber to hear an accused when decisions are being taken in relation to the presentation of his or her defence.[48] According to the Appellant, this principle is equally applicable where Trial Chambers exercise their power to control the proceedings.[49]

16. The Appeals Chamber notes that the Trial Chamber took into consideration the Appellant's Pre-Defence Brief, as well as the "will-say" statements of his proposed witnesses. The Appellant's

[42] Ndayambaje's Response, para. 12.
[43] *See* Ndayambaje's Response, paras. 16 - 49.
[44] Ntahobali's Response, para. 15.
[45] Ntahobali's Response, para. 16.
[46] Ntahobali's Response, paras. 15 – 35.
[47] Appeal, para. 34.
[48] Appeal, para. 36.
[49] Appeal, para. 36.

Pre-Defence Brief and the "will-say" statements of his potential witnesses constituted his submissions to the Trial Chamber on the presentation of his defence, pursuant to Rule 73*ter* of the Rules. After considering the Pre-Defence Brief and the "will-say" statements, the Trial Chamber concluded that:

> From an examination of the will-says attached to the Pre-Defence Brief, the Chamber finds for example that 15 witnesses envisaged to testify about Kanyabashi's character is excessive. Similarly, five witnesses to testify about people alleged to have hidden in Kanyabashi's house between April and July 1994 and six witnesses to testify on the alleged attack on the dispensary in Matyazo *secteur* in April 1994 are excessive.[50]

The Appeals Chamber finds that the submissions of the Defence made in the Pre-Defence Brief and "will-say" statements formed the basis for the Trial Chamber's decision ordering a reduction in the number of the Appellant's witnesses. Therefore, there is no merit in the contention that the Appellant had not been heard when the Trial Chamber ordered a reduction in the number of his witnesses. The Trial Chamber was well aware of the Appellant's reason for the calling of these witnesses and did not consider that the Appellant's defence necessitated calling numerous witnesses to testify to the same factual allegations. Such a decision was well within the Trial Chamber's reasonable exercise of its discretion in the management of the trial proceedings.

D. The Trial Chamber's alleged failure to examine the Appellant's motions and to issue a reasoned decision

17. The Appellant submits that the Trial Chamber erred in failing to comply with the *audi alteram partem* rule, as well as Article 20(2) of the Statute when it ruled on two of his motions seeking to vary his list of witnesses.[51] He argues that the Trial Chamber dismissed both motions "without considering their merit" and without providing a reasoned decision.[52] The Appellant contends that he is entitled to know the Trial Chamber's reasons for determining that his witnesses are excessive in number as well as which witnesses are held to be excessive.[53]

18. The Appeals Chamber notes that a Trial Chamber must, at minimum, provide reasons in support of its findings on the substantive consideration relevant for its decision.[54] In the present case, the Appeals Chamber recalls that the Appellant indicated to the Trial Chamber, on 4 December 2006, that he had fifty-six witnesses.[55] The Trial Chamber directed him to significantly reduce this number of witnesses in its Scheduling Order of 13 December 2006. Following this

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[50] Impugned Decision, para. 35.
[51] Appeal, paras. 39 – 42.
[52] Appeal, para. 39.
[53] Appeal, para. 25.
[54] *Prlić* Decision on Reduction of Time, para. 16.

Scheduling Order, the Appellant filed his motion of 22 December 2006. In that motion, he requested leave to drop sixty-one witnesses from his witness list, even though he had earlier indicated that he had only fifty-six witnesses. In that motion, he further requested leave to add twenty-two witnesses to his witness list.[56] Similarly, in his motion of 7 February 2007, the Appellant requested leave to add seven witnesses and to drop twelve witnesses.[57]

19. In light of the confusing nature of these motions filed in the face of a clear direction to reduce the number of fifty-six witnesses, the Trial Chamber ruled that:

> Kanyabashi's successive motions for variation of his witness list are unnecessary, and constitute an abuse of process as they endlessly relitigate an issue already adjudicated upon. The previous Orders required the Defence to reduce significantly their witness lists at the time. The appropriate course of action would have been to reduce substantially the said witness lists and not to move the Chamber afresh for any addition or substitution of witnesses. Therefore the Chamber denies Kanyabashi's Motions for addition of witnesses.[58]

The Appeals Chamber considers that this reasoning sufficiently informs the Appellant of the reasons for the dismissal of his motions. While the Appellant may, with leave of the Trial Chamber, reinstate witnesses or vary his list of witnesses,[59] he may only do so after he has complied with the Trial Chamber's orders to significantly reduce his witness list. Consequently, the Appellant's argument lacks merit.

E. The alleged violation of the right to present a full and complete defence

20. The Appellant submits that the Impugned Decision "violates his right to make a full answer in defence", as he is now forced to withdraw five witnesses listed in his Pre-Trial Brief, as well as twenty-six witnesses listed in the two motions.[60] He contends that the Trial Chamber committed a discernible error in exercising its discretion when it limited the number of witnesses he may call, to thirty.[61] In this regard, the Appellant argues that the number of his witnesses cannot be deduced by a "simple mathematical calculation"[62] and that the number of witnesses called by his co-accused

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[55] Impugned Decision, para. 32.
[56] Impugned Decision, para. 7. *See* para. 8 of the Impugned Decision where the Appellant subsequently requested nineteen witnesses to be added to his witness list instead of twenty-two.
[57] *See* paras. 3, 4 *supra.*
[58] Impugned Decision, para. 33.
[59] *See* Rule 73*ter* of the Rules which states that "After commencement of the Defence case, the Defence, if it considers it to be in the interest of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called".
[60] Appeal, paras. 46, 47.
[61] Appeal, para. 54.
[62] Appeal, para. 47.

cannot be the only point of reference when determining the number of witnesses he is entitled to call in his defence.[63]

21. As noted above, Trial Chambers exercise discretion in relation to the conduct of proceedings before them.[64] The Appeals Chamber notes that in the *Orić* case,[65] the ICTY Appeals Chamber held that:

> [a]lthough Rule 73*ter* gives the Trial Chamber the authority to limit the length of time and the number of witnesses allocated to the defence case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights. [66]

Consequently, the Appeals Chamber must determine whether in ordering the Appellant to reduce the number of his witnesses, the Trial Chamber took into consideration the complexity of the Appellant's case and determined that the maximum number of witnesses allotted to him was sufficient to allow the Appellant a fair opportunity to present his defence.

22. The Appeals Chamber notes that when ordering the Appellant to reduce the number of his witnesses in the Impugned Decision, the Trial Chamber was guided by its previous orders which directed the Appellant to significantly reduce the number of his witnesses.[67] The Appellant's failure to comply with those orders[68] resulted in the Trial Chamber issuing the Impugned Decision and ordering the Appellant to reduce the number of his witnesses to a maximum of thirty.

23. In issuing the Impugned Decision, the Trial Chamber was also guided by the time-frame of "mid-2007" to complete the Defence cases of all six accused, which it considered to be reasonable in the circumstances of a trial that started in 2001. Thus, it concluded that it was in the interest of justice that proceedings in this trial should come to an end within that time-frame.[69] In this regard, the Trial Chamber considered the "need to balance the rights of each accused to a fair trial" and took into consideration "the right of each Accused in this joint trial to be tried without undue delay", noting that "none of the first three Defence teams have called more than 26 witnesses."[70]

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[63] Appeal, para. 49.
[64] *See* para. 10 *supra.*
[65] *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, ("*Orić* Decision").
[66] *Orić* Decision, para. 8.
[67] Impugned Decision, paras. 3, 5, 31.
[68] Impugned Decision, para. 3.
[69] Scheduling Order of 13 December 2006, p. 3.
[70] Impugned Decision, paras. 30, 37.

24. The Appeals Chamber considers that the Trial Chamber's duty to ensure the fairness and expeditiousness of trial proceedings entails a delicate balancing of interests, particularly in cases, as in the present one, where there are six accused. As already stated, the Appeals Chamber is satisfied that it was well within the discretion of the Trial Chamber to reduce the number of witnesses to be called by the Appellant by reference to the Pre-Defence Brief and "will-say" statements. The Appeals Chamber is further satisfied that in basing its decision on a consideration of the evidence to be adduced by the proposed witnesses, the Trial Chamber properly considered whether reducing the number of the Appellant's witnesses to a maximum of thirty would still allow the Appellant the opportunity to present an adequate defence. Accordingly, the Appeals Chamber finds no error on the part of the Trial Chamber.

F. The alleged violation of the right to equality

25. The Appellant submits that the Impugned Decision violates Article 20(1) of the Statute, which provides that all persons should be equal before the Tribunal[71] and thereby "compromises the fairness of the trial".[72] He argues that when it comes to the presentation of his evidence, he is not being treated the way other parties involved in his trial have been treated.[73] He avers that Mr. Nteziryayo was given "preferential treatment" when he made his request to vary his witness list, while in the case of Mr. Ntahobali the Trial Chamber merely limited the scope of witness testimonies.[74] Furthermore, the Prosecution was never forced to reduce the number of its witnesses and reserved the right to review its witness list.[75]

26. The Appeals Chamber recalls that in the *Karemera et al.* case,[76] it endorsed the following reasoning of the ICTY Appeals Chamber in the *Orić* case:[77]

> The Appeals Chamber has long recognised that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee." At a minimum, "equality of arms obliges a judicial body to ensure that neither party is put at a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an [a]ccused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than

[71] Appeal, para. 59.
[72] Appeal, para. 58.
[73] Appeal, para. 60.
[74] Appeal, para. 59.
[75] Appeal, para. 60.
[76] *Prosecutor v. Édouard Karemera et al.,* Case No.ICTR-98-44-AR 15*bis* 3, Decision on Appeal Pursuant to Rule 15 *bis* (D), 20 April 2007, para. 27.
[77] *Ori}* Decision.

> a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.[78]

The Appeals Chamber considers that all parties are not entitled to call precisely equal numbers of witnesses and, as noted above, the Trial Chamber has the discretion to limit the number of witnesses a party may call. This discretion may be exercised pursuant to Rules 73*bis* and 73*ter* of the Rules. Where the Trial Chamber exercises this discretion, it must be subject to the full respect of the rights of the party concerned. In cases where an exercise of this discretion leads to a situation where one party has more witnesses than the other, this does not necessarily mean that the principle of equality of arms is violated. In the present case, the Appeals Chamber notes that the Trial Chamber took into account the Prosecution's argument that "during its case, it significantly reduced its list of witnesses calling only 59, which is an average of only 10 witnesses per accused".[79] The Appellant has failed to demonstrate any infringement of the principle of equality of arms in his case, and the Appeals Chamber accordingly dismisses his contention in this regard.

IV. DISPOSITION

27. For the aforementioned reasons, the Appellant's Appeal is **DISMISSED** in its entirety.

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

Dated this the 21st day of August 2007,	____________________
at The Hague,	Judge Fausto Pocar,
The Netherlands.	Presiding

ƑSeal of the Tribunalğ

[78] *Ori}* Decision, para. 7 (internal footnote omitted).
[79] Impugned Decision, para. 20.