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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-54-A
12th May 2009
{46/H – 36/H}

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

ICTR Appeals Chamber
Date: 12th May 2009
Action: A. Jureid
Copied To: Concerned Judges, SCOs, LCOs,
ALO's, Parties, CMS, LSC

Registrar: Mr. Adama Dieng
Decision of: 12 May 2009

Augustin NGIRABATWARE

v.

THE PROSECUTOR

Case No. ICTR-99-54-A

JUDICIAL RECORDS ARCHIVE

2009 MAY 12 P 5: 17

**DECISION ON AUGUSTIN NGIRABATWARE'S APPEAL
OF DECISIONS DENYING MOTIONS TO VARY TRIAL DATE**

Counsel for the Defense:
Mr. David C. Thomas

Office of the Prosecutor:
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *KOFEH KUMBELO A. AFANDI*
SIGNATURE: *[Signature]* DATE: 12 May 2009

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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 "Dr. Ngirabatware's Appeal of Trial Chamber's Decision Denying Defence Motion to Vary Trial Date of May 18, 2009" filed on 21 April 2009 ("Appeal") by Augustin Ngirabatware ("Ngirabatware").

A. Background

2. Ngirabatware was arrested in Germany on 17 September 2007 and transferred to the Tribunal in Arusha on 8 October 2008. He made his initial appearance on 10 October 2008, during which he pleaded not guilty to all the counts in the indictment against him.¹

3. On 29 January 2009, the President of the Tribunal issued an Interoffice Memorandum stating that Ngirabatware's trial was scheduled to start on 4 May 2009. On the same day, the Bench of Trial Chamber II of the Tribunal seized of Ngirabatware's case ("Trial Chamber") granted in part the Prosecution's motion to amend the initial indictment.² On 4 February 2009, Ngirabatware filed a motion requesting the Trial Chamber to vacate the scheduled trial date.³

4. During the further appearance held on 9 February 2009, Ngirabatware pleaded not guilty to all charges contained in the amended indictment filed by the Prosecution on 5 February 2009.⁴

5. On 25 February 2009, the Trial Chamber found that there was no justification to vacate the scheduled trial date and denied Ngirabatware's motion to vacate the 4 May 2009 trial date accordingly.⁵ However, "due to scheduling issues", the Trial Chamber ordered that the trial should commence on 18 May 2009.⁶ Arguing that his Defence would not be ready for trial on 18 May 2009, Ngirabatware moved the Trial Chamber to strike the scheduled trial date.⁷

¹ Initial Appearance, T. 10 October 2008 pp. 17-24.

² *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009 ("Decision Granting Leave to Amend the Indictment").

³ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Vacate Trial Date of May 4, 2009, 4 February 2009.

⁴ Further Appearance, T. 9 February 2009 pp. 26-28; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 5 February 2009.

⁵ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Vacate Trial Date of 4 May 2009, 25 February 2009 ("Decision Setting the Trial Date"), para. 12 and disposition.

⁶ *Idem*.

⁷ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Continue 18 May 2009 Trial Date, 11 March 2009.

6. On 25 March 2009, the Trial Chamber denied in its entirety what it considered to be a request for reconsideration of its Decision Setting the Trial Date and reiterated that Ngirabatware's trial shall commence on 18 May 2009.⁸ Thereafter, the Trial Chamber granted Ngirabatware certification to appeal the Decision Denying Reconsideration and ordered a stay of the commencement of the trial should a determination of the appeal be filed later than the set trial date of 18 May 2009.⁹ In the meantime, the Prosecution filed another amended indictment pursuant to the Trial Chamber's decision of 8 April 2009.¹⁰

7. Ngirabatware filed his Appeal on 21 April 2009. The Prosecution responded on 1 May 2009, opposing the Appeal.¹¹ Ngirabatware filed a reply on 5 May 2009.¹²

B. Standard of Review

8. A Trial Chamber has discretion with respect to the scheduling of a trial.¹³ As such, the decision of the Trial Chamber to set the 18 May 2009 trial date is a discretionary decision to which the Appeals Chamber accords deference. The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a "discernible error". The Appeals Chamber will only overturn the Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁴

⁸ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Vary Trial Date, 25 March 2009 ("Decision Denying Reconsideration"), para. 23 and disposition.

⁹ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009 ("Certification Decision"), para. 21 and disposition.

¹⁰ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 14 April 2009 ("Amended Indictment"). See also *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 8 April 2009, para. 4 and disposition.

¹¹ Prosecutor's Response to Augustin Ngirabatware's Appeal of the Trial Chamber's Decision Denying the Defence Motion to Vary Trial Date of 18th May 2009, 1 May 2009 ("Response").

¹² Dr. Ngirabatware's Reply to the Prosecutor's Response to Dr. Ngirabatware's Appeal of the Trial Chamber's Decision Denying the Defence Motion to Vary Trial Date of 18 May 2009, 5 May 2009 ("Reply").

¹³ *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Decision"), para. 16.

¹⁴ See, e.g., *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 8; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, para. 4; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Matthieu Ndirumpatse's Appeal From the Trial Chamber Decision of 17 September 2008, 30 January 2009 ("*Karemera et al.* Decision of 30 January 2009"), para. 18; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.7, Decision on Jérôme-Clément Bicamumpaka's Interlocutory Appeal Concerning a Request for a Subpoena, 22 May 2008, para. 8.

C. Submissions

9. In his Appeal, Ngirabatware submits that the Trial Chamber abused its discretion in denying him minimal adequate time to prepare for trial. He requests the Appeals Chamber to reverse the Decision Denying Reconsideration and remand the matter to the Trial Chamber with instructions to set a trial date in January 2010.¹⁵ Before setting out the arguments in support of his contention that the Trial Chamber abused its discretion, Ngirabatware recalls that his Lead Counsel, legal assistant and investigator were assigned to his Defence team only on 3 December 2008, 15 January 2009 and 6 February 2009, respectively.¹⁶

10. In support of his Appeal, Ngirabatware first argues that the Trial Chamber failed to address his needs to prepare for trial, and instead deferred to the date set by the Office of the President, which was not in a position to know of those needs.¹⁷ Although the Trial Chamber stated that the scheduling of trials depends on a number of factors, Ngirabatware submits, it never analyzed the trial date in light of those factors.¹⁸

11. Second, Ngirabatware submits that the Trial Chamber's decision constitutes an abuse of its discretion in light of the fact that it allowed the Prosecution to file an amended indictment containing 54 new charges less than four months before the trial date. He stresses that in the *Casimir Bizimungu et al.* case, leave to amend the indictment to expand the charges was denied on the ground that less than three months was not enough time to prepare a defence.¹⁹

12. Third, Ngirabatware claims that he is being given far less time to prepare for trial than any other person to ever appear before the Tribunal and that the Trial Chamber has never set forth any reason to justify this prejudicial treatment.²⁰ He adds that given that the Prosecution had years to prepare its case, the principle of equality of arms will be violated if the case proceeds as scheduled.²¹

¹⁵ Appeal, paras. 27, 28, and Conclusion at pp. 16, 17.

¹⁶ *Ibid.*, paras. 4, 7, 12.

¹⁷ *Ibid.*, paras. 27(a), 27(c), 29, 30.

¹⁸ *Ibid.*, para. 24.

¹⁹ *Ibid.*, paras. 31, 32, referring to *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 ("*Bizimungu et al.* Trial Decision"), para. 34 and *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber's Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 19. Ngirabatware points out that two Judges of the present Trial Chamber were part of the bench that issued the *Bizimungu et al.* Trial Decision.

²⁰ Appeal, paras. 27(b), 33, 34. Ngirabatware submits that the average period of time at the Tribunal between the initial appearance and judgement has been approximately four years and five months (*see also* Appeal, para. 16).

²¹ Appeal, paras. 35, 37, 38.

13. Fourth, Ngirabatware asserts that the setting of the trial was motivated by the completion strategy of the Tribunal, rather than consideration of his rights and the need to prepare for trial.²² In Ngirabatware's view, although neither the Office of the President nor the Trial Chamber referred to the completion strategy in connection with setting the trial date, "it is disingenuous to state and naive to believe that the setting has not been dictated by that fact".²³ He emphasizes that the Trial Chamber never identified any alternative reason for pushing the case to trial so quickly.²⁴ He submits that while the completion strategy is a worthy goal, the political considerations and administrative concerns reflected in it cannot prevail over his right to a fair trial.²⁵

14. Finally, Ngirabatware argues that he will be irremediably prejudiced if the trial were to start on 18 May 2009 since it is not possible for his Defence team to complete the pre-trial investigation by this date.²⁶ Specifically, he points out that:

(i) the pre-trial investigation only began in February 2009 due to the filing of the first amended indictment and the time it took to staff the Defence team;²⁷

(ii) the pre-trial investigation involves many witnesses from all over the world, as well as numerous documents, some of which are only in the Kinyarwanda language;²⁸

(iii) his Defence team has received a very large amount of documents of disclosure from the Prosecution which need to be analyzed;²⁹

(iv) the second amended indictment names additional witnesses and makes other changes to the allegations in Count 6;³⁰

(v) he is charged with diversion of funds, a charge which involves a lot of documentary evidence, not all of which has been disclosed by the Prosecution;³¹

(vi) the lack of specificity of the second amended indictment regarding dates necessitates more time to conduct investigations.³²

He avers that, taking into account the scope of the case, the time similar cases have taken and all the other factors involved, his Defence team will in all likelihood be ready for trial by the end of 2009.³³

²² Appeal, paras. 39-42.

²³ Appeal, para. 40.

²⁴ Appeal, para. 25.

²⁵ Appeal, para. 41.

²⁶ Appeal, paras. 42-49.

²⁷ Appeal, para. 44.

²⁸ Appeal, heading (E) at p. 14, para. 46.

²⁹ Appeal, paras. 4, 13, 44, 45.

³⁰ Appeal, para. 44.

³¹ Appeal, para. 45.

³² Appeal, para. 45.

15. The Prosecution responds that the Appeal should be dismissed on the grounds that Ngirabatware fails to demonstrate that the Trial Chamber has made a discernible error and that the Trial Chamber's refusal to vary the trial date of 18 May 2009 is reasonable in the circumstances.³⁴

16. The Prosecution submits that the Trial Chamber fully addressed the needs of Ngirabatware during the initial appearance and the further appearance and clearly revisited the issue in arriving at its decisions denying variation of the trial date.³⁵ In its opinion, the Trial Chamber duly took account of all relevant factors, such as the right of the accused to have adequate time and facilities to prepare his defence but also the right to have a trial without undue delay and the administrative and logistical matters that are necessary for the holding of a trial.³⁶ The Prosecution further contends that the Amended Indictment is considerably more concise, specific and up to date with the practice and jurisprudence of the Tribunal and that "the 'new allegations' have the overall effect of simplifying the proceedings by streamlining the indictment".³⁷

17. As regards Ngirabatware's other arguments, the Prosecution submits that: (i) the matters between the Trial Chamber and the Office of the President are irrelevant considerations in the instant case;³⁸ (ii) the argument that Ngirabatware should be given as much time as previous accused persons is without merit since "each case is unique and all cases before the Tribunal are not subject to the same circumstances";³⁹ (iii) there is no evidence to suggest that the Tribunal's completion strategy has played any role in the setting of the trial date.⁴⁰ After emphasizing that Ngirabatware evaded capture and resisted transfer to the seat of the Tribunal, the Prosecution adds that it is clear that Ngirabatware's strategy is "to seek to avoid trial by delaying the proceedings beyond the temporal mandate of the Tribunal".⁴¹

18. The Prosecution concludes by noting that a focused Defence exercising due diligence will be able to complete its pre-trial preparation in time to commence trial on 18 May 2009.⁴²

19. In reply, Ngirabatware reiterates that he has received far less time to prepare for trial than any other person ever to appear before the Tribunal.⁴³ In his opinion, it is "hypocritical" for the Prosecution to argue that the May trial date is necessary to protect his right to a speedy trial when

³³ Appeal, para. 48. *See also* Reply, para. 18.

³⁴ Response, paras. 2, 9, 10, 29.

³⁵ Response, para. 11.

³⁶ Response, paras. 12-14, 16.

³⁷ Response, paras. 19-21. *See* Decision Granting Leave to Amend the Indictment, para. 30.

³⁸ Response, para. 16.

³⁹ Response, para. 22.

⁴⁰ Response, para. 25.

⁴¹ Response, para. 27.

⁴² Response, paras. 23, 28.

⁴³ Reply, para. 5(e). *See also* *ibid.*, para. 3.

he is not complaining of a violation of that right but of the denial of his right to have adequate time to prepare,⁴⁴ and “ludicrous” to suggest that filing 54 new charges less than four months before trial does nothing more than simplify the proceedings and is not prejudicial in terms of trial preparation.⁴⁵ Ngirabatware adds that he has no incentive to delay the trial unnecessarily or seek to avoid trial, but that he is only seeking a fair trial.⁴⁶ The more time the Defence has to prepare for trial, he also argues, the more focused the case will be and the less time the trial will take.⁴⁷ Listing a number of pending pre-trial matters, Ngirabatware further argues that the Prosecution is not ready for trial either and contends that he is still “in the dark” about many aspects of the Prosecution’s case.⁴⁸ He also emphasizes that his Defence team has not been assigned an office yet and that he is still without a Co-Counsel.⁴⁹ In conclusion, Ngirabatware reiterates that his Defence team cannot be ready for trial on 18 May 2009 and that the Trial Chamber abused its discretion in refusing to set a reasonable trial date.⁵⁰

D. Discussion

20. As a preliminary matter, the Appeals Chamber notes that Ngirabatware does not take issue with the Trial Chamber’s refusal to reconsider its previous decision on the date of the trial, but with the trial date itself and the manner in which it was set. When granting Ngirabatware’s motion for certification to appeal the Decision Denying Reconsideration, the Trial Chamber defined the issue that should be put to the Appeals Chamber for resolution as whether Ngirabatware and his Defence would have sufficient time to prepare the Defence case if the trial proceeds on 18 May 2009 as scheduled.⁵¹ Since the 18 May 2009 trial date was set in the Decision Setting the Trial Date, the consideration of the Appeal will necessarily require the Appeals Chamber to examine this decision. Therefore, although certification was formally granted to appeal the Decision Denying Reconsideration, the Appeals Chamber considers itself seized of a challenge against both the Decision Denying Reconsideration and the Decision Setting the Trial Date (together “Impugned Decisions”).

21. Turning to the merit of the Appeal, the Appeals Chamber first notes that the 18 May 2009 trial date was not set by the Office of the President but by the Trial Chamber.⁵² The question as to

⁴⁴ Reply, paras. 7-9.

⁴⁵ Reply, heading (C) at p. 7. *See also ibid.* paras. 10-12.

⁴⁶ Reply, heading (D) at p. 8, paras. 13-16.

⁴⁷ Reply, para. 17.

⁴⁸ Reply, para. 1(i).

⁴⁹ Reply, para. 2.

⁵⁰ Reply, para. 18.

⁵¹ Certification Decision, para. 19.

⁵² Decision Setting the Trial Date, para. 12 and disposition.

whether the Trial Chamber erroneously deferred to the Office of the President is therefore irrelevant to the resolution of the present Appeal.

22. The Appeals Chamber recalls that Trial Chambers enjoy considerable discretion in the conduct of the proceedings before them,⁵³ including in the scheduling of trials.⁵⁴ However, this discretion finds its limitation in the obligation imposed on Trial Chambers by Articles 19 and 20 of the Tribunal's Statute ("Statute") to ensure that a trial is fair and expeditious.

23. In the Decision Setting the Trial Date, the Trial Chamber duly recalled the right of an accused to a fair trial within a reasonable time and pointed out its obligation to balance the need for the accused to have adequate time for the preparation of his case and the need for an expeditious trial.⁵⁵ It also correctly pointed out that "[i]n arriving at a decision regarding the scheduling of the trial, the Chamber considers all the relevant factors and appropriate concerns".⁵⁶ However, the Appeals Chamber observes that nothing in the Impugned Decisions indicates that the Trial Chamber indeed did so.

24. The Trial Chamber reached its conclusion that there was no justification to vacate the original trial date and set the 18 May 2009 trial date⁵⁷ without expressly addressing Ngirabatware's concerns as to the fairness of his trial or any of the relevant factors. While the Trial Chamber mentioned issues related to the staffing of the Defence team, it omitted to discuss the impact of the staffing situation of the Defence team on the Defence's ability to prepare for trial within the available time.⁵⁸ Instead, the Trial Chamber merely stated that it "expected that the staffing position of the Defence team will be addressed and completed in a timely manner".⁵⁹ Nowhere in the Impugned Decisions did the Trial Chamber consider the decisive question as to whether the time for preparation available to the Defence was objectively adequate to permit Ngirabatware to prepare his case in a manner consistent with his rights.

25. The Appeals Chamber further observes that, contrary to the Prosecution's assertion, the issues regarding Ngirabatware's needs were not addressed during the initial appearance or the further appearance. Ngirabatware raised the issue of the trial date at the status conference held on 9 February 2009 but the Trial Chamber declined to discuss it on the ground that a status conference was not the right place to do so.⁶⁰ The Trial Chamber merely indicated that it would consider

⁵³ See, e.g., *Karemera et al.* Decision of 30 January 2009, para. 17 and references cited therein.

⁵⁴ *Milošević* Decision, para. 16.

⁵⁵ Decision Setting the Trial Date, para. 10.

⁵⁶ Decision Setting the Trial Date, para. 10, referring to *Milošević* Decision, paras. 16, 17.

⁵⁷ Decision Setting the Trial Date, para. 12.

⁵⁸ Decision Setting the Trial Date, para. 11.

⁵⁹ Decision Denying Reconsideration para. 24. See also Decision Setting the Trial Date, para. 11.

⁶⁰ Status Conference, T. 9 February 2009 pp. 4-7.

Ngirabatware's request to vary the trial date in a timely and expeditious manner, bearing in mind the rights of the accused.⁶¹ The information on the staffing of the Defence team given at the status conference was not commented upon by the Trial Chamber, which only requested the Registry to provide the necessary assistance to the parties.⁶²

26. Ngirabatware's right to have adequate time to prepare for trial was explicitly addressed in the Trial Chamber's Decision Granting Leave to Amend the Indictment.⁶³ However, the Trial Chamber's consideration therein was limited to the question as to whether the requested amendments would affect the accused's right to a fair trial, without regard to any other factors.

27. The Appeals Chamber finds that the Trial Chamber erred in failing to address the factors relevant to its making a fully informed and reasoned decision as to whether the setting of the 18 May 2009 trial date infringed Ngirabatware's right to a fair trial, in particular his right to have adequate time for the preparation of his defence provided for in Article 20(4)(b) of the Statute.

28. The Appeals Chamber considers that it is not possible to set a standard of what constitutes adequate time to prepare a defence. The length of the preparation period depends on a number of factors specific to each case, such as, for example, the complexity of the case, the number of counts and charges, the gravity of the crimes charged, the individual circumstances of the accused, the status and scale of the Prosecution's disclosure, and the staffing of the Defence team.⁶⁴ Ngirabatware's comparison with other cases therefore provides very limited, if any, assistance. Likewise, the Appeals Chamber considers that Ngirabatware's argument premised on the principle of equality of arms is ill-founded; the issue is not whether the parties had the same amount of time to prepare their respective cases, but rather if either party, and in particular the accused, is put at a disadvantage when presenting its case.⁶⁵ The principle of equality of arms invoked by Ngirabatware should not be interpreted to mean that the Defence is entitled to the exact same means as the Prosecution.

29. In the present case, the Appeals Chamber notes that Ngirabatware's Lead Counsel was assigned on 2 December 2008. A legal assistant and an investigator were assigned to his Defence

⁶¹ Status Conference, T. 9 February 2009 pp. 5, 7.

⁶² Status Conference, T. 9 February 2009 pp. 6-8.

⁶³ Decision Granting Leave to Amend the Indictment, paras. 25, 30, 35.

⁶⁴ Cf. *Milošević* Decision, paras. 8-19.

⁶⁵ *Karemera et al.* Decision of 30 January 2009, para. 29; *The Prosecutor v. Elie Ndayambaje et al.*, 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, 21 August 2007, para. 18; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Decision"), para. 7, citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 48. See also *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on the Accused Naletilić's Motion to Continue Trial Date, 31 August 2001, para. 7.

team only in January and February 2009, respectively. At the time of the Reply, no Co-Counsel had been assigned yet. The Appeals Chamber further notes that the indictment was significantly amended on 5 February 2009, and further amended on 14 April 2009. Although the Prosecution withdrew counts, removed certain allegations and restructured the indictment so as to render it clearer and more specific, it also added a considerable number of new allegations. Ngirabatware is now charged with six different counts related to different offences⁶⁶ and for many different incidents. His responsibility is charged under both Article 6(1), including participation in a joint criminal enterprise, and Article 6(3) of the Statute. In addition, the Appeals Chamber observes that pre-trial matters are still pending.⁶⁷

30. Taken in isolation, none of these factors would have justified the Appeals Chamber's intrusion in the Trial Chamber's exercise of its discretion. Considered together, however, they lead the Appeals Chamber to conclude that, in light of the particular circumstances of this case, the Defence was not allowed enough time to prepare for trial. Accordingly, the Appeals Chamber finds that, in this specific situation, the date of 18 May 2009 for the commencement of the trial is so unreasonable as to permit the Appeals Chamber to draw an inference of abuse of discretion on the part of the Trial Chamber.

31. Time and resource constraints exist in all judicial institutions and it is legitimate for a Trial Chamber to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time.⁶⁸ However, the Appeals Chamber stresses that these considerations should never impinge on the rights of the parties to a fair trial.⁶⁹

⁶⁶ Ngirabatware is charged for conspiracy to commit genocide; genocide or, alternatively, complicity in genocide; direct and public incitement to commit genocide; and extermination and rape as crimes against humanity.

⁶⁷ The Appeals Chamber notes for instance that no decision has been rendered yet on Ngirabatware's motion objecting to the Prosecution Pre-Trial Brief filed on 19 March 2009: *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence's Objections, Pursuant to Rule 73 bis, to the Prosecutor's Pre-Trial Brief, 16 April 2009. In addition, upon reading "Ngirabatware's Reply to the Prosecutor's Response to the Defence Objections, Pursuant to Rule 73 bis, to the Prosecution's Pre-Trial Brief" filed on 27 April 2009, the Appeals Chamber observes that disclosure issues still remain.

⁶⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal Against "Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge", 1 July 2008 ("Prlić et al. Decision of 1 July 2008"), para. 16; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 23, citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, 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 et al. Decision of 4 July 2006"), p. 4.

⁶⁹ Cf. *Prlić et al. Decision of 1 July 2008*, para. 16; *Orić Decision*, para 8; *Prlić et al. Decision of 6 February 2007*, para. 23; *Prlić et al. Decision of 4 July 2006*, p. 4.

32. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber abused its discretion in failing to address the factors relevant to its taking a fully informed and reasoned decision as to whether the setting of the trial in May 2009 infringed Ngirabatware's right to a fair trial and in setting an unreasonable date for the start of the trial. Because the Trial Chamber is in the best position to determine what would be an appropriate date for the start of the trial, the Appeals Chamber remands the matter to the Trial Chamber.


E. Disposition

33. Accordingly, the Appeals Chamber **GRANTS** the Appeal, **REVERSES** the Impugned Decisions and **REMANDS** the determination of a trial date consistent with this decision to the Trial Chamber.

Done this twelfth day of May 2009,
at The Hague, The Netherlands.



[Seal of the Tribunal]



Judge Andréia Vaz
Presiding