UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron**
Registrar:	**Mr. Adama Dieng**
Decision of:	**24 July 2009**

Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA
v.

THE PROSECUTOR

Case No. ICTR-98-41-A

DECISION ON ALOYS NTABAKUZE'S MOTION FOR SEVERANCE, RETENTION OF THE BRIEFING SCHEDULE AND JUDICIAL BAR TO THE UNTIMELY FILING OF THE PROSECUTION'S RESPONSE BRIEF

Counsel for Théoneste Bagosora
Raphaël Constant

Counsel for Aloys Ntabakuze
Peter Erlinder
André Tremblay

Counsel for Anatole Nsengiyumva
Kennedy Ogetto

Office of the Prosecutor
Hassan Bubacar Jallow
Alex Obote-Odora
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Evelyn Kamau
William Mubiru
Priyadarshini Narayanan
Aisha Kagabo

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 the "Extremely Urgent Motion for: (a) Severance, and Retention of Briefing Schedule; or, in the Alternative, (b) Judicial Bar to the Untimely Filing of Respondent's Brief, and Dismissal of Appellant's Conviction" filed by Aloys Ntabakuze ("Ntabakuze") on 24 June 2009 ("Motion"), in which Ntabakuze requests that the Appeals Chamber sever his case from those of his co-appellants whilst maintaining the briefing schedule pursuant to Rule 112 of the Rules of Procedure and Evidence of the Tribunal ("Rules") and to bar the filing of the Prosecution's response brief as untimely.[1]

A. Procedural Background

2. In its Judgement pronounced on 18 December 2008 and filed in English on 9 February 2009, Trial Chamber I of the Tribunal convicted Théoneste Bagosora ("Bagosora"), Anatole Nsengiyumva ("Nsengiyumva"), and Ntabakuze (together "co-Appellants") of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II and sentenced them to life imprisonment.[2]

3. Bagosora and Nsengiyumva requested that the time limits for filing their respective notices of appeal and appeal briefs start running only from the date on which the Trial Judgement was served on them and their Counsel in French.[3] Ntabakuze did not make such a request. The Pre-Appeal Judge granted Bagosora's request on the grounds that he did not understand English and that his Counsel's working language was French.[4] He was ordered to file his notice of appeal no later than 30 days from the date of the filing of the French translation of the Trial Judgement.[5] The Pre-Appeal Judge granted Nsengiyumva's request in part. Because Nsengiyumva did not understand English but his Lead Counsel did, Nsengiyumva was ordered to file his notice of appeal no later than 13 March 2009 (that is 30 days after he was served with the written Trial Judgement)

[1] Motion, Conclusion, p. 11.

[2] *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 ("Trial Judgement"), paras. 2258, 2277-2279.
[3] *Avis d'appel et Requête en demande de délai*, 7 January 2009; Nsengiyumva Extremely Urgent Motion for Extension of Time to File Notice of Appeal, Appeal Brief and Motion for Additional Evidence, 19 February 2009.
[4] Decision on Théoneste Bagosora's Motion for Extension of Time for Filing Appeal Submissions, 15 January 2009 ("15 January 2009 Decision"), pp. 3, 4.
[5] 15 January 2009 Decision, p. 4.

and his appeal brief no later than 45 days from the filing of the French translation of the Trial Judgement.[6]

4. In his decision ruling on Nsengiyumva's request, the Pre-Appeal Judge also noted that the Tribunal's Language and Conference Services Section had informed him that the French translation would not be available before the end of November 2009.[7] In the circumstances, the Pre-Appeal Judge directed the Registrar to provide the French translation of the Trial Judgement to the parties "as soon as practicable, but in any event no later than 1 December 2009".[8]

5. On 11 and 13 March 2009 respectively, Ntabakuze and Nsengiyumva filed their initial notices of appeal.[9]

6. On 16 April 2009, the Pre-Appeal Judge granted the Prosecution's motion challenging the initial notices of appeal filed by Ntabakuze and Nsengiyumva and ordered them to file revised versions of their notice of appeal, while maintaining the existing schedule for the filing of the appeal briefs.[10] As regards the general briefing schedule, the Pre-Appeal Judge noted that the Prosecution may elect to file a consolidated brief in response to all three appeal briefs and that the time limit for filing such a consolidated brief would run only from the filing date of the last appeal brief.[11] Considering that the issues raised in Ntabakuze's and Nsengiyumva's appeals could be easily responded to in separate response briefs, and "[w]ith expeditious and fair appeal proceedings in mind", the Pre-Appeal Judge "strongly encourage[d] the Prosecution to respond to all three respective appeal briefs in separate response briefs".[12]

7. Ntabakuze and Nsengiyumva filed their amended notices of appeal on 18 and 26 May 2009, respectively.[13] Ntabakuze filed his initial appeal brief on 25 May 2009.[14]

---

[6] Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing Appeal Submissions, 2 March 2009 ("2 March 2009 Decision"), pp. 4-6.
[7] 2 March 2009 Decision, p. 6.
[8] *Ibid*.
[9] Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 11 March 2009; Nsengiyumva's Notice of Appeal, 13 March 2009.
[10] Decision on Prosecution Motion Requesting Compliance with Requirements for Filing Notices of Appeal, 16 April 2009 ("16 April 2009 Decision"), para. 25.
[11] 16 April 2009 Decision, para. 24.
[12] *Ibid*.
[13] Public Amended Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 18 May 2009; Nsengiyumva's Second Amended Notice of Appeal, 26 May 2009 ("Nsengiyumva Amended Notice of Appeal"). *See* Decision on Aloys Ntabakuze's Motion for Leave to File Amended Notice of Appeal Pursuant to the 16 April 2009 Decision, 15 May 2009; Decision on Prosecution Motion Regarding Nsengiyumva's Amended Notice of Appeal Filed on 23 April 2009, 25 May 2009.
[14] Appeal Brief in the Interest of: Major Aloys Ntabakuze, 25 May 2009 ("Appeal Brief").

8. On 12 June 2009, the Prosecution informed the Appeals Chamber and the Defence that in light of the overlapping nature of the issues relevant to the cases of all three co-Appellants, it considered that it would be of greater assistance to the Appeals Chamber if it responded to all three respective appeal briefs in one consolidated response as opposed to separate response briefs.[15] Subsequently, Ntabakuze gave notice that he intended to file a motion for provisional release and a motion to sever his case from those of his co-Appellants and enforce the briefing schedule.[16]

9. On 24 June 2009, Ntabakuze filed the instant Motion, as well as an amended version of his Appeal Brief.[17] The Prosecution responded to the Motion on 6 July 2009.[18] Bagosora and Nsengiyumva did not file any response. Ntabakuze replied to the Prosecution Response on 10 July 2009.[19]

B. Submissions

10. In his Motion, Ntabakuze requests the severance of his case from the cases of his two co-Appellants, the retention of the briefing schedule as foreseen by Rules 111 and 112 of the Rules, and that the Prosecution be precluded from filing a response brief beyond 40 days after the filing of his Appeal Brief. He furthermore requests that the Appeals Chamber expedite its decision on the Motion, hear oral argument on the Motion, and order that the "convicting judgment be dismissed in its entirety".[20]

11. Ntabakuze submits that maintaining the joinder of the cases at the appeal stage would cause him prejudice and would be irreconcilable with the interests of justice.[21] He argues that pursuant to the Pre-Appeal Judge's order that the Registry make available the French translation of the Trial Judgement at the latest on 1 December 2009, the filing schedule for the co-Appellants' appeal submissions will not start until after that date.[22] Noting the Prosecution's intention to file a consolidated response to all three appeal briefs, Ntabakuze contends that it cannot be expected that

[15] Prosecutor's Notice Regarding the Filing of a Consolidated Respondent's Brief, 12 June 2009, paras. 3, 4 ("Prosecution Notice").
[16] Notice of Intention to File Motion for Provisional Release Pending Appeal, and to: (a) Sever this Case and Enforce the Briefing Schedule; or, in the Alternative, (b) Bar Filing of the Respondent's Brief, and Dismiss Convictions Entered by the Trial Chamber, 17 June 2009.
[17] Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze, 24 June 2009 ("Amended Appeal Brief"). *See* Decision on Aloys Ntabakuze's Motion for Leave to File a Corrected Appeal Brief and Order Concerning the Appeal Brief, 23 June 2009. *See also* Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze Second Corrigendum, 6 July 2009.
[18] Prosecution Response to Ntabakuze's Motion on Severance and Retention of the Briefing Schedule, 6 July 2009 ("Prosecution Response").
[19] Reply-Motion for Severance, 10 July 2009 ("Reply").
[20] Motion, Conclusion, p. 11.
[21] Motion, para. 27.
[22] Motion, para. 3.

the Prosecution's consolidated response brief be filed less than 11 months after the filing of his appeal brief, assuming that no other delay occurs.[23]

12. Ntabakuze submits that the Prosecution erred in basing its right to file a consolidated response brief to all three appeal briefs on paragraph (C)(1)(b) of the Practice Direction on the Length of Briefs and Motions on Appeal ("Practice Direction"),[24] as in his view the Practice Direction only regulates "the *length* of Briefs and Motions on Appeal, not the *timing* of filing which is specifically regulated by Rules 111, 112 and 116".[25] Ntabakuze claims that the filing schedule imposed by the Rules guarantees "equality of arms, fairness of the proceedings and expediency of the process" and that only "good cause" may allow a departure from the provisions of the Rules.[26] According to him, "the intent of the proviso of Paragraph (C)(1)(b) *in fine* does not supersede that of Rule 112" since it would "in effect render Rule 112 moot, and lead to extreme delays in proceedings".[27] He submits that if allowed in the instant case, the extension of the Prosecution deadline to file its response brief would give the Prosecution an unfair advantage over him, would result in gross injustice and cause a serious imbalance between the parties.[28] He adds that such a unilateral extension of the filing deadline would "implicate this Chamber in the Prosecution's violation of [Ntabakuze'sğ rights to be tried without undue delay".[29]

13. Ntabakuze argues that the incidents for which he was convicted in the Trial Judgement "bear no connection at all with any of his co-accused" and that his appeal brief is thus not interrelated with the cases of his co-Appellants.[30] He further recalls the Pre-Appeal Judge's finding that filing a consolidated brief "would result in a substantial delay" and that the appeal briefs in this case "can be easily responded to in separate response briefs".[31]

14. Ntabakuze submits that the severance of his case would avoid any prejudice arising from the long delay generated by the translation of the Trial Judgement in light of his right to an "expeditious and fair appeal"[32] and would "serve the interests of international justice".[33] He further avers that a severance would support the "Security Council's Completion Strategy" as by

[23] Motion, para. 17.
[24] Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006.
[25] Motion, para. 18(a).
[26] Motion, para. 18(d).
[27] Motion, para. 18(e).
[28] Motion, paras. 18, 19.
[29] Motion, para. 29.
[30] Motion, para. 21. *See also ibid.*, para. 32.
[31] Motion, para. 23, quoting 16 April 2009 Decision, para. 24.
[32] Motion, para. 30.
[33] Motion, para. 27.

maintaining the original briefing schedule the Appeals Chamber could dispose of Ntabakuze's case before the end of 2009, well ahead of the cases of his co-Appellants.[34]

15. Finally, Ntabakuze submits that the Prosecution's "discretionary decision" not to file its response brief within 40 days of the filing of his Appeal Brief as prescribed under Rule 112 of the Rules violates his right to an expeditious and fair trial and should lead the Appeals Chamber to preclude the Prosecution from filing a response brief beyond that date.[35]

16. The Prosecution responds that Ntabakuze fails to demonstrate any undue delay prejudicial to his right to a fair trial that could amount to a conflict of interest justifying severance on appeal.[36]

17. The Prosecution asserts that paragraph (C)(1)(b) of the Practice Direction authorizes the Prosecution to file a consolidated response brief without filing a prior motion requesting the Chamber for permission to do so. It avers that Rule 112 of the Rules comes into effect only after the Prosecution has exercised its right either to file separate responses or a consolidated response to each appeal. It submits that in the present case, by deciding to file a consolidated response brief, it has "only exercised its recognized right under the Rules" after careful consideration in light of the Pre-Trial Judge's suggestion to file separate briefs.[37]

18. The Prosecution further argues that the joint trial of all three co-Appellants on similar indictments and the serious nature of their convictions and sentences militate against severance at the current stage of the proceedings.[38]

19. Ntabakuze replies that the Prosecution erroneously relies on a decision in the *Hadžihasanović et al.* case, as the Chamber in that case permitted the Prosecution to file a consolidated brief only after *all* co-appellants had sought an extension of time to file their briefs and as the delay amounted to not more than a number of days.[39] He avers that each such case is to be judged on a case-by-case basis and that "where scheduling decisions find tension with the

[34] Motion, para. 28.
[35] Motion, para. 33.
[36] Prosecution Response, paras. 10, 14.
[37] Prosecution Response, para. 8. *See also ibid.*, para. 9.
[38] Prosecution Response, para. 14.
[39] Reply, para. 5(a), referring to *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motions for Extension of Time, Request to Exceed Page Limit, and Motion to File a Consolidated Response to Appeal Briefs, 27 June 2006 ("*Hadžihasanović* Decision").

fundamental protections afforded Ftoğ an accused person, the Prosecutor is obligated to engage his discretion to ensure that such fundamental protections are not violated."[40]

20. Ntabakuze further claims that the Prosecution would suffer no detriment to the principle of equality of arms between the parties by adhering to the briefing schedule laid down by the Rules, as the Rules reflect this principle. Ntabakuze repeats that the Prosecution's extension of the briefing schedule disproportionately favors the Prosecution and violates Ntabakuze's right to a fair trial and appeal.[41] He reiterates the alleged absence of any interrelationship between the cases.[42]

C. Discussion

1. Request for oral hearing

21. Ntabakuze requests that the Appeals Chamber hear the parties on his Motion in oral argument, "either in person or by phone at the earliest convenience of the Chamber".[43]

22. The Appeals Chamber notes that it is within its discretion to decide a motion with or without an oral hearing.[44] Ntabakuze's sole argument for an oral hearing seems to be based on the premise that oral arguments would expedite the Appeals Chamber's decision.[45] However, he fails to specify why and how an oral hearing could expedite the decision. The Appeals Chamber is not satisfied that an oral hearing is necessary in this case, nor that it would expedite its decision on the matter since the information before it is sufficient to enable it to reach an informed decision. The Appeals Chamber therefore denies Ntabakuze's request to hear the parties in oral argument.

2. Request for severance

23. The Appeals Chamber recalls that the joinder or severance of trials is governed by Rules 48 and 82 of the Rules. Rule 48 states that "[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried". Rule 82 provides the following:

---

[40] Reply, para. 5(b). *See also ibid.*, para. 5(c).
[41] Reply, paras. 6(b), 13.
[42] Reply, paras. 7(c), 8.
[43] Motion, Conclusion, p. 11.
[44] *See, e.g., Prosecutor v. Mile Mrkšić and Veselin Šljivan~anin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009, para. 11; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdictions, 6 June 2007, para. 8; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 9.
[45] Motion, Conclusion, p. 11.

> (A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
>
> (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

24. The Appeals Chamber notes that by virtue of Rule 107 of the Rules, Rules 48 and 82 of the Rules also apply at the appellate stage. It further notes that, as before the Trial Chamber, the decision on joinder or severance is discretionary and requires a complex balancing of intangibles in order to properly regulate the proceedings.[46] Pursuant to Rule 82(B) of the Rules, when considering the severance of an appellant's case from a previously joint trial, the Appeals Chamber has to assess whether joint proceedings would give rise to any conflict of interests that might cause serious prejudice to an accused, or whether a severance would protect the interests of justice.

25. The Appeals Chamber recalls that the preference for joint trials and appeals of individuals accused of acting in concert in the commission of a crime or being held responsible for the same complex of crimes with a common scheme or strategy is not based merely on administrative efficiency. Joint appeal proceedings not only enhance fairness as between the appellants by ensuring a uniform procedure against all[47] but also minimize the possibility of inconsistencies in (a) treatment of such evidence, (b) common legal findings of the Trial Chamber, (c) sentencing, or (d) other matters that could arise from separate appeals.[48]

(a) Conflict of interests causing a serious prejudice to Ntabakuze

26. Ntabakuze submits that his right to an expeditious trial would be infringed if his case were not severed from the cases of his co-Appellants.[49] He argues that the current schedule creates a conflict of interests since it allows his co-Appellants an extension of time to review the Trial

[46] *Cf. Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9; *Prosecutor v. Zdravko Tolimir et al*., Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 5 ("*Tolimir* Decision").
[47] *See* for example Rule 115(D) of the Rules which benefits co-appellants in the presentation of additional evidence.
[48] This has been previously noted for trial proceedings in a number of cases: *See, e.g*., *Tolimir* Decision, para. 8; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motions By Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 31 ("Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts."); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 26 September 1996, para. 7.
[49] Motion, paras. 18(f), 19, 27.

Judgement in a language they understand and to prepare their appeal submissions subsequently while preventing him from pursuing his appeal in accordance with the normal briefing schedule.[50]

27. The Appeals Chamber notes that had Ntabakuze's co-Appellants not received extensions of time, the Prosecution's response brief would have been due within 40 days of the filing of his Appeal Brief. Instead, in the present case, the Prosecution notified the Appeals Chamber that it intends to file its consolidated response brief only after it has received the last appeal brief subsequent to the issuance of the French translation of the Trial Judgement.[51] Given that the French translation of the Trial Judgement will in all likelihood not be available before the end of November 2009,[52] the delay incurred by Ntabakuze due to the translation of the Trial Judgement and the Prosecution's filing of a consolidated response brief would amount to approximately ten months.[53] It follows that Bagosora and Nsengiyumva's interests in waiting for the French translation of the Trial Judgement diverge from Ntabakuze's.

28. The question remains whether this conflict of interests causes serious prejudice to Ntabakuze. Ntabakuze posits that the long delay occasioned by the extension of time granted to his co-Appellants will give rise to prejudice.[54]

29. The Appeals Chamber considers that in light of the specific circumstances of the case, the prolongation of Ntabakuze's appeal by approximately ten months does not amount to an undue delay capable of causing *serious* prejudice. The trial proceedings were highly complex, encompassing a vast amount of alleged crimes in different locations, and corresponding evidence assessed at trial. All three co-Appellants were high-ranking military staff and were convicted for a number of crimes for which they received substantial sentences. It can be expected that the Appeals Chamber will have to assess a large amount of different grounds of appeal of all co-Appellants, encompassing a variety of issues.

30. The Appeals Chamber further considers that Ntabakuze fails to substantiate how the delay could infringe on his right to make his appeal submissions adequately. Likewise, he fails to demonstrate how the fact that the Prosecution would *de facto* have 11 months to respond instead of

[50] Motion, para. 19.
[51] Prosecution Notice, pp. 3, 4.
[52] *See* 2 March 2009 Decision, p. 6.
[53] Ntabakuze filed his initial Appeal Brief on 25 May 2009 (*See* fn. 15). According to Rule 112 of the Rules, in the absence of any co-accused, the Prosecution would have had to file its response brief on 6 July 2009. Assuming that the translation of the Trial Judgement will be available on 1 December 2009, Nsengiyumva will file his appeal brief in the second half of February 2010 and Bagosora will file in mid-March 2010. The Prosecution's consolidated response brief would thus be due end of April 2010, ten months later than if the Prosecution had filed a separate response brief to Ntabakuze's appeal brief.

the statutory 40 days would cause him prejudice serious enough to warrant the severance of his case.

31. In light of the complexity of the proceedings, the magnitude of the case and Ntabakuze's sentence, and in the absence of any substantiation of serious prejudice, the delay of his case of approximately ten months does not amount to a conflict of interests of a nature substantial enough to cause serious prejudice to Ntabakuze.

32. Therefore, the Appeals Chamber finds that Ntabakuze has failed to demonstrate that he might suffer serious prejudice by not being granted a separate appeal. On the contrary, the Appeals Chamber finds that a joint appeal will entail a number of significant advantages for Ntabakuze, which will be discussed below.[55]Although a certain delay of Ntabakuze's appeal is due to the translation of the Trial Judgement required by his co-Appellants, this does not amount to an undue delay of his appeal in light of the circumstances of the case.

(b) Interests of justice

33. Ntabakuze claims that the severance of his case would protect the interests of justice as the crimes for which he was convicted bear no connection with any of the co-Appellants and that thus the Prosecution's declaration to file a consolidated response brief at the earliest 11 months from the filing of Ntabakuze's Appeal Brief violates his right to be tried without undue delay and therefore "cannot be seen to serve the interests of justice".[56]

34. The Appeals Chamber notes that when assessing whether the interests of justice require the severance of a case pursuant to Rule 82(B) of the Rules, issues such as the interrelation of the co-Appellants' cases on a factual and legal basis and considerations of judicial economy have to be duly taken into account. The Appeals Chamber recalls that "a joint trial is the best guarantee that identical evidence with regard to each accused is fully considered".[57] The same is true on appeal. The Appeals Chamber further notes that in the instant case, Ntabakuze may directly benefit from the Appeals Chamber's consideration of all issues raised by all co-Appellants in their respective appeal briefs at the same time.

[54] Motion, para. 27.
[55] *See infra* paras. 34, 35.
[56] Motion, para. 23.
[57] *The Prosecutor v. Vinko Pandurević & Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("*Pandurević* Decision of 24 January 2006"), para. 27. The ICTY Appeals Chamber found that it was reasonable to conclude that "one joint trial would ensure that the same evidence is available and assessed with regard to each accused and thus

35. The Appeals Chamber disagrees with Ntabakuze's contention that his appeal is not interrelated with the cases of his co-Appellants.[58] The Trial Chamber convicted all co-Appellants for genocide, crimes against humanity, namely, murder, extermination, persecution and other inhumane acts, and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II in the form of violence to life.[59] All co-Appellants were senior military officers and were found liable for these crimes pursuant to Article 6(3) of the Statute, which were committed at the same time in broadly the same area. According to the Trial Judgement, "most of the evidence was relevant, either directly or circumstantially, to two or more of [the co-Appellants]".[60] Any challenge to the findings of the Trial Chamber common to all of the co-Appellants on either a factual or on a legal basis would, if successful, benefit each of them. If Ntabakuze's case were severed, he would not be able to benefit directly from any such challenges of his co-Appellants.

36. The Appeals Chamber notes that, in respect of the issue of common findings, Nsengiyumva raises a variety of issues in his notice of appeal which could affect Ntabakuze's case. These encompass, *inter alia*, an alleged violation of Article 22 of the Statute and Rule 87(A) of the Rules due to the termination of the mandate of one of the Judges before the Judgement was filed[61] and an alleged error of law in the application of Article 6(3) of the Statute.[62] Additionally, Bagosora notified the Appeals Chamber that he intended to contest the Trial Chamber's findings regarding the organized structure of military operations conducted pursuant to orders from superior military authorities,[63] which may include general findings of the Trial Chamber regarding the criminal liability of the co-Appellants. Likewise, Bagosora indicated that he intended to contest the characterization of facts relating to 7 and 9 April 1994 as genocide, crimes against humanity, or war crimes.[64]

37. Further, the Appeals Chamber observes that both Ntabakuze and Bagosora were found liable pursuant to Article 6(3) of the Statute for the killings of Tutsi civilians committed by members of the Para Commando Battalion in the Kabeza area on 7 and 8 April 1994.[65] If Bagosora were to challenge the Trial Chamber's factual findings on Kabeza separately, relying on different

---

result in a greater likelihood of consistent evaluation of the evidence, findings and verdicts on the basis of the same facts" (*See Pandurević* Decision of 24 January 2006, para. 23).
[58] *See* Motion, para. 21.
[59] Trial Judgement, para. 2258.
[60] Trial Judgement, para. 79.
[61] Nsengiyumva Amended Notice of Appeal, para. 4.
[62] Nsengiyumva Amended Notice of Appeal, paras. 7-9.
[63] *Avis d'appel et Requête en demande de délai*, 7 January 2009, p. 2.
[64] *Ibid*.

arguments to those raised by Ntabakuze, the Appeals Chamber may reach different conclusions regarding the Trial Chamber's findings: this may have repercussions on Ntabakuze's case.[66] Moreover, the Trial Chamber relied upon a number of "crime base" witnesses to make findings concerning all of the co-Appellants about elements of the underlying offences and the general requirements of the statutory crimes. A successful challenge of these testimonies or findings could have repercussions for all of the co-Appellants. The severance of one of the co-Appellants at this stage might lead to discrepancies regarding the Appeals Chamber's ultimate findings in both cases. Such a result could contradict the interests of justice.

38. Lastly, the Appeals Chamber dismisses Ntabakuze's argument that a severance of his case would be supported by the "Security Council's Completion Strategy".[67] The Appeals Chamber recalls that although the "Completion Strategy" is reflected in Security Council Resolutions,[68] considerations of judicial economy may not impinge on the right of the parties to a fair trial.[69] Moreover, the "Completion Strategy" has no impact whatsoever upon a Chamber's duty to ensure that the proceedings before it are conducted in a fair and expeditious manner.

39. The Appeals Chamber finds therefore that Ntabakuze has failed to demonstrate that it is necessary to sever his case from those of his co-Appellants to protect the interests of justice.

(c) Conclusion

40. While the Appeals Chamber acknowledges the delay facing Ntabakuze in his appeal proceedings, it notes that he neither established a conflict of interests causing him *serious* prejudice nor demonstrated that the severance of his case would protect the interests of justice. On the contrary, the Appeals Chamber notes that Ntabakuze may benefit from the challenges of his co-Appellants where their cases are legally or factually interrelated, which serves both the interests of Ntabakuze and the interests of justice while promoting judicial economy.

---

[65] Trial Judgement, paras. 926, 927, 2128, 2135, 2158, 2186, 2188, 2194, 2196, 2213, 2215, 2245, 2247, 2160.
[66] The Appeals Chamber also notes that Witness AH's testimony on which the Trial Chamber relied for its finding on Kabeza was also relied upon to establish Bagosora's responsibility concerning the killing of 10 Belgian peacekeepers on 7 April 1994 (Trial Judgement, paras. 761, 923). In case this witness testimony is revisited by the Appeals Chamber regarding its probative value, the credibility of the witness and the Trial Chamber's findings thereupon, it may have a repercussion on Ntabakuze's case.
[67] Motion, para. 28.
[68] Security Council Resolutions 1503 (2003) of 28 August 2003, 1534 (2004) of 26 March 2004, 1878 (2009) of 7 July 2009.
[69] *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 31; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR.73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 23. *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15*bis*.3, Decision on Appeals Pursuant to Rule 15*bis*(D), 20 April 2007, para. 24.

3. Request for retention of the briefing schedule and for precluding the Prosecution from filing a response brief

41. Ntabakuze requests that the Appeals Chamber retain the briefing schedule as provided for in the Rules and bar the filing of the Prosecution's response brief as untimely. He avers that paragraph (C)(1)(b) of the Practice Direction is inapplicable in the current circumstances of the case and that its application would give the Prosecution an unfair advantage over him, and violate his right to be tried without undue delay.[70] He further submits that the Prosecution's decision not to file its response brief within the time limit prescribed under Rule 112 of the Rules violates his right to an expeditious and fair trial, which should lead the Appeals Chamber to bar the Prosecution from filing a response brief beyond 40 days after the filing of the Appeal Brief.[71]

42. The Appeals Chamber finds that it was open to the Prosecution to rely on paragraph (C)(1)(b) of the Practice Direction for the determination of the scheduling deadline. The Appeals Chamber agrees that paragraph (C)(1)(b) of the Practice Direction authorizes the Prosecution to elect to file a consolidated response brief in cases involving a plurality of co-accused without first obtaining leave from the Appeals Chamber to do so.[72] The finding of the Appeals Chamber in *Hadžihasanović* was, contrary to Ntabakuze's contention, of a general nature and is further reflected in the Pre-Appeal Judge's express finding that "under the Practice Direction on the Length of Briefs and Motions on Appeal of 8 December 2006, the Prosecution may elect to file a consolidated brief in response to all three appeal briefs" and that the time-limit for the filing of such brief would only run from the filing date of the last appeal brief in this case.[73] The wording of paragraph (C)(1)(b) specifies and further defines the provision of Rule 112(A) of the Rules in the event of a plurality of accused. The Appeals Chamber therefore dismisses Ntabakuze's request to preclude the Prosecution from filing a response brief beyond 40 days after the filing of his Appeal Brief.

43. However, the Appeals Chamber considers that the circumstances of this case warrant further assessment of the issue as the filing schedules have become manifestly different for Ntabakuze's co-Appellants, leaving a time difference of a minimum of eight months between the filing of his appeal brief and the appeal brief of his co-Appellant Nsengiyumva and an even longer period until the filing of Bagosora's appeal brief due to the outstanding translation of the Trial Judgement.

[70] Motion, paras. 18, 29; Reply, para. 5.
[71] Motion, paras. 18, 29, 33; Reply, para. 5. The Appeals Chamber notes that Ntabakuze's request was conditioned on the Prosecution not filing a response brief within 40 days of the filing of his Appeal brief. The Prosecution elected not do so and thus the Appeals Chamber considers the merits of this request.

44. Rules 108, 111, and 112 of the Rules establish an equilibrated system for the appellant and the respondent regarding the timetable for filing their submissions, according an appropriate amount of time to each party. This filing schedule is envisaged to facilitate and expedite the Appeals Chamber's assessment of the parties' submissions in order to guarantee swift and fair appeal proceedings. If the briefing schedule pursuant to paragraph (C)(1)(b) of the Practice Direction were to be maintained in the present case, several months would lapse without any progress on Ntabakuze's appeal. Additionally, this would leave the Prosecution with approximately 11 months to respond to Ntabakuze's appeal brief instead of 40 days as prescribed under Rule 112(A) of the Rules, which would further contradict the filing schedule prescribed in the Rules.

45. Furthermore, an analysis of the case reveals that while numerous legal and factual issues concern all of the co-Appellants, the Prosecution can address them in separate response briefs. As the Prosecution submits, "a comprehensive and consolidated response to all three Appellant's Briefs will be of greater assistance to the Appeals Chamber";[74] however, the Prosecution does not purport, let alone present, any argument to the effect, that filing separate responses would create any difficulties for the Appeals Chamber or the parties.

46. The Appeals Chamber further considers that an earlier submission of the Prosecution's response brief will add to the enforcement of equality of arms, as enshrined in Article 20(4) of the Statute. Therefore, the Appeals Chamber finds that it is in the interests of justice to adjust the briefing schedule to correspond to the specific circumstances of this case. Moreover, this will allow the Appeals Chamber to expedite the assessment of Ntabakuze's appeal as well as the appeals of his co-Appellants, which, as a result, will have a positive effect on the setting of the appeals hearing date and the appeals proceedings as a whole.

47. Accordingly, the Appeals Chamber considers it appropriate to order the Prosecution to file its response brief to Ntabakuze's appeal within 40 days of the filing of this Decision. Further, the Prosecution shall file separate response briefs to Bagosora and Nsengiyumva's appeal briefs within the time limit prescribed under Rule 112(A) of the Rules. In light of the distinct features of this case, the Appeals Chamber considers it appropriate to extend the word limit provided for under paragraph (C)(1)(b) of the Practice Direction and allow the Prosecution to file separate response briefs not exceeding 30,000 words each. Should any additional matters of particular importance for the Prosecution arise in the course of the review of Bagosora's and Nsengiyumva's briefs, the

[72] *Hadžihasanović* Decision, para. 8.
[73] 16 April 2009 Decision, para. 24.
[74] Prosecution Notice, para. 3.

Prosecution may argue such points during the appeal hearing or, upon good cause being shown, by way of an amended response brief. The Appeals Chamber therefore considers that this amended schedule does not prejudice any party to the proceedings and serves the interests of justice.

4. Dismissal of Ntabakuze's conviction

48. Ntabakuze requests that the Appeals Chamber dismiss his convictions.[75] The Appeals Chamber will take a decision on Ntabakuze's appeal of his convictions in its Judgement after the conclusion of the appeals proceedings. Consequently, no such decision will be taken in the present Decision.

D. Disposition

49. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion as far as a modification of the briefing schedule for the filing of the Prosecution response brief to Ntabakuze's appeal is concerned;

DENIES the remainder of the Motion;

ORDERS the Prosecution to file its separate response brief to Ntabakuze Amended Appeal Brief no later than forty (40) days after the filing of this Decision;

FURTHER ORDERS the Prosecution to file separate response briefs to Bagosora and Nsengiyumva's appeal briefs no later than forty (40) days after the timely submission of their appeal briefs, respectively.

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

Done this twenty-fourth day of July 2009,
at The Hague, The Netherlands.

Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

[75] Motion, Conclusion, p. 11. The Appeals Chamber notes that Ntabakuze's request was conditioned on the Prosecution not filing a response brief within 40 days of the filing of his Appeal brief. The Prosecution elected not do so and thus the Appeals Chamber considers the merits of this request.