



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

7742/H

CA

IN THE APPEALS CHAMBER

ICTR-98-42-A

08<sup>th</sup> May 2013

Before: Judge Fausto Pocar, Presiding {7742/H - 7721/H}  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Carmel Agius  
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. Bongani Majola

Decision of: 8 May 2013

**THE PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO  
Arsène Shalom NTAHOBALI  
Sylvain NSABIMANA  
Alphonse NTEZIRYAYO  
Joseph KANYABASHI  
Élie NDAYAMBAJE**

Case No. ICTR-98-42-A

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM: ROSEITE MUZIRO - MORRISON	
SIGNATURE: <i>[Signature]</i>	
DATE: 8/5/2013	

**DECISION ON NTEZIRYAYO'S MOTION TO AMEND HIS NOTICE OF  
APPEAL AND ON PROSECUTION'S MOTION TO STRIKE  
NTEZIRYAYO'S NEW APPEAL GROUNDS**

Counsel for Pauline Nyiramasuhuko

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Michel Marchand and Alexandra Marcil

Counsel for Élie Ndayambaje

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Tajesh Adhihetty

ICTR Appeals Chamber

08 MAY 2013

Date: *Chambers, Defcase,*  
Action: *DIPRAMAD 8JPLP*  
Copied To: *[Signature]*

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 seised of a motion to amend his notice of appeal filed by Alphonse Nteziryayo (“Nteziryayo”) on 26 March 2013<sup>1</sup> and a motion to strike aspects of Nteziryayo’s appeal brief filed by the Prosecution on 18 April 2013.<sup>2</sup>

#### A. Procedural Background

2. On 24 June 2011, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Nteziryayo of direct and public incitement to commit genocide.<sup>3</sup> The Trial Chamber sentenced him to 30 years of imprisonment.<sup>4</sup>

3. On 25 July 2011, the Pre-Appeal Judge granted Nteziryayo’s request for extension of time for the filing of his appeal submissions based, in part, on Nteziryayo’s and his Counsel’s inability to work in English.<sup>5</sup> The Pre-Appeal Judge ordered that Nteziryayo’s notice of appeal be filed no later than 90 days from the date on which he was served with the French translation of the Trial Judgement and that his appeal brief be filed no later than 90 days from the date on which he filed his notice of appeal.<sup>6</sup> On 1 March 2012, in light of the assignment of a Co-Counsel capable of working in English, the Pre-Appeal Judge ordered that Nteziryayo’s notice of appeal be filed no later than 1 May 2012, and his appeal brief no later than 60 days from the date on which he was served with the French translation of the Trial Judgement.<sup>7</sup>

4. On 26 April 2012, Nteziryayo filed his notice of appeal.<sup>8</sup>

5. On 2 July 2012, Nteziryayo was served with an informal working copy of the French translation of the Trial Judgement (“French Working Copy”).<sup>9</sup> On 5 February 2013, Nteziryayo was served with the official French translation of the Trial Judgement.<sup>10</sup>

<sup>1</sup> Nteziryayo’s Urgent Motion for Leave to Amend the Notice of Appeal, 26 March 2013 (“Nteziryayo Motion to Amend Notice of Appeal”).

<sup>2</sup> Prosecution Motion to Strike Nteziryayo’s New Appeal Grounds, 18 April 2013 (“Prosecution Motion to Strike”).

<sup>3</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 (“Trial Judgement”), para. 6186. *See also ibid.*, para. 6234.

<sup>4</sup> Trial Judgement, para. 6271.

<sup>5</sup> Decision on Motions for Extension of Time for the Filing of Appeal Submissions, 25 July 2011 (“25 July 2011 Decision”), paras. 13, 16.

<sup>6</sup> 25 July 2011 Decision, paras. 13, 16.

<sup>7</sup> Decision on the Filing of Alphonse Nteziryayo’s Appeal Submissions, 1 March 2012 (“1 March 2012 Decision”), paras. 1, 4, 6.

<sup>8</sup> Alphonse Nteziryayo’s Notice of Appeal, 26 April 2012 (“Notice of Appeal”).

<sup>9</sup> *See* E-mail from Other Registry Services Unit, Appeals Chamber Support Section, dated 2 July 2012.

6. On 26 March 2013, Nteziryayo filed the Nteziryayo Motion to Amend Notice of Appeal, to which he appended the Proposed Amended Notice of Appeal.<sup>11</sup>

7. On 2 April 2013, the Prosecution filed a response objecting in part to the Nteziryayo Motion to Amend Notice of Appeal.<sup>12</sup> Nteziryayo did not file a reply.

8. On 8 April 2013, Nteziryayo filed his Appeal Brief.<sup>13</sup>

9. On 18 April 2013, the Prosecution filed a motion requesting the Appeals Chamber to strike 24 grounds from Nteziryayo's Appeal Brief that are allegedly not identified in his Notice of Appeal.<sup>14</sup>

10. On 19 April 2013, following the Prosecution's request for expedited filings,<sup>15</sup> the Pre-Appeal Judge ordered that Nteziryayo's response to the Prosecution Motion to Strike, if any, should be filed by 23 April 2013 and that the Prosecution's reply, if any, should be filed by 25 April 2013.<sup>16</sup> Nteziryayo filed a response objecting to the Prosecution Motion to Strike on 23 April 2013,<sup>17</sup> to which the Prosecution replied on 25 April 2013.<sup>18</sup>

11. The Appeals Chamber will first consider the Nteziryayo Motion to Amend Notice of Appeal before turning to the Prosecution Motion to Strike.

## **B. Nteziryayo Motion to Amend Notice of Appeal**

### **1. Applicable Law**

12. In accordance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal set out in the notice of appeal. Such a motion should be submitted as soon as possible after the moving party has identified the new alleged error of the trial chamber or after

<sup>10</sup> The French translation of the Trial Judgement was filed on 1 February 2013 and was served to the parties on 5 February 2013. *See* Nteziryayo Motion to Amend Notice of Appeal, para. 1.

<sup>11</sup> *See* Nteziryayo Motion to Amend Notice of Appeal, Annex A "Nteziryayo's Amended Notice of Appeal" ("Proposed Amended Notice of Appeal").

<sup>12</sup> Prosecution Response to Nteziryayo's Urgent Motion to Amend Notice of Appeal, 2 April 2013 ("Prosecution Response"), paras. 1, 2, 26-28.

<sup>13</sup> Confidential Appeal Brief on Behalf of Alphonse Nteziryayo, 8 April 2013 (confidential) ("Appeal Brief").

<sup>14</sup> Prosecution Motion to Strike, paras. 1, 34.

<sup>15</sup> Prosecution Motion to Strike, para. 35.

<sup>16</sup> Decision on Prosecution's Request for Expedited Filings, 19 April 2013, p. 2.

<sup>17</sup> Nteziryayo Response to Prosecutor's Motion to Strike Out Nteziryayo's New Appeal Grounds, 23 April 2013 ("Nteziryayo Response"), paras. 3, 4, 34.

<sup>18</sup> Prosecution Reply to Nteziryayo's Response to Motion to Strike, 25 April 2013 ("Prosecution Reply"). *See also* Corrigendum to Prosecution Reply to Nteziryayo's Response to Motion to Strike, 29 April 2013.

discovering any other basis for seeking to vary the notice of appeal.<sup>19</sup> The motion must explain precisely what amendments are being sought and show, with respect to each amendment, that the “good cause” requirement is satisfied.<sup>20</sup> The “good cause” requirement encompasses both good reason for including the proposed new or amended grounds of appeal and good reason as to why the proposed amendments were not included or correctly articulated in the original notice of appeal.<sup>21</sup> The good cause requirement is to be interpreted more restrictively at later stages in the appeal proceedings when variations to the grounds of appeal may substantially affect the efficient administration of justice.<sup>22</sup>

13. In its previous determinations as to which proposed variations to a notice of appeal may be authorised within the scope of the good cause requirement, the Appeals Chamber has considered the following factors to be of relevance: (i) the proposed variation is minor but clarifies the notice of appeal without affecting its content; (ii) the opposing party has not opposed the variation or would not be prejudiced by it; (iii) the variation would bring the notice of appeal into conformity with the appeal brief; (iv) the variation would not unduly delay the appeal proceedings; or (v) the variation could be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.<sup>23</sup>

## 2. Submissions

14. Nteziryayo requests leave to amend his Notice of Appeal, identifying seven proposed amendments (“Proposed Amendments”), and to replace it with the Proposed Amended Notice of Appeal.<sup>24</sup> Specifically, Nteziryayo seeks to: (i) amend all grounds of appeal by including page references in addition to paragraph references to the Trial Judgement;<sup>25</sup> (ii) add additional references to footnotes on the headings of his existing ground 5 (“Ground 5”), ground 9 (“Ground 9”), and ground 10 (“Ground 10”) in the Notice of Appeal;<sup>26</sup> (iii) add a paragraph to Ground 10 (“Proposed Paragraph 73”);<sup>27</sup> and (iv) add a new ground of appeal (“Proposed

<sup>19</sup> See, e.g., Decision on Élie Ndayambaje’s Motion to Amend his Notice of Appeal, 5 April 2013 (“5 April 2013 Decision”), para. 9 and reference cited therein.

<sup>20</sup> See, e.g., 5 April 2013 Decision, para. 9 and reference cited therein.

<sup>21</sup> See, e.g., 5 April 2013 Decision, para. 9 and reference cited therein.

<sup>22</sup> See, e.g., *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Renzaho’s Motion to Amend Notice of Appeal, 18 May 2010, para. 9; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić’s Motion to Amend his Notice of Appeal, 16 December 2009, para. 11.

<sup>23</sup> See, e.g., 5 April 2013 Decision, para. 10 and reference cited therein.

<sup>24</sup> Nteziryayo Motion to Amend Notice of Appeal, paras. 1, 3, p. 5.

<sup>25</sup> Nteziryayo Motion to Amend Notice of Appeal, para. 7 (referred to as Proposed Amendment 2).

<sup>26</sup> Nteziryayo Motion to Amend Notice of Appeal, paras. 8-13 (referred to as Proposed Amendments 3, 4, and 5). The Appeals Chamber notes that Nteziryayo erroneously refers in the Nteziryayo Motion to Amend Notice of Appeal to the heading of ground “11” while his proposed additional reference relates to the heading of Ground 10. See Nteziryayo Motion to Amend Notice of Appeal, paras. 12, 13.

<sup>27</sup> Nteziryayo Motion to Amend Notice of Appeal, paras. 14, 15 (referred to as Proposed Amendment 6). See also Proposed Amended Notice of Appeal, para. 73.

Ground 11”), which would also require a change to the table of contents.<sup>28</sup> A review of the Proposed Amended Notice of Appeal reflects that, in addition to Proposed Paragraph 73, Nteziryayo further seeks to add another paragraph under Ground 10 (“Proposed Paragraph 72”).<sup>29</sup>

15. Nteziryayo submits that he only recently filed his motion and the Proposed Amended Notice of Appeal because he and his Lead Counsel only understand French and have only had the French translation of the Trial Judgement for a limited time.<sup>30</sup> Nteziryayo argues that the Proposed Amendments are minor, clarify the appeal, will ensure compliance with the Practice Direction on Formal Requirements for Appeals from Judgement, and will not prejudice the Prosecution or unduly delay proceedings.<sup>31</sup> With respect to Proposed Ground 11, Nteziryayo submits that this amendment is of “substantial importance to the excessive sentence passed by the Trial Chamber”.<sup>32</sup>

16. The Prosecution responds that Nteziryayo has failed to show good cause justifying the Proposed Amendments.<sup>33</sup> Specifically, it argues that Nteziryayo’s contentions concerning delay are unjustified because he and his Lead Counsel have had the French Working Copy of the Trial Judgement since July 2012 and his Co-Counsel can work in English.<sup>34</sup> With respect to the Proposed Amendments, the Prosecution objects to Nteziryayo’s request to include page references in addition to paragraph references to the Trial Judgement in all grounds of appeal, as these changes are not reflected in the Proposed Amended Notice of Appeal.<sup>35</sup> While the Prosecution does not object to Nteziryayo’s request to add additional references to the footnote to the heading of Ground 9,<sup>36</sup> it argues that Nteziryayo seeks to add unsupported and irrelevant references to the heading of Ground 5,<sup>37</sup> and that he provides no reason for the inclusion of the additional reference to the heading of Ground 10.<sup>38</sup> While the Prosecution does not object to Nteziryayo’s request to add Proposed Paragraph 73 under Ground 10,<sup>39</sup> it objects to the addition of Proposed Paragraph 72, arguing that it is not identified in the Nteziryayo Motion to Amend Notice of Appeal and that it is ambiguous and redundant with what Nteziryayo seeks to include under Proposed Ground 11.<sup>40</sup> Finally, the Prosecution argues that the addition of Proposed Ground 11, and all changes in the

<sup>28</sup> Nteziryayo Motion to Amend Notice of Appeal paras. 6, 16-18 (referred to as Proposed Amendments 1 and 7).

<sup>29</sup> See Proposed Amended Notice of Appeal, para. 72.

<sup>30</sup> Nteziryayo Motion to Amend Notice of Appeal, paras. 1, 2, 20.

<sup>31</sup> Nteziryayo Motion to Amend Notice of Appeal, paras. 2, 19 referring to Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005 (“Practice Direction on Formal Requirements”).

<sup>32</sup> Nteziryayo Motion to Amend Notice of Appeal, para. 17. See also *ibid.*, paras. 16, 18.

<sup>33</sup> Prosecution Response, paras. 1, 4.

<sup>34</sup> Prosecution Response, para. 5.

<sup>35</sup> Prosecution Response, paras. 7, 16. See also *ibid.*, para. 2.

<sup>36</sup> Prosecution Response, paras. 18, 19. See also *ibid.*, paras. 2, 28.

<sup>37</sup> Prosecution Response, para. 17.

<sup>38</sup> Prosecution Response, para. 14. The Prosecution further argues that the additional reference appears to relate to Proposed Ground 11 rather than Ground 10. *Idem.*

<sup>39</sup> Prosecution Response, para. 20. See also *ibid.*, paras. 2, 28.

<sup>40</sup> Prosecution Response, para. 22. See also *ibid.*, paras. 2, 21.

Proposed Amended Notice of Appeal relating to this new ground of appeal, reflect a significant substantive change to the Notice of Appeal, which would prejudice the Prosecution.<sup>41</sup>

### 3. Discussion

17. The Appeals Chamber observes that Nteziryayo filed the Nteziryayo Motion to Amend Notice of Appeal less than two weeks before the expiration of the time-limit for filing his appeal brief. Given the timing of the Nteziryayo Motion to Amend Notice of Appeal as well as the briefing schedule for motions on appeal,<sup>42</sup> Nteziryayo has prevented the issuance of this decision prior to the deadline for the filing of his appeal brief. Indeed, the Appeal Brief he filed on 8 April 2013 is not in conformity with either his Notice of Appeal or Proposed Amended Notice of Appeal, as discussed in greater detail below. This conduct is disruptive to the appeal proceedings and threatens the efficient administration of justice.<sup>43</sup>

18. With respect to Nteziryayo's argument that he was delayed in filing the Nteziryayo Motion to Amend Notice of Appeal because he and his Lead Counsel only speak French and have only had the French translation of the Trial Judgement for a limited time, the Appeals Chamber recalls that preparations for filing a notice of appeal fall primarily within the purview of Defence counsel.<sup>44</sup> Furthermore, the Appeals Chamber has already determined that Nteziryayo's Co-Counsel works in English and is "capable of discussing the contents of the Trial Judgement with Mr. Nteziryayo and the Lead Counsel".<sup>45</sup> The Appeals Chamber also observes that Nteziryayo was served with the French Working Copy of the Trial Judgement on 2 July 2012,<sup>46</sup> and that he does not highlight any material difference between the French Working Copy and the official French translation of the Trial Judgement that required him to wait for the official French translation before raising the Proposed Amendments. The Appeals Chamber is therefore not satisfied that the recent availability

<sup>41</sup> Prosecution Response, paras. 12, 13, 15. The Prosecution highlights additional changes in the Proposed Amended Notice of Appeal that appear to be typographical errors or stylistic changes. *See ibid.*, paras. 23-25. The Appeals Chamber considers the change identified in paragraph 24 of the Prosecution Response to be a typographical error and observes that the challenges in the Appeal Brief reflect the references provided in the original Notice of Appeal. *See* Appeal Brief, ground 4, paras. 98-173. Similarly, the Appeals Chamber finds that the change identified in paragraph 25 of the Prosecution Response is minor and in no way alters the substance of the Notice of Appeal.

<sup>42</sup> *See* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006 ("Practice Direction on Written Submissions"), paras. 13, 14. The Practice Direction on Written Submissions specifies that a response to a motion shall be filed within 10 days of the filing of the motion, and that a reply may be filed within four days of the filing of the response. *Ibid.*

<sup>43</sup> While Nteziryayo argues that good cause exists to allow the changes found in the Proposed Amended Notice of Appeal because they "serve to bring the [N]otice of [A]ppeal into conformity with the [A]ppeal [B]rief", a review of both documents reflects that this is not the case. *See* Nteziryayo Motion to Amend Notice of Appeal, para. 19. Specifically, the Proposed Amended Notice of Appeal contains "Ground 11", while no such ground exists in the Appeal Brief. *Compare* Proposed Amended Notice of Appeal, Proposed Ground 11 *with* Appeal Brief.

<sup>44</sup> *See* *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Dominique Ntawukulilyayo's Motion for Extensions of Time for Filing Appeal Submissions, 24 August 2010, para. 7.

<sup>45</sup> 1 March 2012 Decision, para. 4.

<sup>46</sup> *See supra* para. 5.

of the official French translation of the Trial Judgement constitutes good cause for the Proposed Amendments. Thus, the Appeals Chamber finds that Nteziryayo has failed to demonstrate good cause for not including the Proposed Amendments in his Notice of Appeal.

19. Turning to the substance of the proposed amendments, the Appeals Chamber notes that the request to add page references in addition to paragraph references to the Trial Judgement is not reflected in the Proposed Amended Notice of Appeal.<sup>47</sup> Consequently, the Appeals Chamber cannot grant the addition of a proposed amendment that is neither specified nor substantiated, and therefore rejects this proposed amendment.

20. Furthermore, the Appeals Chamber finds that the additional footnote references to the respective headings of Grounds 5 and 10 of Nteziryayo's appeal are not relevant to these grounds.<sup>48</sup> Therefore, the Appeals Chamber does not authorise these proposed amendments.

21. By contrast, the Appeals Chamber considers that the additional footnote reference to the heading of Ground 9 and the addition of Proposed Paragraph 73 under Ground 10 are minor amendments, improve the clarity of the Notice of Appeal, ensure further compliance with Rule 108 of the Rules and paragraph 1(c)(iii) and (v) of the Practice Direction on Formal Requirements, and do not substantially affect the content of the Notice of Appeal. Moreover, the Prosecution does not object to these changes.<sup>49</sup> In view of the nature of these amendments and the fact that they will not cause prejudice to the Prosecution, the Appeals Chamber considers that it is in the interests of justice to allow them, despite Nteziryayo's failure to show good cause for not including them in his Notice of Appeal. The Appeals Chamber therefore grants Nteziryayo's request to add: (i) the additional footnote reference to the heading of Ground 9; and (ii) the Proposed Paragraph 73 under Ground 10.

22. Turning to Proposed Ground 11, the Appeals Chamber observes that allowing this amendment would lead to a substantive change of the Notice of Appeal. Specifically, this amendment would expand Nteziryayo's challenges to his sentence by adding alleged factual errors committed by the Trial Chamber and challenge the Trial Chamber's assessment of aggravating circumstances.<sup>50</sup> The Appeals Chamber considers that Nteziryayo has failed to show good cause for

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<sup>47</sup> Compare Notice of Appeal with Proposed Amended Notice of Appeal.

<sup>48</sup> Compare Proposed Amended Notice of Appeal, fn. 52 (referring to paragraph 3583 of the Trial Judgement) with Notice of Appeal, Ground 5. Compare also Proposed Amended Notice of Appeal, fn. 81 (referring to paragraph 5589 of the Trial Judgement) with Notice of Appeal, Ground 10. The Appeals Chamber further notes that the proposed additional reference to the heading of Ground 10 is already reflected under Proposed Ground 11. See Proposed Amended Notice of Appeal, Proposed Ground 11, p. 23, fn. 83.

<sup>49</sup> See *supra* para. 16.

<sup>50</sup> See Proposed Amended Notice of Appeal, Proposed Ground 11, paras. 74-76. See also Nteziryayo Motion to Amend Notice of Appeal, paras. 16, 17.

not including Proposed Ground 11 in his Notice of Appeal. Nevertheless, the Appeals Chamber recalls that, in certain limited circumstances, it has permitted amendments which were of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if the grounds were excluded, despite the absence of a showing of good cause.<sup>51</sup> Without expressing any views on the merits of Nteziryayo's appeal, the Appeals Chamber considers that allowing this amendment could be of substantial importance to his challenge of the sentence imposed by the Trial Chamber. The Appeals Chamber considers that this amendment will not prejudice the Prosecution since it will have the opportunity to respond to it. Consequently, the Appeals Chamber grants Nteziryayo leave to add Proposed Ground 11.<sup>52</sup>

23. The Appeals Chamber further notes that the inclusion of Proposed Paragraph 72 under Ground 10 is not outlined in the Nteziryayo Motion to Amend Notice of Appeal. The Appeals Chamber recalls that an appellant is not free to vary his notice of appeal in any way without prior leave of the Appeals Chamber and that all proposed variations to a notice of appeal must be indicated in the request for leave to amend the notice of appeal.<sup>53</sup> The Appeals Chamber also notes that Proposed Ground 11 contains challenges that are almost identical to those developed in Proposed Paragraph 72.<sup>54</sup> In these circumstances, the addition of Proposed Paragraph 72 is unnecessary and the Appeals Chamber denies its inclusion.

24. Finally, the Appeals Chamber observes that Nteziryayo inserted into ground 10 of his Appeal Brief allegations that are almost identical to his Proposed Ground 11.<sup>55</sup> Consequently, ground 10 in the Appeal Brief exceeds the scope of the Notice of Appeal.<sup>56</sup> This appears aimed at expanding Nteziryayo's appeal to include submissions related to his new Proposed Ground 11 without awaiting the outcome of the Nteziryayo Motion to Amend Notice of Appeal. Recalling that the present decision is being issued after Nteziryayo's deadline to file his Appeal Brief as a result of his own delay, the existing variance is unjustified and his Appeal Brief is declared inadmissible.

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<sup>51</sup> 5 April 2013 Decision, para. 31 and reference cited therein.

<sup>52</sup> The Appeals Chamber accepts that the addition of Proposed Ground 11 will require an expansion of the table of contents in the revised notice of appeal in order to reflect this addition.

<sup>53</sup> See 5 April 2013 Decision, para. 29 and references cited therein.

<sup>54</sup> Compare Proposed Amended Notice of Appeal, para. 72 with Proposed Amended Notice of Appeal, para. 74. Indeed, while Proposed Ground 11 challenges the Trial Chamber's factual findings regarding Nteziryayo's role in the Civil Defence Programme and argues that this alleged error impacted the consideration of aggravating circumstances, it also argues that this factual finding also impacted the assessment of the gravity of Nteziryayo's offences. See Proposed Amended Notice of Appeal, para. 74.

<sup>55</sup> Compare Appeal Brief, ground 10, paras. 303-325 with Proposed Amended Notice of Appeal, Proposed Ground 11, paras. 74-76.

<sup>56</sup> Specifically, the challenges in ground 10 of the Appeal Brief concerning the Trial Chamber's conclusions that Nteziryayo held a leadership position in the Civil Defence Programme and that this unfairly impacted the consideration of aggravating circumstances in sentencing exceed the scope of the challenges pertaining to alleged errors in sentencing set out under Ground 10 of the Notice of Appeal. Compare Appeal Brief, paras. 303-325 with Notice of Appeal, Ground 10, paras. 70, 71.



#### 4. Conclusion

25. As a result, the Appeals Chamber:

- (i) denies Nteziryayo's request for leave to add Trial Judgement page number references as set forth in the Nteziryayo Motion to Amend Notice of Appeal;
- (ii) denies Nteziryayo's request for leave to add the additional footnote references to the headings of Ground 5 and Ground 10 as set forth in the Nteziryayo Motion to Amend Notice of Appeal and in the Proposed Amended Notice of Appeal;
- (iii) grants Nteziryayo's request for leave to add the additional footnote reference to the heading of Ground 9 as set forth in the Nteziryayo Motion to Amend Notice of Appeal and in the Proposed Amended Notice of Appeal;
- (iv) grants Nteziryayo's request for leave to add Proposed Paragraph 73 under Ground 10 as set forth in the Nteziryayo Motion to Amend Notice of Appeal and in the Proposed Amended Notice of Appeal;
- (v) grants Nteziryayo's request for leave to add Proposed Ground 11 as set forth in the Nteziryayo Motion to Amend Notice of Appeal and in the Proposed Amended Notice of Appeal;
- (vi) denies the inclusion of Proposed Paragraph 72 under Ground 10 as set forth in the Proposed Amended Notice of Appeal; and
- (vii) authorises Nteziryayo's remaining requested amendments.

26. Nteziryayo is instructed to file an amended notice of appeal in conformity with this decision and ordered to file a revised appeal brief in conformity with such amended notice of appeal and the directions of the Appeals Chamber discussed below.

### **C. Prosecution Motion to Strike**

#### 1. Applicable Law

27. The Appeals Chamber recalls that under Rule 108 of the Rules, a party seeking to appeal a judgement must set forth the grounds of appeal in a notice of appeal, indicating "the substance of the alleged errors and the relief sought". The only formal requirement under the Rules is that the notice of appeal contains a list of the grounds of appeal; it does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, the place for detailed arguments being

the appeal brief.<sup>57</sup> The grounds of appeal and the arguments in an appeal brief must be set out and numbered in the same order as in the notice of appeal, unless otherwise varied with leave of the Appeals Chamber.<sup>58</sup>

28. Any variation of the grounds of appeal must be done by motion in accordance with the Rules, setting out the specific Rule under which the variation is sought and the arguments in support of the request to vary the grounds of appeal as required by that Rule.<sup>59</sup> These rules are based on principles of fair trial and effectiveness, aimed at ensuring that both parties have adequate opportunity to be fully apprised of each others' submissions and to respond in good time.<sup>60</sup> When new grounds of appeal have been presented for the first time in an appeal brief or in a brief in reply, the Appeals Chamber may strike them at the request of a party or disregard them.<sup>61</sup>

## 2. Analysis

29. The Prosecution submits that Nteziryayo has added 24 new grounds of appeal to his Appeal Brief, which were not listed or identified in his Notice of Appeal.<sup>62</sup> The Prosecution contends that this unauthorized addition of multiple new grounds at this late stage of the briefing prejudices it and undermines the fairness of the proceedings.<sup>63</sup> The Prosecution accordingly requests that the Appeals Chamber strike all 24 new grounds from the Appeal Brief.<sup>64</sup>

30. Nteziryayo responds that the Prosecution Motion to Strike is devoid of merit.<sup>65</sup> He contends that each of the alleged new grounds was pleaded in his Notice of Appeal.<sup>66</sup> In his view, the Prosecution conflates a ground of appeal with mere argument and "demands an unreasonably high level of detail in the Notice [of Appeal]".<sup>67</sup> Nteziryayo submits that striking his Appeal Brief would be a "draconian measure"<sup>68</sup> and an "exceptional remedy"<sup>69</sup> that can only be justified if the

<sup>57</sup> See, e.g., *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Prosecution's Motion to Order Veselin Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds Contained in his Appeal Brief, 26 August 2008 ("*Šljivančanin* Decision"), para. 8.

<sup>58</sup> See Practice Direction on Formal Requirements, para. 4.

<sup>59</sup> See *supra* paras. 12, 23; Practice Direction on Formal Requirements, para. 2.

<sup>60</sup> See, e.g., *Šljivančanin* Decision, para. 9 and references cited therein.

<sup>61</sup> See, e.g., *Šljivančanin* Decision, para. 9 and references cited therein.

<sup>62</sup> Prosecution Motion to Strike, para. 1.

<sup>63</sup> Prosecution Motion to Strike, paras. 1, 32, 33.

<sup>64</sup> Prosecution Motion to Strike, paras. 1, 34.

<sup>65</sup> Nteziryayo Response, paras. 1, 3, 4.

<sup>66</sup> Nteziryayo Response, paras. 3, 5-29.

<sup>67</sup> Nteziryayo Response, para. 3.

<sup>68</sup> Nteziryayo Response, para. 30.

<sup>69</sup> Nteziryayo Response, para. 31.

Prosecution demonstrates that it is prejudiced and if the adjudication of the new grounds is not of substantial importance to the appeal.<sup>70</sup>

31. The Appeals Chamber stresses that parties in this case have been reminded on several occasions of their obligations to abide by the provisions of the Rules and practice directions applicable to appeal proceedings and warned against any attempts to circumvent the applicable procedural requirements.<sup>71</sup> The Appellants in this case have, in particular, been reminded that they are not free to vary their notices of appeal in any way without prior leave of the Appeals Chamber and that all proposed variations must be indicated in a request for leave to amend the notice of appeal.<sup>72</sup>

32. Nteziryayo has sought leave to vary his Notice of Appeal, a request which the Appeals Chamber is disposing of in the present decision. The Appeals Chamber recalls, however, that in filing his request less than two weeks before the expiration of the time-limit for filing his appeal brief, Nteziryayo has prevented the Appeals Chamber from issuing a decision on his requested amendments prior to the deadline for the filing of his appeal brief.<sup>73</sup> Further, Nteziryayo has already implemented some of the requested amendments in his Appeal Brief without awaiting the outcome of the Nteziryayo Motion to Amend Notice of Appeal.<sup>74</sup>

33. In these circumstances, and given that Nteziryayo was fully aware that any variation of a notice of appeal requires prior leave following a formal request for amendment under Rule 108 of the Rules,<sup>75</sup> the Appeals Chamber will construe any further variation of the scope of Nteziryayo's appeal through the Appeal Brief as an unacceptable attempt to circumvent the procedural requirements applicable on appeal and an unauthorized expansion of the scope of his appeal. If Nteziryayo intended the Appeals Chamber to consider the merits of new allegations of error other than those identified in the Nteziryayo Motion to Amend Notice of Appeal, he should have expanded his motion accordingly or formally requested further amendments. The Appeals Chamber will therefore order that any new allegation of error going beyond the scope of the Notice of Appeal is to be struck from the Appeal Brief without consideration of any prejudice to the Prosecution or

<sup>70</sup> Nteziryayo Response, paras. 30, 33 referring to *Šljivčanin* Decision, para. 35.

<sup>71</sup> See Order Issuing a Formal Warning to Counsel for Ntahobali, Kanyabashi, and Ndayambaje, 15 April 2013, p. 2; Decision on Pauline Nyiramasuhuko's Motion to Amend Her Amended Notice of Appeal, 18 February 2013 ("18 February 2013 Decision"), para. 28; Decision on Nyiramasuhuko's, Ntahobali's, Kanyabashi's, and Ndayambaje's Motions for Extensions of the Word Limit for Their Appeal Briefs, 13 December 2012, para. 20.

<sup>72</sup> See, e.g., 5 April 2013 Decision, para. 29; 18 February 2013 Decision, para. 16.

<sup>73</sup> See *supra* para. 17.

<sup>74</sup> See *supra* para. 24.

<sup>75</sup> As evidenced by the filing of the Nteziryayo Motion to Amend Notice of Appeal.

Nteziryayo's generic submission that each new ground is of considerable importance to his appeal.<sup>76</sup>

34. The Appeals Chamber now turns to the Prosecution's specific challenges under each ground of appeal.

(a) Notice of Appeal Ground 2

35. The Prosecution argues that, through paragraphs 36, 49(ii), 52, 53, 63, 71, 72, and 75 of his Appeal Brief, Nteziryayo introduces three new challenges not contained in ground 2 of his Notice of Appeal ("Ground 2").<sup>77</sup> Specifically, it asserts that these paragraphs raise the following new grounds of error: (i) that the Trial Chamber's finding that the Muyaga commune meeting took place on or after 21 June 1994 radically transformed the case after the trial had concluded;<sup>78</sup> (ii) error in the assessment of the evidence concerning when the meeting took place;<sup>79</sup> and (iii) failure to consider Defence evidence regarding Nteziryayo's movements from 21 June 1994 onwards.<sup>80</sup>

36. Nteziryayo responds that paragraphs 18, 19, 23, 25, and 26 of the Notice of Appeal provided sufficient notice of the impugned challenges.<sup>81</sup>

37. The Appeals Chamber observes that Ground 2 does not contain a specific challenge to the Trial Chamber's conclusion that the Muyaga commune meeting occurred on or after 21 June 1994 and how this conclusion varied from the notice given in relation to the timing of this event.<sup>82</sup> Nonetheless, bearing in mind that the purpose of a notice of appeal is to identify alleged errors rather than provide detailed arguments in relation to them, the Appeals Chamber is satisfied that paragraphs 36, 49(ii), 52, 53, 63, 71, and 72 of the Appeal Brief are substantially linked to and fall within the broad challenges in Ground 2 concerning the allegedly defective pleading of this event and the resulting prejudice.<sup>83</sup>

38. The Appeals Chamber further considers that, when read in context, the evidence referred to as well as inconsistencies highlighted in paragraphs 71 and 72 of the Appeal Brief are included to demonstrate how Nteziryayo's Defence was allegedly misled as it relates to the timing of the Muyaga commune meeting and the prejudice suffered. As such, the Appeals Chamber considers

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<sup>76</sup> Nteziryayo Response, para. 37.

<sup>77</sup> Prosecution Motion to Strike, paras. 7-10.

<sup>78</sup> Prosecution Motion to Strike, para. 7. *See also* Prosecution Reply, paras. 5, 6.

<sup>79</sup> Prosecution Motion to Strike, paras. 8, 9 *referring to* Appeal Brief, paras. 71, 72. *See also* Prosecution Reply, para. 7.

<sup>80</sup> Prosecution Motion to Strike, para. 10 *referring to* Appeal Brief, para. 75. *See also* Prosecution Reply, para. 7.

<sup>81</sup> Nteziryayo Response, paras. 5, 6.

<sup>82</sup> *See* Notice of Appeal, paras. 18-26. The Appeals Chamber also observes that Ground 2 of the Notice of Appeal does not cite to paragraph 3672 of the Trial Judgement, which discusses that the Muyaga commune meeting occurred on or after 21 June 1994. *See idem*.

that the discussion of the Trial Chamber's assessment of the evidence concerning when the meeting took place does not go beyond the scope of the Notice of Appeal.

39. Finally, the Appeals Chamber observes that, while not substantially linked to Ground 2, the argument pertaining to the Trial Chamber's alleged failure to assess evidence relating to Nteziryayo's movements at the time of the alleged Muyaga commune meeting, which was developed under paragraph 75 of the Appeal Brief, relates to challenges properly raised under ground 7 of the Notice of Appeal ("Ground 7").<sup>84</sup> The Appeals Chamber therefore finds that this argument is substantially linked to Nteziryayo's Notice of Appeal. However, in order to fully comply with the Practice Direction on Formal Requirements and for the sake of clarity, Nteziryayo is instructed to move this paragraph under Ground 7 in his revised appeal brief.<sup>85</sup>

(b) Notice of Appeal Ground 3

40. The Prosecution argues that, by cross-referencing paragraphs 71 and 72 of the Appeal Brief, paragraph 96 of the Appeal Brief incorporates under ground 3 of the Notice of Appeal the new allegations made in paragraphs 71 and 72.<sup>86</sup>

41. Nteziryayo responds that the references to paragraphs 71 and 72 in support of paragraph 96 were incorporated in error, as paragraph 96 should instead refer to paragraphs 70 and 74-78 of the Appeal Brief.<sup>87</sup> He submits that notice of these arguments is provided through paragraph 34 of the Notice of Appeal.<sup>88</sup>

42. The Prosecution replies that the "corrected" Appeal Brief would now incorporate by reference the new argument relating to the Trial Chamber's alleged failure to consider Nteziryayo's movements from 21 June 1994 developed under paragraph 75 of the Appeal Brief.<sup>89</sup>

43. The Appeals Chamber notes Nteziryayo's concession that the references in paragraph 96 to paragraphs 71 and 72, as well as to paragraphs 66 and 73, were made in error and instructs Nteziryayo to correct his Appeal Brief accordingly. In light of the Appeals Chamber's conclusion above regarding the contents of paragraph 75, the Appeals Chamber dismisses the Prosecution's contention in reply concerning the cross-referencing to paragraph 75 in paragraph 96. Nteziryayo is

<sup>83</sup> See Notice of Appeal, paras. 18-26.

<sup>84</sup> Notice of Appeal, p. 20, fn. 72 referring, in part, to Trial Judgement, paras. 3670-3691.

<sup>85</sup> See *infra* paras. 72-74.

<sup>86</sup> Prosecution Motion to Strike, para. 11.

<sup>87</sup> Nteziryayo Response, para. 9.

<sup>88</sup> Nteziryayo Response, para. 10.

<sup>89</sup> Prosecution Reply, para. 8.

nonetheless instructed to reflect the move of the contents of paragraph 75 to Ground 7 in his revised appeal brief.

(c) Notice of Appeal Ground 4

44. The Prosecution argues that a number of paragraphs of the Appeal Brief raise new grounds of error that are not identified in ground 4 of the Notice of Appeal (“Ground 4”).<sup>90</sup> Specifically, the Prosecution submits that: (i) paragraphs 105(d), 147 and 148 of the Appeal Brief raise new grounds of error pertaining to the assessment of the failure of five Prosecution witnesses to identify Nteziryayo in court and the assessment of Witness FAG’s identification evidence;<sup>91</sup> (ii) paragraphs 114-116 of the Appeal Brief raise new challenges as to the probative value of the evidence of Prosecution Witnesses QAQ and QAR;<sup>92</sup> (iii) paragraph 124 of the Appeal Brief introduces for the first time the ground that the Trial Chamber failed to provide a reasoned opinion in rejecting Defence Witness KWEPO’s evidence in relation to the date Nambaje was abducted and killed;<sup>93</sup> (iv) paragraphs 105(c), 106, 125, 128, 136, 149-156, and 171 of the Appeal Brief allege as a new ground that the Trial Chamber erred in failing to consider that witnesses may have testified about a different Muyaga meeting than the one charged;<sup>94</sup> (v) paragraph 159 of the Appeal Brief introduces new submissions that the Trial Chamber failed to treat the testimonies of “victim” Witnesses TP and QAL with caution;<sup>95</sup> and (vi) paragraph 161 of the Appeal Brief contains new allegations concerning potential collusion between five specified witnesses.<sup>96</sup>

45. Nteziryayo responds that paragraphs 37 to 40 of the Notice of Appeal provided sufficient notice of these arguments.<sup>97</sup>

46. The Prosecution replies that the new grounds are not directly linked to paragraphs 37 to 40 of the Notice of Appeal.<sup>98</sup>

<sup>90</sup> Prosecution Motion to Strike, paras. 12-18.

<sup>91</sup> Prosecution Motion to Strike, para. 12.

<sup>92</sup> Prosecution Motion to Strike, para. 13.

<sup>93</sup> Prosecution Motion to Strike, para. 14. The Prosecution also complains that Nteziryayo cited for the first time in his Appeal Brief paragraphs 4700 and 4701 of the Trial Judgement as relevant to Ground 4. *See idem*. Nteziryayo concedes that paragraphs 4700 and 4701 of the Trial Judgement were not cited in the Notice of Appeal and requests the Appeals Chamber “to impose the proportionate remedy of ordering an amendment to the Notice [of Appeal]”. *See* Nteziryayo Response, para. 15. The Appeals Chamber considers that, for the sake of clarity, the Notice of Appeal should indeed have referred to paragraphs 4700 and 4701 of the Trial Judgement. However, the Appeals Chamber does not find it necessary to order an amendment of the Notice of Appeal in this regard.

<sup>94</sup> Prosecution Motion to Strike, para. 16.

<sup>95</sup> Prosecution Motion to Strike, para. 17.

<sup>96</sup> Prosecution Motion to Strike, para. 18.

<sup>97</sup> Nteziryayo Response, paras. 12-18.

<sup>98</sup> Prosecution Reply, paras. 9-14.

47. The Appeals Chamber observes that, in his Notice of Appeal, Nteziryayo does not raise challenges about the ability of Prosecution witnesses to identify him. Notably, paragraph 38(c) of the Notice of Appeal challenges the Trial Chamber's assessment concerning "discrepancies as to the identity of persons present at the function" and refers to paragraph 4611 of the Trial Judgement. However, this paragraph of the Trial Judgement discusses evidence concerning whether persons *other than* Nteziryayo were present at this particular meeting.<sup>99</sup> Paragraph 37 of the Notice of Appeal only raises the very broad allegation that the "Trial Chamber's assessment of the evidence and its reasoning [in relation to the Muganza commune meeting] is erroneous". Consequently, the Appeals Chamber concludes that paragraphs 105(d), 147, and 148 of the Appeal Brief, which challenge the ability of certain Prosecution witnesses to identify Nteziryayo (and not other persons), exceed the scope of the Notice of Appeal, and orders that those paragraphs be struck out.

48. As for the arguments raised under paragraphs 114-116 of the Appeal Brief, the Appeals Chamber observes that paragraph 37 of the Notice of Appeal, which broadly contests the Trial Chamber's assessment of evidence, contains a range of references to the Trial Judgement that include the references identified in paragraphs 114-116.<sup>100</sup> While the Notice of Appeal does not expressly challenge the Trial Chamber's assessment of evidence of Witnesses QAQ and QAR or expressly identify errors in the Trial Chamber's use of their evidence in corroboration, the Appeals Chamber is satisfied that, in the context of this case, these relatively standard evidentiary challenges are substantially linked to paragraph 37 of the Notice of Appeal and, as such, do not exceed the scope of the Notice of Appeal.

49. The Appeals Chamber finds that the allegation pertaining to the Trial Chamber's alleged failure to provide a reasoned opinion raised under paragraph 124 of the Appeal Brief is not substantially related to the challenges to the Trial Chamber's assessment of Prosecution evidence concerning the date of the meeting as set forth in paragraph 38(a) of the Notice of Appeal. The Appeals Chamber concludes that the allegation raised under paragraph 124 of the Appeal Brief exceeds the scope of the Notice of Appeal and should accordingly be struck out.

50. The Appeals Chamber further finds that paragraph 38(a) of the Notice of Appeal, which challenges the Trial Chamber's treatment of inconsistencies regarding the timing of the Muganza commune meeting and refers to paragraph 4592 of the Trial Judgement, provided sufficient notice that Nteziryayo would be challenging whether Prosecution witnesses testified about the same event. The Appeals Chamber considers that, in this context, the challenge in the Notice of Appeal

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<sup>99</sup> Trial Judgement, para. 4611.

<sup>100</sup> Compare Notice of Appeal, para. 37, fn. 45 (*referring to* Trial Judgement, paras. 4589-4645) with Appeal Brief, paras. 114, 115 (*referring to* Trial Judgement, paras. 4595, 4601, 4602, 4621).

inherently raises questions as to whether sufficient consideration was given to whether the witnesses discussed the same meeting, given the differences in dates.<sup>101</sup> Consequently, the Appeals Chamber is satisfied that paragraphs 105(c), 106, 125, 128, 136, 149-156, and 171 fall within the scope of Ground 4.

51. Turning to paragraphs 159 and 161 of the Appeal Brief, the Appeals Chamber considers that the arguments raised therein exceed the scope of the Notice of Appeal, which fails to raise expressly or implicitly these types of evidentiary challenges. Significantly, the Notice of Appeal elsewhere raises challenges about the Trial Chamber's purported failure to exercise sufficient caution with respect to incarcerated witnesses awaiting judgement or those convicted of crimes.<sup>102</sup> However, such arguments could not reasonably be interpreted to extend to "victim" witnesses as well. Furthermore, the Appeal Brief acknowledges that the Trial Chamber's failure to consider collusion among Prosecution witnesses amounted to a distinct, "second error of law" in its assessment of Prosecution evidence.<sup>103</sup> Such a particular challenge, which is not expressly set forth in the Notice of Appeal, is not substantially linked to the general or specific challenges set forth under Ground 4 or elsewhere. The Appeals Chamber therefore orders that paragraphs 159 and 161 be struck out from the Appeal Brief.

(d) Notice of Appeal Ground 5

52. The Prosecution argues that a number of paragraphs of the Appeal Brief raise new grounds of error that are not identified in Ground 5.<sup>104</sup> In particular, the Prosecution submits that: (i) paragraphs 60, 174(i), and 175 to 177 of the Appeal Brief raise challenges to the Prosecution's alleged failure to put its case concerning the Muyaga commune meeting to Nteziryayo during cross-examination, which were not identified in the Notice of Appeal;<sup>105</sup> (ii) paragraphs 174(ii)-(iii), 178-192, 224(c), (f)-(g), and (i) of the Appeal Brief raise new evidentiary challenges relating to the fact that Nteziryayo spoke at the Muyaga commune meeting and to Witness QBY's evidence concerning the date of this meeting;<sup>106</sup> (iii) paragraphs 174(vi), 206-210, and 224(f) of the Appeal Brief assert for the first time in relation to the Muyaga incident that the Trial Chamber ignored evidence regarding Nteziryayo's dedication to assisting Tutsis and his busy schedule between 17 and 28 June 1994;<sup>107</sup> and (iv) paragraphs 174(ix), 222, 223, and 224(e) of the Appeal Brief

<sup>101</sup> Notice of Appeal, para. 38(a).

<sup>102</sup> Notice of Appeal, para. 63.

<sup>103</sup> Appeal Brief, para. 161.

<sup>104</sup> Prosecution Motion to Strike, paras. 19-23.

<sup>105</sup> Prosecution Motion to Strike, para. 19.

<sup>106</sup> Prosecution Motion to Strike, paras. 20, 21.

<sup>107</sup> Prosecution Motion to Strike, para. 22.



allege for the first time that the Trial Chamber failed to consider potential collusion between Prosecution Witnesses QBY and FAB.<sup>108</sup>

53. Nteziryayo responds that these alleged errors were adequately identified in paragraphs 41, 43(a), and 44 to 46 of the Notice of Appeal or are a corollary of arguments set forth in these paragraphs.<sup>109</sup>

54. The Prosecution replies that the new grounds are not directly linked to the allegations raised in paragraphs 41, 43(a), 44, and 45 of the Notice of Appeal.<sup>110</sup>

55. After careful review of the Notice of Appeal, the Appeals Chamber considers that the contentions in paragraphs 60, 174(i), and 175 to 177 of the Appeal Brief constitute a new challenge concerning the legal implications of the Prosecution's failure to cross-examine Nteziryayo concerning the date of the Muyaga commune meeting. The Notice of Appeal provides no indication that Nteziryayo intended to pursue this distinct challenge. Accordingly, the Appeals Chamber finds that the challenge developed under paragraphs 60, 174(i), and 175 to 177 of the Appeal Brief exceed the scope of the Notice of the Appeal and should accordingly be struck out.

56. By contrast, the Appeals Chamber observes that paragraphs 42 and 43(a) of the Notice of Appeal expressly allege that the Trial Chamber erred in finding that Nteziryayo spoke at the Muyaga commune meeting and in relation to the assessment of Witness QBY's testimony that a meeting occurred on 23 May 1994. Consequently, the Appeals Chamber is satisfied that paragraphs 174(ii)-(iii), 178-192, 224(c), (f)-(g), and (i) fall within the challenges raised in Ground 5.

57. With respect to the Prosecution's submissions related to paragraphs 174(vi), 206-210, and 224(f) of the Appeal Brief, the Appeals Chamber considers that, while paragraph 41 of the Notice of Appeal generally argues that the Trial Chamber erred in its assessment of evidence, the paragraphs of the Notice of Appeal cited by Nteziryayo fail to provide any indication that the Trial Chamber failed to consider what was effectively presented as alibi evidence in relation to this meeting.<sup>111</sup> Nevertheless, the Appeals Chamber is satisfied that the general challenges to the Trial Chamber's assessment of Defence evidence under Ground 7 are substantially linked to these paragraphs of the Appeal Brief.<sup>112</sup> While the Notice of Appeal could have set forth the challenges in

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<sup>108</sup> Prosecution Motion to Strike, para. 23.

<sup>109</sup> Nteziryayo Response, paras. 19-23.

<sup>110</sup> Prosecution Reply, paras. 15-19.

<sup>111</sup> The paragraphs that provide any detail concerning the nature of Nteziryayo's challenges related to the Muyaga commune meeting focus on alleged errors concerning the credibility of Prosecution evidence and the failure to adequately consider evidence that the Muyaga commune meeting occurred in May 1994. See Notice of Appeal, paras. 43(a)-(b).

<sup>112</sup> See Notice of Appeal, paras. 59-61.

paragraphs 174(vi), 206-210, and 224(f) of the Appeal Brief more clearly, the Appeals Chamber finds that these challenges do not exceed the scope of the Notice of Appeal.

58. Finally, the Appeals Chamber observes that neither paragraph 41 nor paragraph 45 of the Notice of Appeal expressly identifies challenges to Prosecution evidence concerning collusion. Furthermore, while paragraphs in ground 8 of the Notice of Appeal contend that the Trial Chamber failed to exercise sufficient caution with incarcerated witnesses awaiting judgement or those convicted of crimes,<sup>113</sup> collusion among these or other witnesses was not alleged. The Appeals Chamber finds that the allegations raised in paragraphs 174(ix), 222, 223, and 224(e) of the Appeal Brief exceed the scope of the Notice of Appeal and should accordingly be struck out.

(e) Notice of Appeal Ground 6

59. The Prosecution argues that paragraphs 230(i) and (viii), 231, 233(d), 248, and 249 of the Appeal Brief raise new allegations of error with respect to in-court identification and potential collusion between Prosecution Witnesses QBU and FAK which were not identified in ground 6 of the Notice of Appeal (“Ground 6”).<sup>114</sup> The Prosecution also submits that paragraphs 230(vi) and 244 of the Appeal Brief, which incorporate by cross-reference paragraphs 206 to 210 of the Appeal Brief, raise for the first time in relation to the Kibayi incident the Trial Chamber’s alleged failure to consider Nteziryayo’s dedication to assisting Tutsis and his busy schedule between 17 and 28 June 1994.<sup>115</sup>

60. Nteziryayo responds that these arguments are rooted in paragraphs 47, 48, and 52 to 55 of the Notice of Appeal.<sup>116</sup>

61. The Prosecution replies that the new grounds are not directly linked to the allegations raised in the paragraphs of the Notice of Appeal referred to by Nteziryayo.<sup>117</sup>

62. The Appeals Chamber observes that Ground 6 partly raises challenges to the Trial Chamber’s assessment of identification evidence concerning the Kibayi commune meeting and refers, *inter alia*, to paragraph 3681 of the Trial Judgement, which addresses issues of in-court identification.<sup>118</sup> In this context, the Appeals Chamber is satisfied that paragraphs 230(i), 231, and

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<sup>113</sup> See Notice of Appeal, paras. 63, 64.

<sup>114</sup> Prosecution Motion to Strike, paras. 24, 26.

<sup>115</sup> Prosecution Motion to Strike, para. 25.

<sup>116</sup> Nteziryayo Response, paras. 24-26.

<sup>117</sup> Prosecution Reply, paras. 20, 21. The Prosecution submits that paragraphs 52-55 of the Notice of Appeal do not refer to Nteziryayo’s in-court identification. See *ibid.*, para. 20.

<sup>118</sup> Notice of Appeal, paras. 52, 53, fn. 70.

233(d) of the Appeal Brief, which concern in-court identification, are substantially related to the identification challenges raised in the Notice of Appeal.

63. The Appeals Chamber notes that the issue of collusion is not expressly addressed anywhere in the Notice of Appeal. However, paragraphs 50 to 53 of the Notice of Appeal highlight the striking similarities between the prior statements and testimonies of Witnesses FAK and QBU concerning this event, emphasizing that their evidence evolved in an identical fashion from their prior statements, and thereby suggesting collusion between the witnesses. The Appeals Chamber therefore considers that the arguments in paragraphs 230(viii), 248, and 249 of the Appeal Brief that concern collusion are substantially related to the Notice of Appeal.

64. The Appeals Chamber observes that paragraphs 47, 48, and 53 of the Notice of Appeal do not allege that the Trial Chamber failed to consider what was effectively presented as alibi evidence in relation to this meeting.<sup>119</sup> Nevertheless, as discussed in relation to paragraphs 206 to 210 of the Appeal Brief,<sup>120</sup> the Appeals Chamber is satisfied that the general challenges to the Trial Chamber's assessment of Defence evidence under Ground 7 are substantially linked to the allegation developed in these paragraphs of the Appeal Brief.<sup>121</sup> While the Notice of Appeal could have provided clearer indication of the arguments developed in paragraphs 206 to 210, 230(vi), and 244 of the Appeal Brief, the Appeals Chamber considers that these arguments are substantially related to the Notice of Appeal and do not exceed its scope.

(f) Notice of Appeal Ground 9

65. The Prosecution argues that paragraphs 276(b)-(c), and 289 to 292 of the Appeal Brief contain new allegations of error concerning the alleged delay between the closing arguments and the issuance of the Trial Judgement that are not identified in Ground 9.<sup>122</sup> Nteziryayo responds that paragraph 67 of his Notice of Appeal identified issues pertaining to delays in the proceedings.<sup>123</sup>

66. The Appeals Chamber observes that Ground 9 does not specifically refer to the delay Nteziryayo experienced between the closing arguments and the issuance of the Trial Judgement. Under this ground, however, Nteziryayo submits that “[t]he joinder effectively led to inordinate delays in the proceedings thereby occasioning the Appellant prejudice”.<sup>124</sup> In this context, the

<sup>119</sup> Notably, paragraph 53 of the Notice of Appeal provides references to excerpts of the testimony of Defence Witness AND64, which do not concern Nteziryayo's whereabouts in June 1994. *See* Notice of Appeal, para. 53, fn. 68 referring to Witness AND64, T. 8 March 2007 pp. 29-31.

<sup>120</sup> *See supra* para. 57.

<sup>121</sup> *See* Notice of Appeal, paras. 59-61.

<sup>122</sup> Prosecution Motion to Strike, para. 27. *See also* Prosecution Reply, para. 22.

<sup>123</sup> Nteziryayo Response, para. 27.

<sup>124</sup> Notice of Appeal, para. 67.

Prosecution could have reasonably anticipated that one of the resulting delays from joinder pertained to the delays between the closing arguments and the filing of the Trial Judgement as set forth in paragraphs 276(b)-(c) and 289 to 292 of the Appeal Brief. The Appeals Chamber is therefore satisfied that these arguments are substantially linked to the Notice of Appeal and do not exceed its scope.

(g) Notice of Appeal Ground 10

67. The Prosecution argues that under paragraphs 300(ii)-(v), 303 to 335, 336(b), and 339 of his Appeal Brief Nteziryayo raises new allegations of error that are not identified in Ground 10 in particular with respect to: (i) aggravating factors and the finding that Nteziryayo had a leadership role in the Civil Defence;<sup>125</sup> (ii) double-counting factors in assessing the gravity of the offence and in aggravating the sentence;<sup>126</sup> (iii) a breach of the principle of parity;<sup>127</sup> and (iv) the failure to provide a reasoned opinion in denying mitigation.<sup>128</sup>

68. Nteziryayo responds that the Notice of Appeal gives sufficient indication of the arguments contained in his Appeal Brief.<sup>129</sup>

69. As noted previously in relation to the Nteziryayo Motion to Amend Notice of Appeal, Ground 10 omits any challenge related to aggravating factors or the Trial Chamber's conclusions concerning Nteziryayo's leadership position in the Civil Defence.<sup>130</sup> Nevertheless, the Appeals Chamber has granted leave to Nteziryayo to amend his Notice of Appeal to include Proposed Ground 11, which references these two challenges. Although the Appeals Chamber is concerned that Nteziryayo included these arguments in his Appeal Brief without awaiting the outcome of the Nteziryayo Motion to Amend Notice of Appeal, it considers in the interests of expeditious proceedings that the allegations developed under paragraphs 300(ii), and 303 to 325 of the Appeal Brief should not be struck out as they will be substantially related to Nteziryayo's pending revised notice of appeal. However, in accordance with the Practice Direction on Formal Requirements, the Appeals Chamber instructs Nteziryayo to develop these allegations under ground 11 of his revised appeal brief.

<sup>125</sup> Prosecution Motion to Strike, para. 28 referring to Appeal Brief, paras. 300(ii), 303-325. See also Prosecution Reply, para. 23.

<sup>126</sup> Prosecution Motion to Strike, para. 29 referring to Appeal Brief, paras. 300(iii), 326, 327. See also Prosecution Reply, para. 23.

<sup>127</sup> Prosecution Motion to Strike, para. 30 referring to Appeal Brief, paras. 300(iv), 328-333. See also Prosecution Reply, para. 23.

<sup>128</sup> Prosecution Motion to Strike, para. 31 referring to Appeal Brief, paras. 300(v), 334, 335, 336(b), 339. See also Prosecution Reply, para. 23.

<sup>129</sup> Nteziryayo Response, paras. 28, 29.

<sup>130</sup> See *supra* paras. 22-24.

70. However, the Appeals Chamber notes that Nteziryayo's arguments concerning the double-counting of his leadership position in both the gravity of the offence and aggravating factors are not included in his Notice of Appeal or in the Proposed Amended Notice of Appeal. These arguments concern a distinct legal error in sentencing and exceed the scope of Nteziryayo's Notice of Appeal. Consequently, the Appeals Chamber orders that paragraphs 300(iii), 326, and 327 of the Appeal Brief be struck out.

71. With respect to the Prosecution's suggestion that the arguments in the Appeal Brief concerning the principle of parity exceed the scope of the Notice of Appeal, the Appeals Chamber observes that paragraph 71 of the Notice of Appeal alleges that the "sentence is manifestly excessive in the context of the nature of the offence". In this regard, the Appeals Chamber finds that the Notice of Appeal implies arguments relating to the principle of parity, and that paragraphs 300(iv), and 328 to 333 of the Appeal Brief are substantially linked to the Notice of Appeal. Similarly, the Appeals Chamber considers that Ground 10, which refers to the Trial Chamber's treatment of "mitigating circumstances", provides sufficient notice of the arguments raised in paragraphs 300(v), 334, 335 (in the last sentence), 336(b), and 339 of the Appeal Brief.

### 3. Conclusion

72. In light of the foregoing the Appeals Chamber:

- (i) instructs Nteziryayo to move paragraph 75 of his Appeal Brief so that it falls under ground 7 in his revised appeal brief;
- (ii) instructs Nteziryayo to replace "[66, 70-74] of Ground 2" in paragraph 96 of his Appeal Brief with "[70, 74, 76-78] of Ground 2 and [75] of Ground 7" in the corresponding paragraph in his revised appeal brief;
- (iii) strikes out paragraphs 105(d), 124, 147, 148, 159, and 161 of Nteziryayo's Appeal Brief under ground 4;
- (iv) strikes out paragraphs 60, 174(i) and (ix), 175 to 177, 222, 223, and 224(e) of Nteziryayo's Appeal Brief under ground 5;
- (v) instructs Nteziryayo to move paragraphs 300(ii), and 303 to 325 of his Appeal Brief so that it falls under ground 11 of his revised appeal brief;
- (vi) strikes out paragraphs 300(iii), 326, and 327 of Nteziryayo's Appeal Brief under ground 10;

(vii) instructs Nteziryayo to re-number his revised appeal brief accordingly; and

(viii) denies all the Prosecution's remaining submissions.

73. Nteziryayo is ordered to file a revised appeal brief in conformity with the present decision.

**D. Disposition**

74. For the foregoing reasons, the Appeals Chamber:

**GRANTS** the Nteziryayo Motion to Amend Notice of Appeal **in part** to the extent specified in paragraph 25 of the present decision;

**INSTRUCTS** Nteziryayo to file a revised notice of appeal containing the amendments authorised herein ("Amended Notice of Appeal") no later than 13 May 2013;

**GRANTS** the Prosecution Motion to Strike **in part** to the extent specified in paragraph 72 of the present decision;

**ORDERS** Nteziryayo to file a revised version of his Appeal Brief in conformity with his Amended Notice of Appeal and complying with paragraph 72 of the present Decision no later than 13 May 2013; and

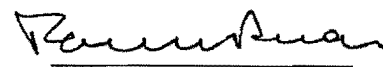
**DISMISSES** the Nteziryayo Motion to Amend Notice of Appeal and the Prosecution Motion to Strike in all other respects.

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

Done this eighth day of May 2013,  
at The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
Judge Fausto Pocar  
Presiding