8091/H

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
17 August 2006
(8091/H – 8069/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 17 August 2006

ICTR Appeals Chamber
Date: 17 August 2006
Action: P. T.
Copied To: concerned parties, SLO, LOS, Archives

JUDICIAL RECORDS/ARCHIVES
RECEIVED
2006 AUG 21 A 10: 21

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

DECISION ON APPELLANT JEAN-BOSCO BARAYAGWIZA'S MOTIONS FOR LEAVE TO SUBMIT ADDITIONAL GROUNDS OF APPEAL, TO AMEND THE NOTICE OF APPEAL AND TO CORRECT HIS APPELLANT'S BRIEF

Counsel for Jean-Bosco Barayagwiza
Mr. D. Peter Herbert
Mr. Tanoo Mylvaganam

Counsel for Ferdinand Nahimana
Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis

Counsel for Hassan Ngeze
Mr. Bharat B. Chadha

Office of the Prosecutor
Mr. James Stewart
Mr. Neville Weston
Mr. Abdoulaye Seye

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: Tchidimbo Patrice
SIGNATURE: DATE: 17.08.2006

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 "[t]he Appellant Jean-Bosco Barayagwiza's Motion for Leave to Submit Additional Grounds pursuant to Rule 108 of the I.C.T.R. Rules of Procedure and Evidence and for an Extension of Page Limits pursuant to the Decision of the Appeals Chamber of 14th November 2005" filed by Jean-Bosco Barayagwiza ("Appellant") on 6 March 2006 ("Motion of 6 March 2006"), in which he requests the Appeals Chamber to grant him leave to add seven new grounds of appeal to his Appellant's brief[1] and to amend the Notice of Appeal[2] accordingly.

2. The Prosecution responded to the Motion on 16 March 2006 requesting the Appeals Chamber to dismiss it in its entirety and expunge it from the record.[3] The Appellant filed his reply out of time on 24 March 2006[4] without providing any reasons for the late filing.[5] Accordingly, the Appeals Chamber finds the Reply to have been filed untimely and will not consider the submissions contained therein.

3. The Appeals Chamber is also seized of "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Amend the Notice of Appeal in the Light of the Decision of the Appeals Chamber dated 14/11/2005" filed by the Appellant on 5 July 2006 ("Motion of 5 July 2006"), in which he seeks to have his Notice of Appeal amended by substituting it with the amended notice of appeal annexed to the Motion of 5 July 2006.[6] The Prosecution filed its Response on 17 July 2006,

[1] "Appellant's Appeal Brief", 12 October 2005 ("Appellant's Brief").
[2] "Amended Notice of Appeal", 12 October 2005 ("Notice of Appeal").
[3] "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Submit Additional Grounds Pursuant to Rule 108 of the I.C.T.R. Rules of Procedure and Evidence and for an Extension of Page Limits pursuant to the Decision of the Appeals Chamber of 14th November 2005'", filed confidentially on 16 March 2006 ("Response to Motion of 6 March 2006"), para. 19. The Appeals Chamber notes that the Prosecution gives no reason as to why the Response to Motion of 6 March 2006 or the present decision need to be confidential and finds that there is no apparent reason for the confidential classification of the Response to Motion of 6 March 2006, since no protected witnesses or materials are involved. Consequently, both the Response to Motion of 6 March 2006 and the present decision should be public.
[4] "The Appellant Jean-Bosco Barayagwiza's Reply to The Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Submit Additional Grounds Pursuant to Rule 108 of the ICTR'", 24 March 2006 ("Reply").
[5] The Appeals Chamber notes that, pursuant to paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal of 16 September 2002, a reply to a motion submitted during the appeals from judgement must be filed "within four days of the filing of the response", which means that the Appellant's Reply should have been filed no later than 20 March 2006, unless good cause is shown for the delay.
[6] Motion of 5 July 2006, para. 7.

requesting that the Motion of 5 July 2006 be dismissed and expunged from the record.[7] The Appellant did not file a reply.

4. Finally, the Appeals Chamber is seized of "The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion Relating to the Appeal Brief of 12th October 2005" filed by the Appellant on 7 July 2006, in which he applies to bring corrections to the Appeal Brief of 12 October 2005 ("Motion of 7 July 2006"). The Prosecution did not file a response.

I. Procedural Background

5. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[8] The Appellant filed a first notice of appeal on 22 April 2004,[9] which was amended on 27 April 2004.[10] His initial Appellant's brief was filed on 25 June 2004.[11]

6. The proceedings in relation to the Appellant were stayed from 19 May 2004[12] through 26 January 2005,[13] pending the assignment of a new lead counsel. The current Lead Counsel was assigned to the Appellant by the Registrar on 30 November 2004, and on 19 January 2005, the Appeals Chamber dismissed the Appellant's challenge to this assignment.[14] The Appellant's request for reconsideration of the Decision of 19 January 2005 was dismissed by the Appeals Chamber on 4 February 2005.[15]

7. Pursuant to the decisions of 17 May 2005[16] and 6 September 2005,[17] both his Notice of Appeal and Appellant's Brief were filed by the Appellant on 12 October 2005.

---

[7] Prosecutor's Response to "the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Amend the Notice of Appeal in the Light of the Decision of the Appeals Chamber dated 14/11/2005", 17 July 2006 ("Response to Motion of 5 July 2006"), para. 17.

[8] *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").

[9] *« Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) »*, 22 April 2004.

[10] *« Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' »*, 27 April 2004.

[11] *« Mémoire d'Appel »*, 25 June 2004.

[12] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.

[13] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005 ("Order of 26 January 2005"). In particular, the Appellant was initially ordered to file "any amended or new Notice of Appeal no later than 21 February 2005 (*i.e.*, thirty days from the Decision of 19 January 2005)" and "any amended or new Appellant's Brief no later than 9 May 2005 (*i.e.*, seventy-five days after the time limit for filing the Notice of Appeal)."

[14] Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 ("Decision of 19 January 2005").

[15] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 ("Decision of 4 February 2005").

[16] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").

8. The Appeals Chamber recalls its Decision of 14 November 2005, by which it rejected the "Amended Notice of Appeal", "Corrections to Appeal Brief" and confidential "Appellant's Appeal Brief" filed on 7 November 2005, on the grounds that the Appellant had not properly sought leave to amend his grounds of appeal as prescribed by the Rules of Procedure and Evidence of the Tribunal ("Rules"), and thus had not demonstrated good cause for the Appeals Chamber to authorize such amendments.[18] In light of that decision, the Appeals Chamber will not consider any arguments of the parties in relation to the contents of the rejected filings.

II. Applicable Law

9. Pursuant to Rule 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the grounds of appeal" contained in the notice of appeal. Such motions should be submitted "as soon as possible after identifying the new alleged error"[19] of the Trial Chamber to be included in the notice of appeal or after discovering any other basis for seeking a variation to the notice of appeal. Generally, "a request to amend a notice of appeal must, at least, explain precisely what amendments are sought and why, with respect to each such amendment, the 'good cause' requirement of Rule 108 is satisfied".[20]

10. It has been held that the concept of "good cause" under this provision encompasses both good reason for including the new or amended grounds of appeal sought and good reason showing why those grounds were not included (or were not correctly phrased) in the original notice of appeal.[21] In its cases, the Appeals Chamber has relied upon a variety of factors in determining whether "good cause" exists, including (i) the fact that the variation is so minor that it does not affect the content of the notice of appeal; (ii) the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and (iii) the fact that the variation would bring the notice of appeal into conformity with the appeal brief.[22] Where an appellant seeks a substantive

[17] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Decision of 6 September 2005").
[18] Order Concerning Appellant Jean-Bosco Barayagwiza's Filings of 7 November 2005, 14 November 2005 ("Decision of 14 November 2005"), p. 3.
[19] *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005, pp. 2-3.
[20] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Motion to Amend Notice of Appeal, 14 October 2005 ("*Blagojević* Decision of 14 October 2005"), para. 7. *See also* Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, paras 2-3.
[21] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 ("*Blagojević* Decision of 26 June 2006"), para. 7; *See also, e.g., Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 10 ("*Blagojević* Decision of 24 November 2005"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005, pp. 2-3.
[22] *Blagojević* Decision of 26 June 2006, para. 7; *See also Blagojević* Decision of 24 November 2005, para. 7; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave

amendment broadening the scope of the appeal, "good cause" might also, under some circumstances, be established.[23] In such instances, each amendment is to be considered in light of the particular circumstances of the case.[24]

11. The jurisprudence of the Tribunal establishes that the "good cause" requirement must be interpreted restrictively at late stages in the appeal proceeding when amendments would necessitate a substantial slowdown in the progress of the appeal – for instance, when they would require briefs already filed to be revised and resubmitted.[25] To hold otherwise, would leave appellants free to change their appeal strategy and essentially restart the appeal process at will (including after they have had the advantage of reviewing the arguments in a response brief), interfering with the expeditious administration of justice and prejudicing the other parties to the case.[26]

12. In the interest of protecting the right of convicted defendants to a fair appeal, the Appeals Chamber has, in limited circumstances, permitted amendments even where there was no good cause for failure to include the new or amended grounds in the original notice—that is, where the failure resulted solely from counsel negligence or inadvertence. In such instances, the Appeals Chamber has permitted amendments which are of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if they were excluded.[27] In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of counsel.

13. In sum, variations to the notice of appeal will only be allowed (i) for good cause reasons within the meaning of Rule 108, as defined by the above-discussed principles; (ii) if they remedy the counsel's negligence or inadvertence and are of substantial importance to the success of the appeal; or (iii) if they otherwise correct ambiguity or error made by counsel and do not unduly delay the appeal proceedings, as, for example, in the case of minor and non-substantive modifications. With respect to the revisions to the appeal brief (or, in the alternative, supplemental briefing), they will be permitted only (i) as necessary to reflect the amendments to the notice of

---

to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005 ("*Blagojević* Decision of 20 July 2005"), pp. 3-4.

[23] *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, para. 7; *Blagojević* Decision of 20 July 2005, p. 3.

[24] *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, para. 7.

[25] *Blagojević* Decision of 26 June 2006, para. 8.

[26] *Id.*

[27] *Blagojević* Decision of 26 June 2006, para. 9; *Blagojević* Decision of 24 November 2005, para. 8; *Blagojević* Decision of 14 October 2005, para. 8. *See* also *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002 ("*Kordić* Decision of 9 May 2002"), para. 5.

appeal; or (ii) as necessary to correct ambiguity or error in the counsel's filings, without unduly delaying the appeal proceedings.[28]

14. Finally, the Appeals Chamber notes that it is the Appellant's burden to demonstrate that each amendment should be permitted under the standards outlined above, including establishing lack of prejudice to the Prosecution.[29]

III. Discussion

A. Motion of 6 March 2006

Submissions of the Parties

15. The Appellant submits that the Motion of 6 March 2006 is filed in accordance with the Decision of 14 November 2005 and seeks leave to file new grounds of appeal in order to remedy "gaps identified in the manner in which the points of law and fact have been raised in the Appeals Brief".[30] He asserts that, after having conducted a review of all the material filed to date, it has become apparent to his Defence team that "there are new matters of law and fact that need to be covered in the new Grounds".[31] He further argues that it is "a matter of fairness that he be given the opportunity to address those questions in writing, at least in their broad terms, before going into more details during the oral hearing".[32] He concludes that if his request to submit the additional grounds is denied, "a miscarriage of justice is likely to occur".[33]

16. The Appellant argues that if leave is granted to file the new grounds of appeal, it is unlikely that any prejudice will be caused to the Prosecution because the oral hearing is not scheduled for the immediate future. He adds that the additional grounds contained in the Motion of 6 March 2006 would facilitate the understanding of his case for "each and every party".[34] In addition, the Appellant seeks leave to amend the Notice of Appeal accordingly.[35]

---

[28] *Blagojević* Decision of 26 June 2006, para. 11.
[29] *Ibid.*, para. 14.
[30] Motion of 6 March 2006, para. 1. The Appeals Chamber understands the Appellant to submit that the Decision of 14 November 2005 "left the door open to the Appellant to file a motion requesting leave to present" additional *grounds of appeal* and not "additional *evidence*" as stated in his Motion of 6 March 2006 (emphasis added).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Ibid.*, para. 5.
[35] *Ibid.*, p. 17.

17. The Prosecution objects to the Motion of 6 March 2006 and submits that the Appellant continues to misapply Rule 108 of the Rules by submitting the additional grounds without having previously sought leave to amend the Notice of Appeal.[36]

18. The Prosecution argues that even if the Motion of 6 March 2006 was to be treated as requesting leave to amend the Notice of Appeal, it would not meet the "good cause" requirement under Rule 108.[37] In this respect, it contends that the Appellant (i) is merely repeating his arguments already contained in his Notice of Appeal; (ii) "is not correcting any minor errors or providing a precise formulation of any ground of appeal"; and (iii) "is not seeking to remedy any inadvertence or negligence of his counsel".[38] The Prosecution adds that denial of the Motion of 6 March 2006 would not lead to a miscarriage of justice since the newly submitted grounds of appeal would either have no bearing on the Trial Judgement or they are already developed in the Notice of Appeal and the Appellant's Brief.[39]

Analysis

19. The Appeals Chamber notes that the Appellant does not request to amend any of his grounds of appeal in the Notice of Appeal and Appellant's Brief, but simply submits that the seven additional grounds should be included anew. The Appeals Chamber further notes that instead of seeking to demonstrate "good cause" for submitting the additional grounds of appeal at this late stage of the proceedings on appeal, the Appellant simply attaches the new grounds of appeal that he seeks to have admitted as part of the briefing.[40] With regard to the general assertion that it has been only recently that the Defence team realized that new issues of law and fact need to be addressed,[41] it is obvious that any amendment sought to any notice of appeal is the result of further analysis having been undertaken over the course of time and that this fact, taken alone, cannot constitute "good cause" for an amendment.[42] The Appellant merely suggests that a denial of the Motion of 6 March 2006 would result in a miscarriage of justice, without illustrating why this would happen or why he failed to include these arguments in his Notice of Appeal several months earlier. Therefore, it is apparent that the Motion of 6 March 2006 is devoid of any arguments in relation to the requirements prescribed by Rule 108 of the Rules and the jurisprudence of the Appeals Chamber. In this respect, the Appeals Chamber finds that the Motion of 6 March 2006 is frivolous.

[36] Response to Motion of 6 March 2006, paras 2-5, 10.
[37] *Ibid.*, paras 6-8.
[38] *Ibid.*, paras 9, 12-13.
[39] *Ibid.*, paras 9, 14.
[40] Motion of 6 March 2006, paras 6-57.
[41] Motion of 6 March 2006, para. 1.
[42] *Blagojević* Decision of 24 November 2005, para. 10.

20. However, in fairness to the Appellant, who should not be prejudiced because of any negligence or inadvertence by his Counsel in failing to include the submitted additional grounds,[43] the Appeals Chamber will examine them in order to determine whether they should be included because they are of substantial importance to the success of the appeal or are likely to otherwise correct ambiguity or error in the previous filings without unduly delaying the appeal proceedings.

21. As a preliminary matter, the Appeals Chamber notes that the Appellant seeks to have his Notice of Appeal modified only as a consequence of including the newly submitted grounds of appeal into his Appellant's Brief. Rule 108 of the Rules clearly applies to seeking a variation of the notice of appeal and, where leave is granted to amend the notice of appeal, the appellant may be granted leave to amend the appeals brief to reflect the amendment to the notice of appeal. Nevertheless, the Appeals Chamber will consider the Motion of 6 March 2006 as requesting the variation of grounds of appeal contained in both the Notice of Appeal and the Appellant's Brief simultaneously. Since the variations of the Appellant's Notice of Appeal sought by his Motion of 5 July 2006 are of a broader scope than the newly submitted grounds of appeal, the Appeals Chamber will address the former in a separate section of the present decision.[44]

Ground 1: Error in Law and Fact by Admitting Uncorroborated and/or Hearsay Evidence

22. The newly submitted Ground 1 refers to (i) allegedly erroneous admission of hearsay evidence not corroborated by direct evidence;[45] (ii) alleged "failure to be consistent in giving hearsay evidence more weight than direct testimonies in crucial areas of the evidence";[46] and (iii) allegedly erroneous admission of the testimony of a single un-corroborated witness.[47] The Prosecution responds that these issues are already dealt with in the Appellant's Brief.[48]

---

[43] *Kordić* Decision of 9 May 2002, paras 5, 7 stating, *inter alia*, that the inability of the counsel to articulate a ground of appeal properly should not exclude the appellant from raising that ground of appeal.

[44] *See* paras. 47- 53 *infra.*

[45] Motion of 6 March 2006, para. 6 with reference to the Trial Judgement, para. 97, notably with respect to testimonies of Alison Des Forges concerning the alleged Appellant's succession of Bucyana, the alleged Appellant's membership of the Executive Committee and the fact that the Appellant was President of the CDR before 1994; of Witnesses X and ABE concerning the fact that the Appellant evicted his wife as soon as he learnt that she was a Tutsi; of Witness AHB concerning the date of the alleged delivery of arms at Kabari and Mizingo; and of Witness MK concerning the secret meetings at the office of the Minister of Transport.

[46] Motion of 6 March 2006, para. 10 with reference to the Trial Judgement, paras 267, 276, 695, 875-878, notably with regard to failure to take into account the testimony of Hassan Ngeze and Ferdinand Nahimana on the fact that the Appellant did not succeed Bucyana as President of the CDR party or that the CDR party did not exclude Tutsi as members, as well as on the denunciation by the CDR party of the charges concerning the extermination of Tutsi, while admitting hearsay evidence on the same allegations from Alison Des Forges, Omar Serushago, Witnesses X, LAG, ABC and AHB.

[47] Motion of 6 March 2006, paras 13-14. As examples, the Appellant refers to the findings concerning the testimony of Witness ABC on supervision of barricades in Rugunga (Trial Judgement, paras 336, 341, 975); Witness AHB's testimony on delivery of arms to 3 sectors in Mutura (Trial Judgement, paras 727, 728, 730, 954, 975, 977, 1035, 1613, 1064-1067, 1081, 1106-1107); Witness AFX's testimony on CDR meetings organized by the Appellant in 1993 (Trial Judgement, paras 264, 704, 717, 967); testimony of Alison Des Forges on the alleged "shouting match" conversation

23. The Appeals Chamber notes that certain issues raised in the newly submitted Ground 1 are covered in the Appellant's Brief. For example, under his Grounds 8 and 9, the Appellant contests the Trial Chamber's reliance on the testimony of Witness AFX, including his evidence regarding a CDR meeting in 1993.[49] Ground 13 deals with the weight attached to the "single hearsay report" of the interview of Gaspard Gahigi conducted by Philippe Dahinden on the Appellant's role at the RTLM.[50] Ground 18 addresses the issue of reliance by the Trial Chamber on the "unsupported hearsay" "in the absence of any documentary evidence" with regard to the finding that the Appellant became President of the CDR without specifying the source of such hearsay evidence.[51] Ground 19 similarly contests the finding that the Appellant was President of CDR in Gisenyi prior to 1994 based "on nothing more than rumour and hearsay".[52] Under Ground 20, the Appellant argues that the finding of the Trial Chamber concerning the fact that the Appellant became "a member of the Executive Committee of CDR and more influential than President Bucyana" was based "entirely on rumour, or vague and unfounded information from dubious sources", including the testimony of Alison Des Forges, while the authenticity of the only documentary evidence in this regard was not proved.[53] Further findings based on the testimony of Alison Des Forges are contested under Grounds 27 ("shouting match" with the US Ambassador Rawson) and 41 (the Appellant's role and influence within CDR).[54] Ground 23 includes arguments contesting the Trial Chamber's conclusion on the Appellant's participation in planning of the demonstration coordinated by the Ministry of Foreign Affairs based on the testimony of Witness AGK.[55] The reliance upon the uncorroborated testimony of Witness AHB with respect to the distribution of weapons in Mutura and Gisenyi is disputed under Ground 24.[56] The reliance on uncorroborated testimony of Witness ABC with regard to the Appellant's supervision of the roadblocks in Rugunga is argued under Ground 26.[57] Finally, with respect to the entire testimony of Witness FS, the Appellant generally suggests that it cannot be relied upon in determination of his guilt since this

between the Appellant and Ambassador Rawson (Trial Judgement, paras 314 and 336); Witness AGK's testimony concerning the demonstration of CDR youths at the Ministry of Foreign Affairs (Trial Judgement, paras 697-699, 714); and Witness FS' testimony on "Hutu Power" (Trial Judgement, paras 128, 890-895).

[48] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras 156, 184-185, 229 and 336-337.

[49] Appellant's Brief, paras 126, 130-131.

[50] *Ibid.*, paras 155-156.

[51] *Ibid.*, para. 184.

[52] *Ibid.*, para. 185.

[53] *Ibid.*, paras 186-189.

[54] *Ibid.*, paras 229 and 336-337.

[55] *Ibid.*, paras 200-201.

[56] *Ibid.*, paras 208-217.

[57] *Ibid.*, para. 220.

evidence was heard while the then Counsel did not engage in cross-examination or advance any submissions on his behalf.[58]

24. In this situation, where the newly submitted Ground 1 significantly overlaps with several existing grounds of appeal, the Appellant should have sought authorization to amend his existing grounds of appeal in order to specify or clarify them showing that previous pleadings failed to address these issues adequately and that correcting such failures will not unduly delay the proceedings on appeal or are necessary in order to avoid a miscarriage of justice.[59] In this respect, he should have identified with precision the new arguments that are of substantial importance to his appeal. The Appellant has not done so with respect to his allegedly new arguments as compared to the ones that are already before the Appeals Chamber. In looking at these arguments in the newly submitted Ground 1, which were already made in the Notice of Appeal and the Appellant's Brief, the Appeals Chamber does not conclude that there was any ambiguity or error, or otherwise negligence or inadvertence, in their original articulation.

25. Although the issue of the Trial Chamber's reliance on the testimony of Witnesses X, ABE, MK and AHB is not covered by the Appellant's Brief with respect to the certain specific findings referred to in the Motion of 6 March 2006, the Appeals Chamber does not consider that the addition of the newly submitted Ground 1 is of any substantial importance to the present appeal in this respect. In fact, without passing on the merits of the alleged error, which must be assumed for this purpose,[60] the newly submitted Ground 1 with regard to these witnesses, if successful, would not lead to reversal of the Appellant's convictions. Thus, failure to include this new ground in the Notice of Appeal and Appellant's Brief would not result in a miscarriage of justice for the Appellant. More specifically, the factual findings of the Trial Chamber on Barayagwiza having taken part in CDR meetings and demonstrations and supervised roadblocks,[61] which is the basis of its legal findings on genocide[62] and on direct and public incitement to commit genocide,[63] do not rely on the testimony of Witnesses X[64] and ABE with regard to the fact that the Appellant "sent away his wife" when he "learnt that she was of Tutsi ethnicity."[65] Rather, the Trial Chamber refers to the more relevant evidence of Witnesses AGK, AHI, AAM, AFX, and ABC.[66] Likewise, the factual finding of the Trial Chamber that the Appellant worked closely together with Ferdinand

[58] *Ibid.*, para. 83.
[59] *Cf. Blagojević* Decision of 26 June 2006, para. 23.
[60] *Cf. Ibid.*, paras 21 and 31.
[61] Trial Judgment, para. 719.
[62] *Ibid.*, paras 946-977.
[63] *Ibid.*, paras 978-1039 and specifically para.1035.
[64] The Appeals Chamber also notes that Witness X's testimony was found "generally credible" (Trial Judgement, para. 547).
[65] Trial Judgment, paras 703, 717.

Nahimana and Hassan Ngeze in the management of RTLM and in the CDR, respectively,[67] which is the basis of its legal finding on conspiracy to commit genocide,[68] does not rely solely on the testimony of Witness MK, but also on the evidence of Witnesses AGK and AHA, the testimony of the latter having been considered more significant.[69] Finally, with regard to Witness AHB's testimony concerning the date of the alleged delivery of arms at Kabari and Mizingo,[70] the respective factual finding of the Trial Chamber refers to the distribution of weapons in Gisenyi and, as noted above, is already dealt with in the Appellant's Brief.[71]

26. In light of the findings above, the request for leave to include the newly submitted Ground 1 in the Appellant's Brief and Notice of Appeal is denied.

Ground 2: Error in Failing to consider the Question of Credibility of Witnesses as Being Likely to be Affected by their Ethnicity, Political and or Ideological Motives

27. Under the newly submitted Ground 2, the Appellant submits that the Trial Chamber erred "in rejecting the arguments put forward by the accused that some witnesses gave biased evidence, and depositions and submitted partial expert reports because of their ethnic, political and/or [...] ideological affiliations".[72] The Prosecution responds that these issues are covered by the Appellant's Brief.[73]

28. Similar to the newly submitted Ground 1, the Appeals Chamber notes that, although the Notice of Appeal does not contain a ground that specifically bears on this issue, the newly submitted Ground 2 covers certain issues already argued in the Appellant's Brief. For instance, the Appeals Chamber notes that the fact that the majority of the members of the Ministry of Justice were Tutsi and/or closely allied to the RPF, including Witness François-Xavier Nsanzuwera, is argued under Ground 7 as undermining his credibility.[74] Ground 30 contains the general allegation that "[t]he evidence was largely from a category of witnesses who sought to criminalize legitimate political aspirations of the Hutu" and thus cannot be deemed reliable.[75] The overall issue of the

[66] *Ibid.*, paras 714-719.
[67] *Ibid.*, para. 889.
[68] *Ibid.*, paras 1040-1055 and specifically para. 1049.
[69] *Ibid.*, para. 887.
[70] *Ibid.*, paras 721-722.
[71] *See supra*, footnote 56.
[72] *Motion of 6 March 2006*, para. 15 with reference to the Trial Judgement, para. 73. The Appellant provides a number of examples of such allegedly biased witnesses, including the Expert Witnesses Marcel Kabanda and Alison Des Forges, Witnesses Jean-Pierre Chrétien, Philippe Dahinden, GO, FS, FX, Nsanzuwera, ABE, AFX, WD, AAJ, AAM, MK, AGR, A. Rangira, AEU, AGX, AES, BU, Th. Kamilindi, DM, AHB, EB, FY, A. Murebwayire, J. Kagabo (Motion of 6 March 2006, paras 15-17 with references to the Trial Judgement, paras 332, 712, 913).
[73] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras. 209-227, 246 and 322.
[74] Appellant's Brief, para. 124.
[75] *Ibid.*, para. 246.

integrity and credibility of Prosecution witnesses (including a motivation to lie), notably ABE, EB, AEU, AGX, GO and François-Xavier Nsanzuwera, is addressed under Ground 40 in connection with the application of the burden of proof by the Trial Chamber.[76] The admission into evidence of "partisan and opinion evidence" of Alison Des Forges, Jean-Pierre Chrétien and Marcel Kabanda is contested under Ground 41.[77] The Appeals Chamber does not find, in the absence of any arguments from the Appellant to the contrary, that there was any ambiguity or error, or otherwise negligence or inadvertence, in the original articulation of these errors in the Notice of Appeal and the Appellant's Brief.

29. Although the issue of the potential bias of Witnesses AAJ, AFX, WD, MK, WD, AGR, ABE, A. Rangira, AES, BU, Thomas Kamilindi, DM, AHB, FY, A. Murebwayire and J. Kagabo on the basis that they belong to the Tutsi ethnic group is not covered by the Appellant's Brief, the Appeals Chamber notes that the Motion of 6 March 2006 contains no arguments supporting this general assertion any further, since the Appellant merely states that these witnesses "were likely to be biased" and that the Trial Chamber "should have been cautious because of the possible desire for vengeance against Hutu leaders instilled inside the Tutsi community by the present RPF regime [and] propaganda disseminated through organisations of Tutsi survivals, notably IBUKA and AVEGA".[78] In any case, the Appeals Chamber recalls that Witnesses AAJ, WD, and DM were found not credible by the Trial Chamber.[79] Accordingly, any challenge with respect to their potential bias is moot. The Appeals Chamber concludes that the addition of this issue under the newly submitted Ground 2 would not be of substantial importance for the present appeal. Moreover, the Appeals Chamber notes that no specific relief is sought under this new ground.

30. Consequently, the request for leave to include the newly submitted Ground 2 in the Appellant's Brief and Notice of Appeal is denied.

Ground 3: Error in Admitting, without Permitting any Challenge, the Interpretation of the History of Rwanda Made by Alison Des Forges in the *Akayesu* Case

31. The newly submitted Ground 3 refers to the allegedly erroneous admission of and reliance upon the "version of the History of Rwanda retained in the Akayesu case [...] without subjecting it to any adversarial trial", which constitutes a violation of the Appellant's right to a fair trial and caused him "irreparable prejudice" in that it was "used as a basis for the determination of [his]

[76] *Ibid.*, paras 322-326.
[77] *Ibid.*, paras 327-338.
[78] Motion of 6 March 2006, para. 16.
[79] Trial Judgement, paras 713, 912 and 776 respectively.

culpability".[80] The Appellant further argues that the Trial Chamber also erred in "ignoring the fact that Mrs. Navanethem Pillay sat in the Chamber which rendered the Akayesu judgement" and would thus be biased in her judgement with regard to the Appellant.[81] The Prosecution contends that these issues are raised in the Appellant's Brief.[82]

32. The Appeals Chamber notes that the issues raised in the newly submitted Ground 3 simply reiterate the arguments already contained in the Appellant's Brief: the admission into evidence of Alison Des Forges's interpretation of the history of Rwanda in the *Akayesu* case is generally contested under Ground 41,[83] while the alleged bias and impartiality of Judge Pillay in connection with the fact that she "had previously sat in the determination of the Akayesu's trial", is argued specifically and at length in Ground 1.[84] In the view of the Appeals Chamber, these two grounds read together reveal the same issues as those contained in the newly submitted Ground 3. The Appeals Chamber finds that the newly submitted Ground 3 does not reveal any ambiguity or error, or otherwise negligence or inadvertence, in the articulation of these issues in the Notice of Appeal and the Appellant's Brief. The Appeals Chamber further notes that no specific relief is sought under this new ground.

33. Therefore, the Appellant's request for leave to include the proposed Ground 3 in the Appellant's Brief and Notice of Appeal is denied.

Ground 4: Error in Admitting that the CDR and the RTLM Issued or Broadcast Lists of People Suspected of Collaborations with the RPF on an Ethnic Basis

34. Under the newly submitted Ground 4, the Appellant argues that the Trial Chamber erred in concluding that the CDR and the RTLM distributed lists of people indicating their ethnicity, which led to their death.[85] According to the Appellant, the Trial Chamber erred in holding that "the only common feature of persons appearing on those lists was their Tutsi ethnicity; and that the RTLM, Kangura and the CDR in its press releases, published those lists solely on that basis without any other substantive reason relating to the RPF or its supporters".[86] The Appellant further contests both the authenticity and the contents of "*Communiqué special No.* 5" presented at trial by the

[80] Motion of 6 March 2006, paras 17 and 19 with reference to the Trial Judgement, paras 105-109.
[81] Motion of 6 March 2006, para. 18. The Appellant also refers to the fact that he filed a motion of recusal against Judge Pillay.
[82] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras 327-332 and 335-337.
[83] Appellant's Brief, paras 327-338.
[84] *Ibid.*, para. 33.
[85] Motion of 6 March 2006, para. 20.
[86] *Id.*, with reference to the Trial Judgement, para. 1026.

Prosecution, as well as the consequences of its release at the time of the events.[87] The Prosecution asserts that this issue is dealt with in the Appellant's Brief.[88]

35. The Appeal Chamber notes that most of these arguments are already addressed in the Appellant's Brief, in particular the Appellant's responsibility for the acts of the CDR and RTLM, as well the causal link between the RTLM broadcasts and/or the CDR activities and the extermination of the Tutsi before or after 6 April 1994. The Appellant's responsibility for RTLM broadcasts is extensively addressed in paragraph 107 and under Grounds 6 through 15, and his involvement in the CDR activities under Grounds 16 through 29.[89] Ground 33 is entirely devoted to the allegation that the broadcasts before or after 6 April did not encourage ethnic hatred.[90] The Appellant does not seek to establish that there was any ambiguity or error, or otherwise negligence or inadvertence, in previously articulating these arguments in the Notice of Appeal and the Appellant's Brief. In any event, the Appeals Chamber does not find this to be the case.

36. While it is true that the Appellant does not specifically refer to the issue of the lists in his Notice of Appeal and Appellant's Brief, and in particular the ones contained in the CDR Special Communiqué No. 5 dated 22 September 1992, the Appeals Chamber considers that, in light of the issues already covered by the Appellant's Brief, the newly submitted Ground 4, which is in fact rather an amendment to the existing grounds, is not of such substantial importance to the present appeal that it would, if successful, require reversal of the Appellant's convictions. In this regard, the Appeals Chamber notes that the Trial Chamber found the Appellant criminally responsible for various activities of the RTLM and the CDR to conclude on his guilt for direct and public incitement to commit genocide pursuant to Article 6(3) of the Statute.[91] The factual conclusion that these institutions "named and listed individuals suspected of being RPF or RPF accomplices"[92] is only one of those underlying the finding of guilt. At the same time, the CDR Special Communiqué No. 5 of 22 September 1992[93] was not the only evidence considered by the Trial Chamber when it specifically concluded on "a pattern of naming people" by the RTLM and CDR.[94] The newly

[87] *Ibid.*, para. 21.
[88] Response to Motion of 6 March 2006, para. 14, with reference to the Appellant's Brief, para. 107.
[89] Appellant's Brief, paras 107-240. More specifically, the Appellant argues that "[t]here was no basis for evidence for the interference that the Appellant was able to control the content of broadcasts" and that the Trial Chamber erred in concluding that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and sufficiently disseminated through RTLM, *Kangura* and CDR, before and after 6th April 1994" (*Ibid.*, paras 167-168). He further asserts that what is required to have been proven, but has not, is "a direct link between specific speeches, writings and partly political policy and the killings" (*Ibid.*, para. 195).
[90] *Ibid.*, paras 262-270.
[91] Trial Judgement, paras 1034-1035.
[92] *Ibid.*, para. 1026.
[93] *Ibid.*, paras 286 and 297.
[94] *Ibid.*, para. 1026. The Appeals Chamber notes that in the context of the CDR policy, the Trial Chamber has *inter alia* considered such evidence as: Prosecution Expert Witness Alison Des Forges' testimony notably with respect to the

submitted Ground 4 is wholly unsubstantiated as to such other evidence taken into account by the Trial Chamber in reaching its respective conclusion. Moreover, since, as explained above, the Appellant already generally argues under his existing grounds of appeal that he was not in control of the RTLM and CDR activities and that, in any case, the killings that followed did not result from such messages, the Appellant's failure to include this new ground in the Notice of Appeal and Appellant's Brief would not result in a miscarriage of justice. In addition, as it is the case for the newly submitted Grounds 2 and 3, the new Ground 4 does not contain any explicitly formulated relief sought by the Appellant.

37. In light of the foregoing, the Appeals Chamber rejects the request for leave to include the newly submitted Ground 4 in the Appellant's Brief and Notice of Appeal.

Ground 5: Failure to Give Adequate and Full Grounds as a Basis for the Judgment

38. The Appellant asserts that the Trial Chamber "erred in basing its judgement on many findings which are not founded or insufficiently founded, thus violating the Appellant's right to a fair trial and undermining his ability to adequately prepare his appeal".[95] According to the Prosecution, this issue is dealt with in the Appellant's Brief.[96]

39. Indeed, the issue of providing adequate and full grounds for judgement with respect to various findings of the Trial Chamber has been previously addressed by the Appellant. In particular, under his newly submitted Ground 5(a) he refers to the "absence of evidential grounds for finding that the Appellant supervised and controlled members of the CDR".[97] The Appeals Chamber notes that this argument is discussed at length under Grounds 18 through 24 dealing with the issue of the Appellant's superior responsibility in the context of CDR activities, including the alleged error of fact with regard to the distribution of arms.[98] With respect to the newly submitted Ground 5(b) alleging the "absence of evidential grounds that the Appellant perpetrated acts with the intention of destroying, in all or in part, the Tutsi ethnic group"[99] and the alleged "failure to specify which

---

Appellant's letter of 11 July 1992 and *Kangura* publications (paras 278-282); an undated Special Communiqué of the CDR (paras 283-285) and several other CDR communiqués commented by Alison Des Forges (paras 286-292).

[95] Motion of 6 March 2006, para. 26.

[96] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras 351-352.

[97] Motion of 6 March 2006, para. 27 with reference to the Trial Judgement, para. 954. The Appellant argues, without further substantiation, that, on one hand, the question of supervision and control of the CDR members and Impuzamugambi "was not set out clearly against the counts of the indictment that he was convicted of", and, on the other hand, that the Trial Chamber failed to determine the elements of the Appellant's superior responsibility, notably erring in finding, in the absence of any direct evidence", that he played the "leadership role" by distributing the weapons.

[98] Appellant's Brief, paras 178-217. *See,* in particular, Ground 21 entitled "Finding of Superior Responsibility not Supported by Evidence – Error of Fact and Law" (paras 190-193).

[99] Motion of 6 March 2006, paras 28-29 with reference to the Trial Judgement, paras 969 and 1053-1054. The Appellant also mentions the fact that the issues raised in the Trial Chamber's respective findings were not "introduced by the

precise acts or omission proved that the Appellant acted 'ruthlessly' towards the Tutsi" addressed under the newly submitted Ground 5(c),[100] the Appeals Chamber notes that the existing Grounds 6 through 11 dealing, in particular, with the Trial Chamber's legal and factual findings on the Appellant's *dolus specialis* for the crime of genocide, cover the same allegations.[101] The issue of the alleged failure to make "any specific ground for the finding that the Appellant acted as the 'lynchpin' for conspiracy between the three co-accused",[102] raised in the newly submitted Ground 5(d), is expressly addressed under the existing Ground 30.[103] Similarly, the newly submitted Ground 5(e) regarding the alleged failure "to set out the constituent elements of the crimes of extermination and persecution against the Appellant",[104] is already dealt with, in much greater detail, under existing Grounds 34 through 38.[105] Finally, the alleged failure "to provide [g]rounds for the sentence imposed",[106] raised in the newly submitted Ground 5(f), is substantiated under existing Grounds 45 through 50.[107]

40. The Appeals Chamber finds that the issues raised under the newly submitted Ground 5 are already dealt with in greater detail and with more precision under the above-mentioned existing grounds. Therefore, in the absence of any arguments to the contrary, it cannot conclude that there is any ambiguity or error, or otherwise negligence or inadvertence, in the Notice of Appeal and the Appellant's Brief with respect to these issues. The request for leave to include the newly submitted Ground 5 in the Appellant's Brief and Notice of Appeal is consequently denied in its entirety.

Ground 6: Error in Law by Judging Non-Physical Persons

41. Under the newly submitted Ground 6, the Appellant amalgamates his statement that the Trial Chamber exercised its power *ultra vires* in extending its jurisdiction to legal persons with his previous arguments concerning the lack of challenge with regard to the findings of fact in the *Akayesu* case.[108] He claims that, as a consequence, "[t]he findings and the convictions relating to the CDR policy" as well as the "findings attributable to the Appellant based on the culpability of the

---

Prosecution and thus was not the subject of adversarial debate at the time of the trial", but does not substantiate his claim any further concentrating this sub-ground of appeal on the absence of evidence.

[100] Motion of 6 March 2006., paras. 30-37 with reference to the Trial Judgement, paras 345-348, 736-742, 967.

[101] Appellant's Brief, paras 108-139.

[102] Motion of 6 March 2006, paras 38-46 with reference to the Trial Judgement, paras 1049-1055. The Appellant argues that the Trial Chamber's respective conclusions were not based on any evidential basis and the issues addressed therein were "not even part of the [P]rosecution case and did not appear in the Prosecution's indictment of October 23, 1997 as modified on April 11, 2000" (Motion of 6 March 2006, para. 40).

[103] Appellant's Brief, paras 243-249.

[104] Motion of 6 March 2006, para. 47.

[105] Appellant's Brief, paras 275-312.

[106] Motion of 6 March 2006, para. 48.

[107] Appellant's Brief, paras 351-376.

[108] Motion of 6 March 2006, para. 50.

CDR as a party should be quashed" and that he "should be acquitted of those matters".[109] While the Prosecution concedes that this issue "is not dealt with in the Appellant's Brief, in the same way as it is now being presented in the Motion", it submits that "the substantive argument, in relation to the Appellant's role and responsibility in RTLM and CDR has already been made" by the Appellant.[110] The Prosecution further argues that the matter of the Tribunal's jurisdiction *ratione personae* is irrelevant for the purposes of the present appeal.[111]

42. The Appeal Chamber notes that the lack of jurisdiction of the Tribunal to try non-natural persons is not explicitly raised in the Appellant's Brief, except under the existing Ground 35 with regard to "[e]rrors of fact and law concerning the existence of large scale massacre" attributable to the Appellant[112]. However, in light of the absence of any substantiation of such arguments in the Motion of 6 March 2006, notably with respect to any findings of the Trial Chamber that allegedly "judg[e] the CDR policy and that of the RTLM broadcasts",[113] the Appeals Chamber fails to see how the omission of this ground of appeal would result in a miscarriage of justice for the Appellant. Consequently the request for leave to include the newly submitted Ground 6 in the Appellant's Brief and Notice of Appeal is denied.

Ground 7: Error in Considering as Aggravating Factors the Positions Held by the Appellant in the CDR and the RTLM

43. Under the newly submitted Ground 7, the Appellant contends that the Trial Chamber "erred in determining [his] sentence [...] on the basis of positions which he allegedly held within the CDR and the RTLM whereas the Prosecution did not provide the evidence beyond reasonable doubt that the Appellant actually held those positions attributed to him".[114] The Appellant further reiterates his challenge to the Trial Chamber's finding that he was the "lynchpin" between the three co-accused and concludes that, having held him responsible for both his own acts and omissions as well as those of his subordinates, the Trial Chamber "exposed him to double jeopardy" by considering "merely occupying such positions as an aggravating factor".[115] In addition, the Appellant argues that the Trial Chamber erred "by declaring that there were no mitigating circumstances"[116] and by

[109] *Ibid.*, para. 51.
[110] Response to Motion of 6 March 2006, para. 15 with reference to the Appellant's Brief, paras 150-170.
[111] *Id.*
[112] Appellant's Brief, para. 289.
[113] Motion of 6 March 2006, para. 50.
[114] *Ibid.*, para. 53.
[115] *Ibid.*, paras 54-55.
[116] Motion of 6 March 2006, para. 56. In particular, he maintains that the Trial Chamber should have taken into account "the absence of any evidence of [his] direct participation in any murder." He requests that, if he is not acquitted, "the Appeal Chambers should consider a significant reduction of the sentence [...] and have regard to the significant discrepancy in the sentences imposed against Appellants in similar circumstances."

imposing a "disproportionate" sentence.[117] The Prosecution submits that these issues are "dealt with at length" in the Appellant's Brief.[118]

44. The Appeals Chamber notes that existing Grounds 42 through 51 already cover the issues of sentencing, including the alleged error of the Trial Chamber in finding no mitigating circumstances in the Appellant's case,[119] as well as the argument that the "pronounced sentence is excessive and disproportionate".[120] The Appeals Chamber does not find, in the absence of any submissions from the Appellant to the contrary, that there was any ambiguity or error, or otherwise negligence or inadvertence, in raising them previously in the Notice of Appeal and the Appellant's Brief.

45. As for the allegation of "double jeopardy", the Appellant seems to reiterate his arguments with respect to the Trial Chamber's findings on his superior responsibility under Article 6(3) of the Statute of the Tribunal addressed above[121] instead of addressing its specific considerations relevant to the aggravating factors in terms of sentencing.[122] There are no substantiated arguments with references to the Trial Chamber's findings concerning the Trial Chamber's alleged double-counting of the Appellant's command role in the crimes when considering his sentencing in addition to its evaluation of the form and degree of his participation in the crimes. Therefore, the Appeals Chamber does not find that inclusion of this argument would be of substantial importance to the success of this appeal.

46. In light of the foregoing, the Appeals Chamber denies the Appellant's request to include the proposed Ground 7 in the Notice of Appeal and the Appellant's Brief.

B. Motion of 5 July 2006

Submissions of the Parties

47. The Appellant submits that good cause for amending his Notice of Appeal exists[123] since the proposed amendments (i) do not involve any substantive change to the grounds of appeal set out in

[117] Motion of 6 March 2006, para. 57.
[118] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, para. 339.
[119] Appellant's Brief, paras 339-342. *See* also, Ground 46 in which he argues the alleged error of failing to take into account "the excessive delay in bringing the Appellant to trial" as a mitigating circumstance for the reduction of the sentence (*Ibid.*, paras 353-357); and Grounds 47 and 49 on "inadequate remedy for the violations of the fundamental rights" of the Appellant (*Ibid.*, paras 358-360 and 362-366).
[120] *Ibid.*, paras 347 and 361. *See also* Ground 46, under which he argues that the "sentence must be reduced", because of judgment with an "excessive delay", which is a "mitigating circumstance" (*Ibid.*, paras 353-357). Similarly, under the Ground 51, he maintains that his sentence was unfair in comparison with the sentence of Georges Ruggiu (*Ibid.*, paras 377-379).
[121] *Cf.* para. 39 *supra*.
[122] Trial Judgement, paras 1100, 1102-1103.
[123] Motion of 5 July 2006, paras 8, 11.

the Appellant's Brief and in the Motion of 6 March 2006;[124] (ii) are designed to ensure that the Notice of Appeal complies with the requirements of Rule 108 of the Rules,[125] and thus (iii) "are intended to facilitate the work of the Appeals Chamber".[126] He explains that his Notice of Appeal did not indicate the substance of the alleged errors due to significant time pressure and constraints.[127] Finally, he maintains that the amendments will not prejudice the Prosecution or the co-Appellants.[128]

48. In its Response to Motion of 5 July 2006, the Prosecution objects to the proposed amendments and argues that the Appellant has failed to demonstrate any good cause, pursuant to Rule 108, justifying his request at this late stage of the proceedings, or to show that the denial thereof would lead to a miscarriage of justice.[129] More specifically, the Prosecution notes that the proposed amendments basically, with the exception of Ground 4, consist in merely cutting certain paragraphs from the Appellant's Brief and pasting them into his proposed new notice of appeal.[130] With respect to the newly amended Ground 4, the Prosecution underlines that the Appellant's assertion concerning the Judges' alleged bias and promise "to the highest Rwandan authorities that there would be no more incidents such as the release of Jean-Bosco Barayagwiza" is not pleaded in the Appellant's Brief, amounts to a significant variation of this ground and would thus prejudice the Prosecution in having had no opportunity to respond to these allegations.[131]

49. Furthermore, the Prosecution notes that neither the Appeals Chamber nor the Prosecution itself made any remark or complaint with regard to the existing Notice of Appeal.[132] At the same time, it submits that the notice of appeal annexed to the Motion of 5 July 2006 does not satisfy the requirements of Rules 108 and of paragraph 1.c) of the Practice Direction on Formal Requirements for Appeal from Judgements of 16 September 2002 ("Practice Direction"), since it still fails to identify, for each ground of appeal, the alleged errors of law or facts and the precise references to the challenged findings.[133] The Prosecution finally prays the Appeals Chamber to formally sanction the Appellant's Counsel, pursuant to Rules 46 and 73 (F) of the Rules for this frivolous filing.[134]

---

[124] *Ibid.*, paras 2, 11.
[125] *Ibid.*, paras 3, 8, 11.
[126] *Ibid.*, para. 11.
[127] *Ibid.*, paras 5, 10.
[128] *Ibid.*, para. 13.
[129] Response to Motion of 5 July 2006, paras 2-3, 8, 13, 18.
[130] *Ibid.*, para. 10.
[131] *Ibid.*, para. 12.
[132] *Ibid.*, paras 5, 7.
[133] *Ibid.*, paras 14-16.
[134] *Ibid.*, para. 19.

Analysis

50. The Appeals Chamber recalls that both the Notice of Appeal and the Appellant's Brief were filed by the Appellant on the same date, almost ten months ago, after he had benefited from generous extensions of time granted by the Appeals Chamber following the change to his Defence team,[135] but notes that he is still complaining about "significant pressure of time"[136] and has repeatedly tried to obtain additional time for his filings on the same grounds.[137] Despite the fact that the Notice of Appeal clearly did not conform to the criteria established for such filings under the provisions of Rule 108 and the Practice Direction,[138] the Appeals Chamber accepted that Notice of Appeal as validly filed in the particular circumstances of the case. The Appeals Chamber was mindful of significant delays and multiple previous filings in this case, as well as of the fact that the Prosecution had not opposed the filing in question. In this respect, the Appeals Chamber adds that the purpose for setting forth the grounds, as provided for under Rule 108 of the Rules, is, *inter alia*, "to focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief" and "to give details of the arguments the parties intend to raise in support of the grounds of appeal".[139] The Notice of Appeal and the Appellant's Brief, having been filed simultaneously, allow for the Prosecution to sufficiently understand the Appellant's grounds of appeal and thus, the Appeals Chamber considered that it was in the interests of judicial economy to accept the deficient Notice of Appeal.[140]

51. The Appeals Chamber also wishes to emphasize that it strongly disagrees with the Appellant's claim that his full notice of appeal "could only be completed once the Appeals Brief itself was in its final form".[141] This assertion goes against the logical order of the appeal procedure before the Tribunal, where a notice of appeal is filed shortly after the impugned judgement, while the Appellant's brief is to be filed within seventy-five days *after* the notice of appeal. The Appeals

[135] Decision of 17 May 2005, p. 4; Decision of 2 September 2005, p. 3.
[136] Motion of 5 July 2006, para. 5.
[137] *See, e.g.*, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, paras 22-26. The Appeals Chambers also notes that the same argument is raised by the Appellant in his several pending motions.
[138] The Notice Appeal consists of a simple list of grounds of appeal and indicates neither the relief sought nor the challenged findings of the Trial Chamber.
[139] *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001, p. 3.
[140] This approach is not inconsistent with the Appeals Chamber's findings in para. 46 of *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, stating that "an appeal, which consists of a Notice of Appeal that lists the grounds of Appeal but is not supported by an Appellant's brief, is rendered devoid of all the arguments and authorities". As the Appeals Chamber found in the cited judgement, this would only be the case if the deficient notice of appeal is not followed by a comprehensive Appellant's brief providing detailed arguments. This is clearly not the case in the present appeal.
[141] Motion of 5 July 2006, para. 10.

Chamber reiterates that unjustified amendments would result in appellants being free to change their appeal strategy after they have had the advantage of reviewing the arguments in a response brief, interfering with the expeditious administration of justice and prejudicing the other parties to the case,[142] which is unacceptable. In this sense, the Appeals Chamber finds the Motion of 5 July 2006 frivolous.

52. As explained above,[143] variations to a notice of appeal can be allowed if they are minor and non-substantive modifications that would correct an ambiguity or error made by the counsel in the previous filings and would not unduly delay the appeal proceedings. However, the Appeals Chamber finds that the newly submitted notice of appeal does not correct any such ambiguity or error since, save for Ground 4,[144] it merely reiterates the arguments already developed in the Appellant's Brief.[145] The Appeals Chamber further finds that the newly submitted notice of appeal does not fully conform to the provisions of Rule 108 and the Practice Direction in the sense that, for most Grounds, it still fails to identify with precision the nature of alleged errors, any references to the challenged findings or the relief sought. In addition, in the Annexed Notice of Appeal, the Appellant adds, in certain Grounds, some elements that were specified in the Appellant's Brief under different grounds,[146] which might be even more confusing. It would thus not be in the interests of justice to allow for these amendments, and the denial thereof will not result in a miscarriage of justice for the Appellant.

---

[142] *See supra*, para. 11.

[143] *See supra*, para. 13.

[144] With regard to the newly proposed Ground 4, the Appeals Chamber notes that the first eight lines of the amended wording contain new allegations, which the Prosecution has not had the opportunity to respond to. Their inclusion at the present stage of proceedings might thus prejudice the responding party, unless additional filings further delaying the advancement of the case are allowed. Moreover, the Appeals Chamber notes that the Appellant has not sought leave for this more significant variation of his respective ground of appeal generally arguing that none of the proposed amendments involve any substantive change to the grounds of appeal fully argued in the Appeal Brief. Subsequently, the Appeals Chamber cannot allow for this variation.

[145] For example, para. 9 of the newly submitted notice of appeal largely corresponds to para. 46 of the Appellant's Brief; para. 10 of the newly submitted notice of appeal corresponds to para. 67 of the Appellant's Brief; para. 11, with the exception of lines 2-8, of the newly submitted notice of appeal corresponds to para. 99, lines 3-7 of the Appellant's Brief; para. 12, lines 2-5 of the newly submitted notice of appeal corresponds to para. 101, lines 11-12 of the Appellant's Brief; para. 13 of the newly submitted notice of appeal corresponds to paras 109-110 of the Appellant's Brief; para. 14, lines 3-5 of the newly submitted notice of appeal corresponds to para. 124, lines 1-3 of the Appellant's Brief; para. 18, lines 1-4 of the newly submitted notice of appeal corresponds to para. 134, lines 1-4 of the Appellant's Brief; para. 21, lines 1-4 and 6-10 of the newly submitted notice of appeal corresponds to para. 67, lines 1-5 and 10-13 of the Appellant's Brief; para. 22 of the newly submitted notice of appeal corresponds to paras 168, lines 1-2, and 169 of the Appellant's Brief; para. 23 of the newly submitted notice of appeal corresponds to paras 171, lines 1-6, and 172 of the Appellant's Brief; para. 29, lines 5-10 of the newly submitted notice of appeal corresponds to para. 195 of the Appellant's Brief; paras 40-41 of the newly submitted notice of appeal corresponds to paras 263 and 279 of the Appellant's Brief; 46 of the newly submitted notice of appeal corresponds to para. 313 of the Appellant's Brief.

[146] For example, the "blatant political interference" and the "lack of impartiality" of Judges Pillay and Møse alleged under Ground 4, para. 11, of the newly submitted notice of appeal, are not evoked under Ground 4 of the Appellant's Brief but under Ground 1, at paras 22-41. The lack of "effective representation" alleged under ground 5, para. 12 of the newly submitted notice of appeal, does not appear under Ground 5 of the Appellant's Brief but under Ground 4, at paras 68-99. Under Ground 44, para. 51 of the newly submitted notice of appeal, the Appellant argues that "[t]he Trial

53. For the foregoing reasons, the Appellant's request to amend the Notice of Appeal is denied. At the same time, the Appeals Chamber notes that Ground 46 is absent from the Notice of Appeal, while Ground 45 is entitled "Lack of the Grounds Founding the Sentence because of Judgment with an Excessive Delay" and is followed by Ground 47. The Appellant's Brief has both Ground 45 "Lack of the Grounds Founding the Sentence" and Ground 46 "Reduction of the Sentence because of Judgment with an Excessive Delay". The same structure is presented in the Motion of 5 July 2006. The Appeals Chamber *proprio motu* considers that Ground 46 was inadvertently omitted in the Notice of Appeal and that it should be understood as a technically separate ground of appeal.

C. Motion of 7 July 2006

54. The Appellant also seized the Appeals Chamber with a request to make corrections of "typing error[s] or obvious error(s) of grammar" into his Appellant's Brief that would not amount to any substantial amendments thereto.[147] The Appeals Chamber recalls that "a party may, without requesting leave from the Appeals Chamber, file a corrigendum to their previously filed brief or motion whenever a minor or clerical error in said brief or motion is subsequently discovered and where correction of the error is necessary in order to provide clarification".[148] Consequently, while the Appeals Chamber is cognizant of the lateness of such filing, there was no need for the Appellant to seize it with a Motion in this respect.

55. Having reviewed the proposed corrections, the Appeals Chamber notes that most of the submitted amendments indeed correct grammatical or typing errors, or inaccurate references. While corrections 5, 11, 15, 29, 54, 65, 66, 76 seem to go slightly beyond clerical corrections, the Appeals Chamber considers that they, while usefully providing clarifications to the respective sentences, do not amount to any substantial changes of the Appellant's Brief and can thus be equally permitted.

Chamber failed to give precise and details grounds to explain its decision to sentence the Appellant to 35 years", whereas this allegation is made under Ground 45 of the Appellant's Brief.

[147] Motion of 7 July 2006, para. 3.

[148] *The Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11*bis*.1 Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005, p. 3.

IV. Disposition

56. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion of 6 March 2006 and Motion of 5 July 2006 in their entirety, **FINDS** both Motions to be frivolous[149] and imposes sanctions against the Appellant's Counsel, pursuant to Rule 73(F), in the form of non-payment of fees associated with both Motions; and **GRANTS** the Motion of 7 July 2006.

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

Dated this 17th day of August 2006
At The Hague, The Netherlands

Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[149] *See supra*, paras 19 and 51.

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

REGISTRY AT THE HAGUE
Churchillplein 1, 2517 JW The Hague, The Netherlands
Tel: + 31 (0) 70 512-8225 / 8237 Fax : + 31 (0) 70 512 -8932

APPEALS CHAMBER – PROOF OF SERVICE

CHAMBRE D'APPEL - PREUVE DE NOTIFICATION

7 August 2006	Case Name / *Affaire: NAHIMANA ET AL.*	Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE v. THE PROSECUTOR
	Case No / *No. de l'affaire*: ***ICTR-99-52-A***	

To: / *A:*

ARUSHA
✖ Judicial Archives Fax Number: **1795251**

APPEALS UNIT
✖ Ms Félicité Talon

APPEALS CHAMBER
✖ Judge / Juge Fausto Pocar, Presiding
✖ Judge / Juge Mohamed Shahabuddeen
✖ Judge / Juge Mehmet Güney
✖ Judge / Juge Andresia Vaz
✖ Judge / Juge Theodor Meron

✖ Ms Catherine Marchi-Uhel
✖ Mr Roman Boed
✖ Concerned Associate Legal Officers
✖ Mr Charles Zama

DEFENSE
✖ Accused / *accusé* : Ferdinad NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE
(complete CMS4 Form)

✖ Lead Counsel / *Conseil Principal*: **Mr. Biju-Duval, Mr. Donald Herbert, Mr. Bharat Chadha** ☐ In Arusha (complete CMS 2) ✖ Fax Number: **00-33-1 53 80 47 48 00 44 207 841 6199/6197 00 255-27-250 8854**

☐ ~~Co-Counsel / *Conseil Adjoint*: Ms. Diana Ellis, Ms. Gabriele Della~~ Morte, Ms. Nathalie Leblanc
(name / nom)
☐ In Arusha (complete CMS 2) ☐ Fax Number:

From: / *De:* ✖ **Koffi Afande** ✖ Charles Zama ✖ Rosette Muzigo-Morrison ✖ **Patrice Tchidimbo**

Subject / *Objet:* **Kindly find attached the following documents / *Veuillez trouver en annexe les documents suivants:***

Documents name / *Titre du document*	**Date Filed / *Date d'enregistrement***	**Pages**
Decision on Appellant Jean-Bosco Barayagwiza's Motions for leave to submit additional grounds of Appeal, to amend the Notice of appeal and to correct his Appellant's Brief	August 17, 2006	8091/H 8069/H

~~No. of pages transmitted including this cover sheet / nombre de pages transmises, page de garde comprise:~~ 24
~~In case of transmission difficulties, please contact: Central Registry / En cas de difficultés de transmission, veuillez contacter:~~
Tel: 31 (0) 70 512-8225 / 8237