

ICTR-98-44-AR15 bis.3

13-3-2007

(1645/A - 16061A)

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-AR15bis.3

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 13 March 2007

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S APPEAL FROM DECISION  
ON CONTINUATION OF THE PROCEEDINGS

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TABLE OF CONTENTS

<b>Procedural History .....</b>	<b>3</b>
<b>Grounds of Appeal .....</b>	<b>5</b>
<b>Argument.....</b>	<b>5</b>
<b>The Remaining Judges Erred in Deciding to Continue the Trial in the Absence of an Exercise of Discretion by the President and a Reasoned Decision Thereon Pursuant to Rule 15 bis (C) .....</b>	<b>5</b>
<b>The President’s Discretion.....</b>	<b>6</b>
<b>Right to a Reasoned Decision .....</b>	<b>6</b>
<b>The Remaining Judges Erred in Deciding to Continue the Trial in the Absence of a Decision by the President Appointing a Trial Chamber to Consider Transfer of the Case to a National Jurisdiction <i>Proprio Motu</i> .....</b>	<b>10</b>
<b>Violation of Equality of Arms—as Written .....</b>	<b>11</b>
<b>Violation of Equality of Arms—as Applied .....</b>	<b>13</b>
<b>The Remaining Judges Erred in Concluding that the Completion of the Trial by the End of 2008 was not Mandatory and that the Trial Could be Completed Without Violating the Rights of the Accused .....</b>	<b>14</b>
<b>The Remaining Judges Erred in Concluding that the Trial Should be Continued Despite Circumstances Which had Rendered the Trial Unfair .....</b>	<b>16</b>
<b>The Prosecution’s Numerous Violations of its Disclosure Obligations .....</b>	<b>17</b>
<b>The Wholesale Admission of Material Facts Not Charged in the Indictment...19</b>	
<b>The Unjustified Use of Anonymous Witnesses .....</b>	<b>21</b>
<b>The Prosecution’s Presentation of Perjured Testimony .....</b>	<b>24</b>
<b>The Failure of the Rwandan Government to Produce Statements of Prosecution Witnesses .....</b>	<b>25</b>
<b>The Taking of Important Testimony by Video-Link .....</b>	<b>26</b>
<b>The Prosecution’s Interference with the Defence Right to Meet Prosecution Witnesses .....</b>	<b>30</b>
<b>Conclusion .....</b>	<b>32</b>

1. Joseph Nzirorera respectfully appeals, pursuant to Rule 15 *bis* (D), from the *Decision on Continuation of the Proceedings* (6 March 2007) issued by the remaining Judges. He contends that the remaining Judges erred in ordering the continuation of his trial with a substitute Judge.

### **Procedural History**

2. On 19 January 2007, the Presiding Judge of the Trial Chamber informed the President that Judge Emile Francis Short was unable to continue sitting in the trial of this case due to illness.<sup>1</sup>

3. On 23 January 2007, Mr. Nzirorera requested the opportunity to make submissions to the President on the issue of whether he should order a rehearing pursuant to Rule 15 *bis* (C), rather than referring the matter to the remaining Judges.<sup>2</sup>

4. On 24 January 2007, the President asked the parties to “clarify whether the Accused will grant their consent to the continuation of the proceedings after the assignment of a new Judge to replace Judge Short, and, if not, to state the reasons therefore.”<sup>3</sup>

5. On 29 January 2007, Mr. Nzirorera filed *Joseph Nzirorera’s Submission in Support of a Rehearing* with the President. Mr. Nzirorera informed the President that he did not consent to a continuation of his trial. He contended that the President had the discretion to order a rehearing rather than referring the matter to the remaining Judges. In a 64 page filing, he urged the President to exercise that discretion and order a rehearing.<sup>4</sup>

6. Simultaneous with this submission, Mr. Nzirorera also filed with the President *Joseph Nzirorera’s Request for Designation of a Trial Chamber to Consider Referral to National Jurisdiction* (29 January 2007). The request contained annexes showing that upon the resignation of Judge Short, Mr. Nzirorera had requested the Prosecutor file a motion pursuant to Rule 11 *bis* to transfer his case to a national jurisdiction and the Prosecutor had refused. Therefore, Mr. Nzirorera requested the President to designate a Trial Chamber which could consider transfer of the case *proprio motu*.

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<sup>1</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 2

<sup>2</sup> Letter to Judge Mose, attached as Annex “A” to this appeal

<sup>3</sup> President’s Memorandum to CMS, attached as Annex “B” to this appeal

<sup>4</sup> *Joseph Nzirorera’s Submission in Support of a Rehearing* (29 January 2007) at para. 7

7. The prosecution responded to this request on 31 January 2007<sup>5</sup> and Mr. Nzirorera replied on 1 February 2007.<sup>6</sup>

8. On 7 February 2007, the President sent a memorandum to the Court Management Section indicating he had “considered the submissions received by the parties and am referring the matter to the Trial Chamber in conformity with Rule 15 *bis* (D).”<sup>7</sup> He made no ruling on the request for designation of a Trial Chamber to consider referral to a national jurisdiction.

9. The remaining Judges had already issued a scheduling order requiring submissions on the issue of continuation of the trial to be filed by 31 January 2007.<sup>8</sup> Pursuant to that order, Mr. Nzirorera filed *Joseph Nzirorera’s Submission to Remaining Judges in Support of a New Trial* (31 January 2007). Mr. Ngirumpatse also filed a submission requesting a rehearing<sup>9</sup>, while Mr. Karemera filed a submission agreeing to continuation of the trial with certain conditions.<sup>10</sup> The prosecutor filed a submission urging a continuation of the trial.<sup>11</sup>

10. After receiving the President’s memorandum of 7 February, Mr. Nzirorera filed *Joseph Nzirorera’s Further Submission to Remaining Judges* (8 February 2007). He urged the remaining Judges to return the matter to the President for a reasoned decision under Rule 15 *bis* (C).

11. On 6 March 2007, the remaining Judges issued their *Decision on Continuation of the Proceedings*. It is from that decision that Mr. Nzirorera now files this timely appeal of right pursuant to Rule 15 *bis* (D).

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<sup>5</sup> *Prosecutor’s Response to Joseph Nzirorera’s Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction* (31 January 2007)

<sup>6</sup> *Reply Brief: Joseph Nzirorera’s Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction* (1 February 2007)

<sup>7</sup> President’s Memorandum to CMS, attached as Annex “C” to this appeal.

<sup>8</sup> *Scheduling Order for the Filing of Submissions* (24 January 2007)

<sup>9</sup> *Soumission pour M. Ngirumpatse sur la Scheduling Order for Filing of Submissions* (30 January 2007)

<sup>10</sup> *Reponse de Edouard Karemera a la “Scheduling Order for Filing of Submissions”* (31 January 2007)

<sup>11</sup> *Prosecutor’s Submissions Pursuant to Rule 15 bis (D)* (30 January 2007)

## Grounds of Appeal

12. Mr. Nzirorera raises the following issues on appeal:

- (A) Did the remaining Judges err in deciding to continue the trial in the absence of an exercise of discretion by the President and a reasoned decision thereon pursuant to Rule 15 *bis* (C)?
- (B) Did the remaining Judges err in deciding to continue the trial in the absence of a decision by the President appointing a Trial Chamber to consider transfer of the case to a national jurisdiction *proprio motu*?
- (C) Did the remaining Judges err in concluding that the completion of the trial by the end of 2008 was not mandatory and that the trial could be completed without violating the rights of the accused?
- (D) Did the remaining Judges err in concluding that the trial should be continued despite circumstances which had rendered the trial unfair?

## Argument

### **The Remaining Judges Erred in Deciding to Continue the Trial in the Absence of an Exercise of Discretion by the President and a Reasoned Decision Thereon Pursuant to Rule 15 *bis* (C)**

13. Rule 15 *bis* (C) provides that:

“If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).”

14. Rule 15 *bis* (D) provides in pertinent part that:

“If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice...”

### **The President's Discretion**

15. Mr. Nzirorera contends that Rule 15 *bis* (C) gives the President the discretion to order a rehearing of the trial. The applicability of Rule 15 *bis* (C) to the case of a non-consenting accused whose trial has already commenced appears to be a question of first impression in both *ad hoc* Tribunals.

16. The plain language of the Rule provides that the President “may order a rehearing or a continuation of the proceedings.” The ambiguity arises from the last sentence of the Rule which contains an exception in cases where (1) the trial has already commenced; and (2) the accused does not consent to continuation of the trial. Mr. Nzirorera’s case falls within that exception.

17. In such a case, Rule 15 *bis* (C) provides that the President cannot order a continuation of the proceedings, but must refer the matter to the remaining Judges for their determination. The issue presented is whether, under the Rule, the President retains the option of ordering a rehearing rather than referring the matter to the remaining Judges.

18. An answer to this issue in the negative would create the anomalous situation that the President could order a rehearing where an accused doesn’t want one, but cannot order a rehearing where an accused wants one. This seems contrary to the purpose of the Rule, which is to provide safeguards for an accused who does not consent to the continuation of his trial.<sup>12</sup> Therefore, the Appeals Chamber should conclude that the President has the discretion pursuant to Rule 15 *bis* (C) to order a rehearing, rather than refer the matter to the remaining Judges.

### **Right to a Reasoned Decision**

19. In this case, Mr. Nzirorera specifically requested the President to exercise his discretion and order a rehearing.<sup>13</sup> The President never ruled on this request, but simply issued a memorandum to the Court Management Section indicating he had “considered the submissions received by the parties and am referring the matter to the Trial Chamber in conformity with Rule 15 *bis* (D).”<sup>14</sup>

<sup>12</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-AR15bis, *Decision in the Matter of Proceedings Under Rule 15 bis* (D) (24 September 2003) at para. 18

<sup>13</sup> *Joseph Nzirorera's Submission in Support of a Rehearing* (24 January 2007) at paras. 4-6

<sup>14</sup> President’s Memorandum to CMS, attached as Annex “C” to this appeal.

20. It is therefore impossible to determine whether the President considered that he had the discretion pursuant to Rule 15(C) to order a rehearing or, if he believed that he had such discretion, what factors he took into consideration in exercising that discretion not to order a rehearing.

21. Mr. Nzirorera contends that the decision by the President to refer his case to the remaining Judges violated his statutory right to a reasoned decision. The Appeals Chamber has held that an accused has a right to a reasoned decision as an aspect of the fair trial requirement enshrined in the statute of the Tribunal.<sup>15</sup> The right to a reasoned decision has been held to apply not only to aspects of a Trial Chamber's final judgement<sup>16</sup>, but to decisions on pre-trial motions<sup>17</sup>, such as decisions on provisional release motions.<sup>18</sup>

22. The issue presented in this situation is whether the accused has a right to a reasoned decision from the President, as opposed to a Trial Chamber. Once more, this appears to be an issue of first impression in the jurisprudence of the *ad hoc* Tribunals.

23. Mr. Nzirorera notes that the President of the ICTR has issued reasoned decisions on a number of issues which have come before him such as the desire of an accused to marry<sup>19</sup>, whether a defence team can interview a detainee<sup>20</sup>, whether a detainee can meet with a defence witness<sup>21</sup>, restrictions on a detainee's right to have

<sup>15</sup> *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 18; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 17; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 603; *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 69; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-A, *Judgement* (12 June 2002) at para. 41

<sup>16</sup> *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 423; *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 101; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 605

<sup>17</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 15, fn. 21

<sup>18</sup> *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 6; *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 23

<sup>19</sup> *Prosecutor v Nahimana et al*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Application for Review of the Registrar's Decision of 12 January 2005* (14 September 2005);

<sup>20</sup> *Prosecutor v Ntahobali*, No. ICTR-98-42-T, *The President's Decision on the Appeal Filed Against the Registrar's Refusal to Permit a Confidential Interview with Georges Rutaganda* (7 June 2005) at para. 5

<sup>21</sup> *Prosecutor v Ntagerura*, No. ICTR-96-10A-T, *The President's Decision on the Defence Application Made Pursuant to Rule 64 of the Rules of Detention* (21 May 2002)

contact with other persons<sup>22</sup>, contact among detainees<sup>23</sup>, withdrawal of counsel for an accused<sup>24</sup>, assignment of investigators for the accused<sup>25</sup>, work programs for defence teams<sup>26</sup>, sanctions against defence counsel<sup>27</sup>, and early release of a convicted person.<sup>28</sup>

24. In most of those situations, the President was making the decisions in his administrative capacity and the issues did not involve fundamental fair trial rights. Those decisions were not subject to review. In Mr. Nzirorera's case, however, the decision involves a fundamental fair trial right. If an accused has the right to a reasoned decision on the issue of whether judicial notice would be taken during his trial,<sup>29</sup> surely he should have the right to a reasoned decision on the more fundamental issue of whether his trial should continue at all.

25. In addition, the decision to continue the trial with a substitute Judge is specifically subject to review by a rare automatic right to an interlocutory appeal.<sup>30</sup> An important rationale behind the requirement that a decision be accompanied by a reasoned opinion is that only a reasoned decision allows the Appeals Chamber to perform its duties to understand and review the decision.<sup>31</sup> The decision of the President not to order a rehearing of the trial in the exercise of his discretion is the kind of decision for which a

<sup>22</sup> *Prosecutor v Nindliyiimana et al*, No. ICTR-2000-56-T, *The President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64* (25 November 2002) at para. 9

<sup>23</sup> *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision of President on Request for Reversal of Decision Prohibiting Contact with Other Detainees* (15 February 2005)

<sup>24</sup> *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *The President's Decision on Review of the Decision of the Registrar Withdrawing Mr. Andrew McCartan as the Lead Counsel for Joseph Nzirorera* (13 May 2002)

*Prosecutor v Bizimungu*, No. ICTR-99-50-T, *The President's Decision on Review, in Accordance with Article 19(E) of the Directive on Assignment of Defence Counsel* (20 September 2001); *Barayagwiza v. Prosecutor*, No. ICTR-99-52-A, *Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel* (29 August 2006) at para. 7

<sup>25</sup> *Prosecutor v Bizimungu*, No. ICTR-00-56-T, *Decision on an Application of Review of the Registrar's Decision Denying the Requested Assignment of Emmanuel Rwirangira as a Defence Investigator* (10 June 2004); *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *The President's Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator* (23 November 2002)

<sup>26</sup> *Prosecutor v Karera*, No. ICTR-2001-74-I, *The President's Decision on the Defence Request for a Review of the Registrar's Decision Declining a Work Program* (13 October 2004)

<sup>27</sup> *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *The President's Decisions on Lead Counsel's Applications for Review of Sanctions Imposed Under Rule 73(F)* (26 January 2004)

<sup>28</sup> *Prosecutor v Rutaganira*, No. ICTR-95-IC-T, *Decision on Request for Early Release* (2 June 2006)

<sup>29</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 15, fn. 21

<sup>30</sup> Rule 15 bis (D)

<sup>31</sup> *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 41; *Prosecutor v Natic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 603

reasoned opinion is necessary due to its impact on the rights of the accused and the need for meaningful appellate review.

26. Mr. Nzirorera requested that the remaining Judges refer the matter back to the President for a reasoned decision before deciding to continue the trial.<sup>32</sup> However, the remaining Judges rejected this request. They held that since they would be deciding the same issues as those presented to the President, the rights of the accused were fully guaranteed.<sup>33</sup> Mr. Nzirorera respectfully contends that this was error.

27. As argued above, Rule 15 *bis* gives an accused two chances to oppose the continuation of the trial. First, he can try to persuade the President to order a rehearing under Rule 15 *bis* (C). If that fails, he can try to persuade the remaining Judges that the interests of justice do not favour continuing his trial under Rule 15 *bis* (D). In this case, as far as it can be determined, the President never exercised his discretion under Rule 15 *bis* (C). Thus, Mr. Nzirorera, entitled by the Rules to two bites of the apple, only got one.

28. The failure of the President to exercise his discretion to order a rehearing was not cured by the review of the same issues by the remaining Judges in this situation. First, the vast majority of the issues presented by Mr. Nzirorera in favour of a rehearing involved errors allegedly committed by the Trial Chamber which rendered the partially-completed trial unfair. Thus, the remaining Judges were reviewing their own decisions. Review by the President would have provided an independent decision on whether a rehearing should be ordered because of trial errors. Instead, the remaining Judges simply defended their own decisions in ordering a continuation of the trial.

29. In addition, Mr. Nzirorera contended that continuation of the trial with a substitute Judge should not be ordered because the trial could not reasonably be completed by the end of 2008. This issue, which directly implicates the ICTR's completion strategy and management of its remaining resources, was uniquely suited to consideration by the President rather than the remaining Judges.

30. Finally, Mr. Nzirorera presented to the President what he contended was the most viable alternative to continuing the trial—transfer of his case to a national

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<sup>32</sup> *Joseph Nzirorera's Further Submission to Remaining Judges* (8 February 2007)

<sup>33</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 8

jurisdiction.<sup>34</sup> As the remaining Judges recognized, they were without authority to consider this alternative.<sup>35</sup> Only the President could trigger the consideration of this alternative by designating a Trial Chamber for this purpose. Therefore, review by the remaining Judges was not the equivalent of review by the President.

31. For these reasons, Mr. Nzirorera respectfully contends that the remaining Judges erred in deciding to continue the trial in the absence of an exercise of discretion by the President and a reasoned decision thereon pursuant to Rule 15 *bis* (C).

**The Remaining Judges Erred in Deciding to Continue the Trial in the Absence of a Decision by the President Appointing a Trial Chamber to Consider Transfer of the Case to a National Jurisdiction *Proprio Motu***

32. As stated above, Mr. Nzirorera's principal alternative to continuing the trial was his suggestion that his case be transferred to a national jurisdiction pursuant to Rule 11 *bis*.

33. Rule 11 *bis* (A) provides in pertinent part:

"If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State."

34. Rule 11 *bis* (B) provides that:

"The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given the Prosecutor, and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard."

<sup>34</sup> *Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction* (29 January 2007)

<sup>35</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 90

35. Mr. Nzirorera filed with the President *Joseph Nzirorera's Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* simultaneously with his submission to the President under Rule 15 *bis* (C) for a rehearing. He requested that the President designate a Trial Chamber who could consider, *proprio motu*, the transfer of the case. The President never ruled on the request.

36. The remaining Judges correctly stated that they had “no power to order such a referral because the President has not designated them as a referral Chamber in accordance with Rule 11 *bis* (A)”.<sup>36</sup> However, they erred in deciding to continue the trial without Mr. Nzirorera having an opportunity to have a decision by an appropriate organ on whether his case could be transferred to a national jurisdiction.

#### **Violation of Equality of Arms—as Written**

37. In another issue of first impression at the *ad hoc* Tribunals, Mr. Nzirorera contends that Rule 11 *bis*, as written, violates the principle of equality of arms between the accused and the prosecution by allowing transfer of a case only upon motion of the prosecution, not the accused.

38. The Appeals Chamber has held that the principle of equality of arms is a component of the right to a fair trial.<sup>37</sup> The Appeals Chamber has long recognized that “the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee” and “at a minimum, obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case certainly in terms of procedural equity.”<sup>38</sup>

39. Mr. Nzirorera recognizes that the prosecution and defence have different functions. However, when the parties are before the Court, the principle of equality of arms places them on equal footing. Thus, the prosecution has the power to compel evidence and witnesses pursuant to Article 29 and Rule 54—so does the defence. The

<sup>36</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 90

<sup>37</sup> *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 44; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 67; *Prosecutor v Nahimana et al.*, No. ICTR-99-52-T, *Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana* (5 June 2003) at para. 4; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 14

<sup>38</sup> *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149; *Prosecutor v Oric*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 7; *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement*, (15 July 1999) at paras. 44, 48, 50, 52

prosecution has the power to move for dismissal of a case pursuant to Rule 72 or 73—so does the defence. The prosecution has the power to request a joinder or severance of accused or charges pursuant to Rules 48, 48 *bis*, and 82—so does the defence.

40. However, the language of Rule 11 *bis* (B) does not authorize the accused to request the transfer of his case to a national jurisdiction. It only allows the accused to be heard if the Prosecutor has made a request for transfer. Where the Prosecutor refuses to make such a motion, as he did in this case,<sup>39</sup> the accused is completely frozen out of the Rule 11 *bis* process.

41. The Appeals Chamber has held that “in assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage *vis-à-vis* the Prosecution, taking into account the “principle of basic proportionality” and (2) was the accused permitted a fair opportunity to present his case.”<sup>40</sup>

42. In a recent application of the equality of arms principle, the Appeals Chamber reversed a Trial Chamber decision which limited the defence case to far less time than the prosecution. The Appeals Chamber held that while equality of arms did not require precisely equal time, given the prosecution’s burden of proof, it did require that the time allocated to the defence be reasonably proportional to that of the prosecution.<sup>41</sup>

43. The Rule 11 *bis* scheme violates this proportionality analysis because it shuts out the accused completely from the process of requesting a transfer to a national jurisdiction. Only the prosecution can initiate a request for transfer. While the Prosecutor’s function within the Tribunal, including prosecutorial discretion and his ability to negotiate with foreign governments, may well warrant greater deference to his requests that a case be transferred, it does not warrant the complete ban on requests initiated by the accused found in Rule 11 *bis*.

44. The Rule 11 *bis* scheme also requires a negative answer to the question of whether the accused is permitted a fair opportunity to present his case. The accused has

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<sup>39</sup> See letter from Prosecutor Hassan Jallow dated 25 January 2007 attached as Annex “B” to *Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction* (29 January 2007)

<sup>40</sup> *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149

<sup>41</sup> *Prosecutor v Oric*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005)

no opportunity to make his case for transfer to a national jurisdiction absent initiation of a request for referral by the prosecution.

45. In its brief to the Appeals Chamber in the *Tadic* case, the prosecution argued that the principle of equality of arms required only an obligation on the Trial Chamber to ensure that the parties before it are accorded the same procedural rights and operate under the same procedural conditions in court.<sup>42</sup> Thus Rule 11 *bis* would fail even the prosecutor's narrow test for equality of arms, since it does not provide the accused any procedural rights or conditions to have the Trial Chamber consider a transfer of his case.

46. The Appeals Chamber in *Tadic* rejected the argument of the accused that equality of arms included matters outside of the control of the Tribunal, such as the ability to investigate in a country. But it held that "this principle means that the Prosecution and the Defence must be equal before the Trial Chamber."<sup>43</sup>

47. That is simply not the case under Rule 11 *bis*. Therefore, the Rule violates the right of the accused to equality of arms.

#### **Violation of Equality of Arms—as Applied**

48. Even if Rule 11 *bis*, as written, is held not to violate the principle of equality of arms, the rule, as applied at the ICTR, violates that principle. The Rule limits the entities who can initiate a transfer to the prosecution and the Trial Chamber acting *proprio motu*. However, under existing ICTR practice, only one of those entities is able to act. Because there is no permanent referral bench, as there is at the ICTY, there is no Trial Chamber in existence who can act *proprio motu*.

49. Both the wording of Rule 11 *bis* and case law interpreting it indicate that the Trial Chamber assigned to hear the merits of the case has no jurisdiction to consider referral pursuant to Rule 11 *bis*.<sup>44</sup> Rather, a separate Trial Chamber designated by the President considers such matters.<sup>45</sup>

50. However, there was no Trial Chamber designated. Therefore, the ability to initiate a transfer of this case to a national jurisdiction rested only with the Prosecutor in

<sup>42</sup> *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement*, (15 July 1999) at para. 45, citing *Prosecution's Response to Appellant's Brief on Judgement*, (20 April 1999) at paras. 3.8–3.16, 3.30

<sup>43</sup> *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement*, (15 July 1999) at para. 52

<sup>44</sup> *Prosecutor v. Prlic et al*, No. IT-04-74-PT, *Decision on Defence's Motions for Separate Trials and Severance of Counts* (1 July 2005) at para. 6

<sup>45</sup> This has been the practice at the ICTY in all referral cases under Rule 11 *bis*.

the absence of a designated Trial Chamber competent to consider matters under Rule 11 *bis*. To rectify this imbalance, Mr. Nzirorera filed a request to the President to appoint a Trial Chamber which would then have the discretion to consider transfer of this case *proprio motu*. The President never did so.

51. Therefore, due to the violation of the principle of equality of arms, the remaining Judges erred in deciding to continue the trial in the absence of a decision by the President appointing a Trial Chamber to consider transfer of the case to a national jurisdiction *proprio motu*.

**The Remaining Judges Erred in Concluding that the Completion of the Trial by the End of 2008 was not Mandatory and that the Trial Could be Completed Without Violating the Rights of the Accused**

52. The prosecution began presenting its case in September 2005 and estimated that it will conclude its case 26 months later, in December 2007.<sup>46</sup> This allows less than 12 months for the completion of the cases of the three accused and delivery of the judgement before December 2008, when the Tribunal is scheduled to complete all trials.

53. Mr. Nzirorera contended to the remaining Judges that continuing the proceedings would not serve the interests of justice because the trial could not be fairly completed before the end of December 2008.<sup>47</sup> The Appeals Chamber has held that the time allotted to the defence must be proportional to that taken by the prosecution.<sup>48</sup> The ratio of 26 months for the prosecution to, at most, 12 months for 3 accused (4 months each) simply cannot be justified under any formula.

54. The remaining Judges held that “the completion strategy by 31 December 2008 is not equivalent to the mandate of this Tribunal and is more of a target date.”<sup>49</sup> Mr. Nzirorera respectfully submits that the remaining Judges erred in this assessment of the effect of United Nations Security Council Resolutions on the Tribunals.

55. Resolution No. 1503, adopted by the Security Council on 28 August 2003, “calls on the ICTY and ICTR to take all possible measures to complete... all trial activities at first instance by the end of 2008...” By deciding to continue a trial which

<sup>46</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at paras. 1,85

<sup>47</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras 14-20

<sup>48</sup> *Prosecutor v Oric*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005)

<sup>49</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 87

cannot realistically be completed by the end of 2008, the remaining Judges ignored the terms of this Resolution.

56. Resolution No. 1534, adopted by the Security Council on 26 March 2004, “emphasises the importance of fully implementing the completion strategies...to complete all trial activities at first instance by the end of 2008” and “declares the Council’s determination...to ensure that the time frames...can be met.”

57. These strong and consistent statements demonstrate that the remaining Judges misdirected themselves when they determined that the end of 2008 was only a “target date”. The Security Council has made it clear that all trial activities must end by 2008. Indeed, the President of the ICTR has consistently assured the Security Council that this deadline will be met.<sup>50</sup> The decision of the remaining Judges undermines these pronouncements and treats the Security Council resolutions as guidelines rather than deadlines.

58. The remaining Judges also erred in concluding that if the trial is not completed by the end of 2008, “reasonable decisions will be taken in the interests of justice and taking into account the rights of each co-Accused.”<sup>51</sup> It is impossible to understand what the remaining Judges meant by this statement. If the trial cannot be completed, either the accused will be held hostage to a demand to the Security Council for an extension or the trial will have to be restarted before a national jurisdiction. Either way, the interests of the accused will be prejudiced by having to stand trial and expose his defence strategy in a trial which cannot reasonably be completed.

59. The remaining Judges erred in deciding that continuing the trial under these circumstances served the interests of justice. In fact, ordering a rehearing, where the time allotted to the parties to present their cases can be proportional, and which can commence

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<sup>50</sup> Statement by the President of the ICTR to the Security Council (15 December 2006); Address of the President of the ICTR to the General Assembly (9 October 2006); Statement of the President of the ICTR to the Security Council (7 June 2006); Address of the President of the ICTR to the Security Council (15 December 2005); Address of the President of the ICTR to the General Assembly (10 October 2005); Address of the President of the ICTR to the Security Council (13 June 2005); Address of the President of the ICTR to the Security Council (23 November 2004); Address of the President of the ICTR to the General Assembly (15 November 2004); Address of the President of the ICTR to the Security Council (29 June 2004)

<sup>51</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 87

immediately, far better serves the interests of justice under these circumstances and can assure that the trial can be completed by the end of 2008.<sup>52</sup>

60. Therefore, the remaining Judges erred in concluding that the interests of justice would be served by continuing the trial with a substitute Judge.

**The Remaining Judges Erred in Concluding that the Trial Should be Continued Despite Circumstances Which had Rendered the Trial Unfair**

61. Mr. Nzirorera declined to consent to a continuation of his trial because he believed that the proceedings to this point had not been fair. A Trial Chamber of the ICTY has held that “the fairness of the proceedings conducted to date is a legitimate factor in favor of starting the trial anew.”<sup>53</sup> The Appeals Chamber has implicitly endorsed this principle when ordering a rehearing in this case due to the appearance of bias by the former Presiding Judge.<sup>54</sup>

62. Mr. Nzirorera specifically cited (i) the prosecution’s violation of its disclosure obligations, (ii) wholesale admission of material facts not charged in the indictment; (iii) unjustified use of anonymous witnesses; (iv) the prosecution’s presentation of perjured testimony; (v) the failure of the Rwandan Government to produce statements of prosecution witnesses; (vi) taking of testimony of important witnesses by video-link; and (vii) the prosecution’s interference with the defence right to meet witnesses.<sup>55</sup>

63. The remaining Judges held that, in their view, the trial had been fair, and that any prejudice to the rights of the accused could be cured by subsequent decisions allowing recalling of witnesses or excluding evidence already admitted.<sup>56</sup> An examination of the conduct of the trial demonstrates that it is too broken to fix, and that only a rehearing will guarantee a fair trial to the accused.

<sup>52</sup> The remaining Judges recognized that the substitute Judge would have to view the videotapes of the 479 hours of trial in order to be in the same position as the remaining Judges in a continued trial. *Decision on Continuation of the Proceedings* (6 March 2007) at paras 71,79. At a rate of 6 hours per day, this task alone would take the substitute Judge 83 working days, or more than 4 months from the time of his appointment, to be in a position to continue the trial.

<sup>53</sup> *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision Pursuant to Rule 15 bis (D)* (16 December 2004) at para. 16

<sup>54</sup> *Karemera et al v Prosecutor*, No. ICTR 98-44-AR15bis.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material* (22 October 2004)

<sup>55</sup> *Joseph Nzirorera’s Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 22-279

<sup>56</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at paras. 23, 35

### **The Prosecution's Numerous Violations of its Disclosure Obligations**

64. The Appeals Chamber has held that the obligation to disclose is as important as the obligation to prosecute,<sup>57</sup> and that the prosecution's compliance with its disclosure obligations is essential for a fair trial.<sup>58</sup> It has issued clear warnings to the prosecution that violations of these obligations will not be tolerated.<sup>59</sup> This appeal presents an opportunity for the Appeals Chamber to translate those words into action.

65. From the very beginning of this case, the prosecution consistently violated its disclosure obligations. This conduct impeded Mr. Nzirorera's cross examination of virtually every prosecution witness called so far in the trial. It also substantially disrupted the investigation and preparation of the defence.

66. In his submission to the remaining Judges, Mr. Nzirorera set forth in great detail the violations of disclosure rules and Trial Chamber orders perpetrated by the prosecution trial team in his case.<sup>60</sup> Page limitations allow him only to highlight some of those matters to this Chamber.

67. Disclosure violations occurred with respect to 12 of the 13 witnesses called so far in the trial. As a result, Mr. Nzirorera was forced to cross examine witnesses with prior statements received immediately before or during cross examination<sup>61</sup>. In other instances, prior statements of witnesses were not disclosed at all.<sup>62</sup> Exculpatory material

<sup>57</sup> *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004)

<sup>58</sup> *Prosecutor v Karemera et al.*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 9

<sup>59</sup> *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 215; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 37

<sup>60</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 26-109

<sup>61</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 35 (Mbonyunkiza), 38 (Witness G); 50 (Witness UB), 67 (Witness T), 77 (Witness XBM), 79 (Witness AWB), 99 (Witness GK)

<sup>62</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 36 (Mbonyunkiza), 39 (Witness G), 56 (Witness UB), 66 (Witness T), 73 (Witness BTH), 79 (Witness AWB), 93 (Witness ALG), 94 (Witness HH), 98 (Witness GBU), 101 (Witness GK)

was also not disclosed.<sup>63</sup> The Appeals Chamber specifically found the prosecution's attitude towards its Rule 68 obligations in this case to be "disconcerting".<sup>64</sup>

68. The Appeals Chamber has held that prior statements constitute an important tool for assessing the credibility of a witness.<sup>65</sup> The Appeals Chamber has also noted that "the record of the first interview with a witness is of the highest value because it is most likely to capture the witness's recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence."<sup>66</sup>

69. Trial Chambers of the ICTR have held that disclosure of Rwandan statements of prosecution witnesses is not merely required for the benefit of the defence, but is also required to assist the Trial Chamber in its assessment of witness credibility.<sup>67</sup>

70. The lack of timely disclosure of prior statements of prosecution witnesses was a consistent and serious problem with virtually every witness during the trial. The Trial Chamber found multiple violations of the disclosure rules by the prosecution, but in all cases required Mr. Nzirerera to proceed with his cross examination.<sup>68</sup> The result was that the prosecution profited from its disclosure violations and Mr. Nzirerera was denied his right to an effective cross examination of the prosecution's witnesses, and consequently, his right to a fair trial.

71. The Appeals Chamber has noted in the context of admission of material facts not alleged in the indictment that while isolated failures may be cured by later notice to the accused, the cumulative effect of multiple failures may well deny the accused a fair

<sup>63</sup> *Joseph Nzirerera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 40 (Witness G), 51 (Witness UB), 61 (Witness ZF), 70 (Witness T), 72 (Witness BTH),

<sup>64</sup> *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at fn. 31

<sup>65</sup> *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 169

<sup>66</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 33

<sup>67</sup> *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 8; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Reasons for the Decision on Requests for Admission of Additional Evidence* (8 September 2004) at paras. 47-52.

<sup>68</sup> Des Forges report (warning imposed pursuant to Rule 46--Transcript of 3 October 2005 @ 18); *Oral Decision on Motion for Stay of Proceedings* (Transcript of 16 February 2006 @ 4,8); Witness T (warning imposed pursuant to Rule 46-- Transcript of 24 May 2006 at 36); Rule 68 material (sanctions imposed under Rule 46-- *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (19 October 2006) at para. 17

trial.<sup>69</sup> This is precisely what has happened here with the systemic failure to provide timely disclosure.

72. The cumulative effect of these failures disrupted the defence, forcing it to re-evaluate its approach to prosecution witnesses in mid-stream and to replace its comprehensive pre-trial defence strategy with a mid-trial haphazard, reactive combination of intuition and guesswork. This cannot be cured by recalling all of these witnesses and confronting them with the result of the defence post-testimony investigation and disclosures. The cat has been let out of the bag, so to speak. And there will be little to no time savings in continuing the trial, as opposed to starting anew, if Mr. Nzirorera is indeed allowed to recall all these witnesses.

73. Because the trial which was conducted so far was marred by these pervasive disclosure violations, the remaining Judges erred in concluding that the violations had not violated Mr. Nzirorera's right to a fair trial.<sup>70</sup> The trial record shows that the prosecution profited from its violation of the rules, and Mr. Nzirorera suffered. Under such circumstances, the remaining Judges erred in concluding that the interests of justice would be served by continuing the trial with a substitute Judge. The interests of justice would be served by re-starting the trial with full respect for the rules of disclosure.

**The Wholesale Admission of Material Facts  
Not Charged in the Indictment**

74. During the hearing of the 13 trial witnesses, the Trial Chamber, on 35 occasions, allowed the prosecution to submit evidence of material facts not included in the indictment. These facts have included alleged killings of Tutsis, public speeches made by the accused and other members of the alleged joint criminal enterprise at public rallies, the distribution of weapons by the accused and other members of the joint criminal enterprise, instructions given by the accused to Interahamwe concerning roadblocks, and other events.

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<sup>69</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 26

<sup>70</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 28

75. The admission of large swaths of evidence outside the Indictment rendered the trial unfair by effectively replacing the case in the original indictment with a completely different one--one which Mr. Nzirorera was not prepared to meet.

76. The admission of this evidence also had the effect of extending the bounds of the case beyond what is reasonable in a fair and expeditious trial. It obliged Mr. Nzirorera to cross examine witnesses on matters for which he was not prepared, and to launch mid-trial investigations in order to be able to mount a defence against each of these new allegations during his case.

77. The Appeals Chamber has made it clear that failure to set forth the specific material facts of a crime constitutes a defect in the indictment.<sup>71</sup> The prosecution is expected to know its case before proceeding to trial and may not rely on the weakness of its own investigations in order to mould the case against the accused as the trial progresses.<sup>72</sup> The prosecution in Mr. Nzirorera's case indeed moulded the case as it went along, offering a hodgepodge of evidence not alleged in its indictment, which had already been amended four times prior to the trial.

78. The Trial Chamber repeatedly admitted evidence of material facts not alleged in the indictment despite the cautious approach to admission demanded by the Appeals Chamber—frequently finding that the defect had been cured by notice to the accused.

79. The Appeals Chamber has held that a trial may well turn out to not have been fair based upon the cumulative admission of material facts found to have been “cured” by notice to the defence, even though each fact may have been the subject of adequate notice.<sup>73</sup> That is precisely what happened so far in Mr. Nzirorera's trial, where the wholesale admission of material facts outside the indictment in this case, both

<sup>71</sup> *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 125

<sup>72</sup> *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 26; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 194; *Prosecutor v. Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defects in the Form of the Indictment* (26 May 2005) at para. 19; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 451; *Prosecutor v Karemera et al.*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006)

<sup>73</sup> *Prosecutor v Bagosora et al.*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 30

individually and cumulatively, prejudiced the rights of Mr. Nzirorera by hindering his preparation of a proper defence.

80. In his submission to the remaining Judges, Mr. Nzirorera detailed the 35 items of evidence outside of the indictment which had been admitted by the Trial Chamber.<sup>74</sup> The remaining Judges acknowledged that evidence outside of the indictment had been admitted, but nevertheless held that Mr. Nzirorera had suffered no prejudice and that “even if at a certain stage some evidence of material fact not pleaded in the Indictment is admitted, this does not prejudice subsequent consideration of the concept of the accumulation of curing.”<sup>75</sup>

81. Mr. Nzirorera respectfully contends that the remaining Judges erred in finding that the interests of justice would be served by continuing a trial for which he was not adequately prepared. Rather, the interests of justice would best be served by allowing the prosecution to amend its indictment and restarting the trial with all parties having adequate notice of the allegations upon which the case would be tried.

#### **The Unjustified Use of Anonymous Witnesses**

82. 11 of the 13 witnesses who testified at the trial did so with the benefit of pseudonyms. Mr. Nzirorera contends that the Trial Chamber’s practice of allowing witnesses to testify anonymously in the absence of a specific showing of the need for such protective measures as to each witness, denied him a fair trial.

83. Prior to the commencement of the trial, and before the formation of the Trial Chamber, the Presiding Judge issued an *Order on Protective Measures for Prosecution Witnesses* (10 December 2004). The Presiding Judge authorized the prosecution to designate a pseudonym for each prosecution witness.<sup>76</sup> He justified this blanket protection for each witness on the grounds of the “general security status in the Great Lakes, the volatile security situation in Rwanda and neighboring countries, and potential threats against Rwandans living in other countries.”<sup>77</sup>

84. During the trial, Mr. Nzirorera demonstrated that the same prosecution

<sup>74</sup> *Joseph Nzirorera’s Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at para. 121

<sup>75</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 35

<sup>76</sup> *Order #10* at pg. 4

<sup>77</sup> *Order* at page 2

witnesses for whom pseudonyms were given in Arusha were testifying openly, in their true name, about the same events in Rwanda and other countries.<sup>78</sup> The Trial Chamber steadfastly refused to even inquire of the witnesses as to specific facts justifying the need for a pseudonym.<sup>79</sup>

85. This is the very error pointed out by Professor Goran Sluiter after conducting a study of protective measures at the ICTR. Professor Sluiter wrote:

“The existence of a general volatile security situation usually suffices in the ICTR jurisprudence to justify a variety of protective measures. However, in light of a combined subjective and objective fear test, one would have expected the Chambers to pay more attention to the question of how the security situation in Rwanda has affected proposed witnesses individually.”<sup>80</sup>

86. Mr. Nzirorera contends that the Trial Chamber erred in its approach to anonymous witnesses. Before the trial, the Presiding Judge extended protected witness status, and the use of pseudonyms, to “all Prosecution witnesses and potential Prosecution witnesses wherever they reside and who have not affirmatively waived their right to protective measures.”<sup>81</sup>

87. Professor Sluiter has remarked that “Clearly, claiming a variety of protective measures for all witnesses who have not waived their apparent right to such measures is inconsistent with the exceptional nature of protective measures.”<sup>82</sup>

88. Rule 69(A) provides that:

“In **exceptional circumstances**, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.” (emphasis added)

89. Rule 75(A) provides that:

<sup>78</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at para. 127 (Witness UB), 129 (Witness T), 130 (Witness BTH), 131 (Witness XBM), 132 (Witness ALG), 133 (Witness HH), 134 (Witness GBU)

<sup>79</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at para. 128 (Witness ZF), 129 (Witness T), 130 (Witness BTH), 132 (Witness ALG), 133 (Witness HH)

<sup>80</sup> Sluiter, “The ICTR and the Protection of Witnesses” ,3 *Journal of Int'l Criminal Justice* 962-76 (2005) at p. 968

<sup>81</sup> *Order on Protective Measures for Prosecution Witnesses* (10 December 2004) at page 3

<sup>82</sup> Sluiter, “The ICTR and the Protection of Witnesses” ,3 *Journal of Int'l Criminal Justice* 962-76 (2005) at p. 969

“A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.”

90. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. Measures for protection of witnesses are granted on a case-by-case basis.<sup>83</sup>

91. The burden of justifying extraordinary measures for protection of witnesses lies on the party seeking such protection.<sup>84</sup> It is for the moving party to clearly delineate the dangers that its witnesses and potential witnesses face and the situation which warrants such protective measures.<sup>85</sup> The prosecution never did so in Mr. Nzirorera's case.

92. The Trial Chamber erred in failing to consider the use of pseudonyms on an individual basis. In the *Milosevic* case, the Trial Chamber refused to extend protective measures to an employee of a humanitarian organization absent a showing of “an extraordinary risk” to the safety of the witness or his or her family.<sup>86</sup> No such showing has been made for any witness by the prosecution in this case.

93. In national systems, use of a pseudonym by a witness is also an exceptional measure, requiring the judge to find that any fear of a witness has a legitimate basis.<sup>87</sup>

<sup>83</sup> *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Protection of Witnesses* (25 August 2004) at para. 5; *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (12 July 2000) at para. 9; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 26; *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision on Protection of Defence Witnesses* (4 May 2005) at para. 2

<sup>84</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (2 February 2005) at para. 13; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK* (15 June 2005) at para. 17

<sup>85</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (2 February 2005) at para. 13

<sup>86</sup> *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Protective Measures Concerning a Humanitarian Organization* (1 April 2003)

<sup>87</sup> See, for example, *R v. Moosebay*, 2001 ABPC 156 (Alberta Provincial Court, Canada) at p. 5

94. Making public the identities of witnesses promotes the fairness of the trial by assuring accountability for testimony and by making it possible for people with relevant information about the prosecution witness or event to make themselves known.<sup>88</sup> For example, a member of the public who hears that a certain witness with whom he is acquainted has given testimony about a certain event may come forward if he or she knows that the witness did not observe or participate in that event.

95. Professor Sluiter concluded that “the almost automatic adoption of protective measures is inconsistent with the principle of public, transparent, and accessible trials.”<sup>89</sup>

96. By allowing prosecution witnesses blanket use of pseudonyms, and, in most cases, refusing to even inquire as to the individual circumstances of the witness, the Trial Chamber committed error and denied Mr. Nzirorera a fair trial. The remaining Judges claimed that they had “sought to limit as much as possible the protective measures to what was strictly necessary, taking into account the rights of the Accused.”<sup>90</sup> However, the record of the trial proceedings does not bear that out. Therefore, the remaining Judges erred in concluding that the interests of justice would be served by continuing this fatally flawed trial.

#### **The Prosecution’s Presentation of Perjured Testimony**

97. Mr. Nzirorera contended that the prosecution in his trial breached its professional obligations by presenting testimony which it knew or should have known was false. He cited specific facts with respect to eight witnesses.<sup>91</sup> He contended that by its knowing and reckless use of perjured testimony, the prosecution has distorted the fact finding process and rendered Mr. Nzirorera’s trial fundamentally unfair.

98. The remaining Judges declined to consider this issue, holding that “should the remaining Judges admit the Joseph Nzirorera’s interpretation of perjury, there would be

<sup>88</sup> *Prosecutor v Delalic et al*, No. IT-96-21-PT, *Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” Through to “M”* (28 April 1997) at para 34, quoting *Estes v Texas*, 381 U.S. 532,583 (1965)

<sup>89</sup> Sluiter, “The ICTR and the Protection of Witnesses” ,3 *Journal of Int’l Criminal Justice* 962-76 (2005) at p. 976

<sup>90</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 40

<sup>91</sup> *Joseph Nzirorera’s Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 155 (Mbonkunkiza), 159 (Witness UB), 171 (Witness ZF), 175 (Witness BTH), 178-79 (Witness AWB), 183 (Witness ALG), 188 (Witness HH), 196-97 (Witness GBU)

no more room for an assessment of the credibility and reliability of the witnesses at the end of the case...<sup>92</sup>

99. Mr. Nzirorera respectfully contends that the remaining Judges erred in refusing to consider whether the trial had been rendered unfair by the prosecution's presentation of perjured testimony. While a Trial Chamber may wait until the end of the trial to make findings on witness credibility, the remaining Judges were called upon to assess the fairness of the trial when considering whether the interests of justice were served by continuing the trial. Their failure to do so was error.<sup>93</sup>

**The Failure of the Rwandan Government to Produce  
Statements of Prosecution Witnesses**

100. Mr. Nzirorera contended that his trial had been rendered unfair by the failure of the Rwandan government to produce the prior statements and judgements of prosecution witnesses. In his submission to the remaining Judges, he detailed the efforts made to obtain those statements, and the failure of the Trial Chamber to require the Rwandan government to produce them.<sup>94</sup>

101. The Appeals Chamber has held that:

“under the Statute of the International Tribunal, the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.”  
(emphasis added)<sup>95</sup>

102. The remaining Judges found that there was no prejudice caused to the rights of the accused by the failure to obtain the Rwandan statements and that witnesses could

<sup>92</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 44

<sup>93</sup> See *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision Pursuant to Rule 15 bis (D)* (16 December 2004) at para. 16 (The fairness of the proceedings conducted to date is a legitimate factor in favor of starting the trial anew.)

<sup>94</sup> *Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 206-216

<sup>95</sup> *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 52

be recalled where necessary.<sup>96</sup> Mr. Nzirorera respectfully contends that since Rwandan statements were disclosed late or not at all for virtually every witness who came from Rwanda, the remaining Judges erred in concluding that the interests of justice would be served by continuing the trial with a substitute Judge. Rather, the combination of inadequate cross examination and need to recall many witnesses outweigh the modest time savings that might result from continuing the trial.

### **The Taking of Important Testimony by Video-Link**

103. During the trial, the Trial Chamber allowed the prosecution's two most important witnesses, Witnesses G and T, to testify from Europe by video-link while the accused and the Trial Chamber watched their testimony on television from Arusha.

104. Mr. Nzirorera contends that this procedure violated his right to confront his accusers enshrined in customary international law and in Article 20 of the Statute. The Appeals Chamber has held that this right is an "indispensable cornerstone of justice."<sup>97</sup> While Mr. Nzirorera recognizes that this right is not absolute, he contends that there was no necessity for video-link testimony from these witnesses.

105. Article 20(4)(d) provides that the accused shall have the right "to be tried in his or her presence." Article 20(4)(e) provides that the accused shall have the right to "examine, or have examined, the witnesses against him or her." These sections provide a right to face-to-face confrontation between the accused and his accuser<sup>98</sup>

106. The right to face-to-face confrontation is reflected in Rule 90(A), which provides that "[w]itnesses shall, in principle, be heard directly by the Chamber". This is known as the principle of orality.

107. The Appeals Chamber has said that:

"The principle of orality is intended principally to ensure the accused's right to confront the witnesses against him."<sup>99</sup>

<sup>96</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 48

<sup>97</sup> *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at paras. 11,13

<sup>98</sup> *Prosecutor v. Bagosora et. al*, No. ICTR-98-41-I, *Decision on Prosecutor's Motion for Deposition of Witness OW* (5 December 2001) at para. 19.

<sup>99</sup> *Prosecutor v. Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table*, (19 August 2005) at para. 17.

108. Abridgements of this principle must be limited to those rare situations where face-to-face confrontation is simply not possible, such as due to the health, security, or other vulnerable condition of the witness.

109. The first instance in which testimony by video link was proposed at an International Tribunal was in the *Tadic* case. There, the prosecutor requested that four victims of sexual assault testify by video-link to protect them from re-traumatization. The Trial Chamber recognized the special protection that such witnesses deserved, but declined to allow them to testify by video link. Rather, the Trial Chamber ordered the witnesses to appear in the courtroom, and that alternative methods such as the installation of temporary screens in the courtroom, positioned so that the witness cannot see the accused but the accused may view the witness via the courtroom monitors, be considered.<sup>100</sup>

110. At the ICTR, it has been held that “whenever testimony by video-link has been granted, it has been only when it was an absolute necessity. Each time the security concerns of a witness could be satisfied by less restrictive measures, this measure was favored.”<sup>101</sup> One Trial Chamber has warned explicitly, “The Chamber is of the view that only after all else has failed should video-conferencing be substituted for live, in-person testimony.”<sup>102</sup>

111. In the *Zigiranyirazo* decision, the Appeals Chamber held that a procedure whereby a witness testified before the Trial Chamber in The Netherlands while the accused observed the proceedings via video-link in Arusha violated the right of the accused to be personally present at his trial—a right of equal importance to the right to confront witnesses.<sup>103</sup>

112. The Appeals Chamber recognized that this right was not absolute, but held that restrictions on that right must be proportional—that is the restrictions must serve a

<sup>100</sup> *Prosecutor v Tadic*, No. IT-94-1-PT, *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims or Witnesses* (10 August 1995) at para. 51

<sup>101</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nyiramasuhuko’s Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 40.

<sup>102</sup> See *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, “*Tharcisse Muvunyi Decision on Prosecutor’s Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the Use of Closed Video-Link Facilities.*” (4 July 2005) at para. 24

<sup>103</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 8

sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.<sup>104</sup>

113. While it found that considerations of witness protection constituted a sufficiently important objective, the Appeals Chamber held that there was an insufficient showing of necessity for the video-link arrangement. The Appeals Chamber held that the facts before the Trial Chamber did not demonstrate sufficient grounds to believe that there was insurmountable danger in having the witness testify in Arusha.<sup>105</sup>

114. The Appeals Chamber also held that the Trial Chamber had a duty to do more than simply accept the prosecution's claims concerning the danger to the witness were he to testify in Arusha. It noted that the Trial Chamber should have consulted organs of the Registry to determine if there were security measures which could be taken to ensure the witness' security in Arusha.<sup>106</sup>

115. The Appeals Chamber held that the Trial Chamber had erred in imposing the restrictions on the fair trial rights of the accused through its video-link arrangement. It held that prejudice to the accused would be presumed, and that allowing the testimony of the witness to remain on the record would seriously damage the integrity of the proceedings. It therefore ordered that the testimony be excluded.<sup>107</sup>

116. After the Appeals Chamber decision, the Trial Chamber in *Zigiranyirazo* consulted the Registry and determined that there were adequate security arrangements that could be made to hear the testimony of the witness in Arusha.<sup>108</sup> The witness was brought to Arusha in November 2006 and safely testified live and in person in the presence of the accused.

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<sup>104</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 14

<sup>105</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 18

<sup>106</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 18, fn. 60

<sup>107</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 24

<sup>108</sup> *Prosecutor v. Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link* (16 November 2006) at para. 24

117. Based upon the principles applied by the Appeals Chamber in the *Zigiranyirazo* decision, it appears that the Trial Chamber in Mr. Nzirorera's case also erred when ordering the video-link testimony of Witness G and T.

118. Relying solely on submissions made by the prosecution *ex parte* and kept secret from the accused, the Trial Chamber ordered the testimony of Witnesses G and T by video-link, finding that the witnesses "were in a particularly vulnerable position and that special security measures are necessary."<sup>109</sup>

119. The Trial Chamber denied the accused access to the prosecution's factual representations and decided the matter based solely upon those representations.<sup>110</sup> It never consulted the Registry or any of its organs to determine if there were security measures which could be taken to ensure the witness' security in Arusha.

120. Reliance on the prosecution's representations alone was particularly dangerous in this case because the prosecution had already agreed with Witness G and T as part of their cooperation agreements that they would not be required to testify in Arusha. Thus, the prosecution was highly motivated to exaggerate the security concerns. The Appeals Chamber in *Zigiranyirazo* pointed out that such agreements are not binding on the Trial Chamber.<sup>111</sup>

121. In this case, the Trial Chamber committed an even more serious error than the Trial Chamber in *Zigiranyirazo*. It not only accepted the prosecution's representations without proper inquiry, it did so without allowing the accused to learn of and comment on those representations.

122. There was in fact no justification for a reasonable fear for the safety of Witnesses G and T in Arusha. Detained witnesses have been coming to Arusha from Rwanda for years without a single incident in which their security has been threatened. Similarly, witnesses who are not detained have been coming to Arusha regularly, being protected by the WVSS, and there have been no incidents in which their security has been threatened while in Arusha. In fact, most of these witnesses from Rwanda face an even

<sup>109</sup> *Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T* (14 September 2005) at para. 12

<sup>110</sup> See *Decision on Defence Motion for Disclosure of the Affidavit of Richard Renaud Related to Witnesses G and T* (8 August 2005)

<sup>111</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 18, fn. 59

greater overall risk than Witnesses G and T, who were under the protection of foreign States.

123. In addition, Omar Serushago and Georges Ruggiu testified as prosecution witnesses in Arusha, and they remained safe and sound at the UNDF for more than 5 years after giving their testimony. There was no good reason why Witnesses G and T could not do the same. The subsequent testimony of the witness Michel Bagaragaza in the *Zigiranyirazo* case bore that out.<sup>112</sup>

124. Although the Appeals Chamber in *Zigiranyirazo* has held that the prejudice from denial of a core right of the accused is presumed,<sup>113</sup> the error made by the Trial Chamber in our case was in fact a prejudicial one, as the testimony of these two witnesses was particularly central to the trial.

125. The remaining Judges distinguished the *Zigiranyirazo* decision on the grounds that it dealt with the right of the accused to be personally present, not the propriety of video-link testimony itself.<sup>114</sup> However, the proportionality test set forth in *Zigiranyirazo* was not limited to the right to be personally present, but extends to restrictions on other rights of the accused, such as his right to confrontation.

126. Because the remaining Judges erred in concluding that the taking of video-link testimony from Witnesses G and T was permissible, their conclusion that the interests of justice would be served by continuing the trial with a substitute Judge was consequently also in error.

#### **The Prosecution's Interference with the Defence Right to Meet Prosecution Witnesses**

127. During the trial, the prosecution interfered with the right of the defence to interview prosecution witnesses before their testimony.

128. The Appeals Chamber has noted that "witnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview

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<sup>112</sup> This Trial Chamber had also granted the prosecution's application for Bagaragaza to testify in this case by video-link, *Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE* (6 May 2006) despite a contrary ruling by another section of the Trial Chamber in the *Zigiranyirazo* case.

<sup>113</sup> *Zigiranyirazo v. Prosecutor*, No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 24

<sup>114</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at paras 55-56

them.”<sup>115</sup> This Trial Chamber has specifically endorsed this principle on at least three occasions.<sup>116</sup>

129. In the *Halilovic* decision, the Appeals Chamber recognized that witnesses for the prosecution may have information of value to the defence and that it could present an unfair advantage to the prosecution if the defence were denied access to the witness before he testified.<sup>117</sup>

130. In the *Krstic* decision, the Appeals Chamber noted that the prosecutor had an affirmative duty “to assist the Tribunal to arrive at the truth and to do justice for ( *inter alia*) the accused” and suggested that the prosecution could use its good offices to persuade witnesses to meet with counsel for the accused.<sup>118</sup> The prosecutor did not act in accordance with that duty in Mr. Nzirorera’s case.

131. The prosecutor has an affirmative duty not to discourage or obstruct communication between prospective witnesses and defense counsel.<sup>119</sup> Interference with the right of the accused to have access to interview prosecution witnesses have resulted in the ordering of a new trial in one national system<sup>120</sup> and have been held to violate notions of due process of law.<sup>121</sup>

132. Mr. Nzirorera demonstrated that the prosecution in his case misrepresented the refusal of Witness ZF to meet with the defence before his testimony<sup>122</sup> and had injected himself into defence counsel’s meeting with Witness XBM resulting in the witness’ refusal to answer counsel’s questions.<sup>123</sup>

<sup>115</sup> *Prosecutor v Mrksic et al*, No. IT-95-13/1-AR73, *Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Other Party* (30 July 2003) at para. 15

<sup>116</sup> *Decision on Joseph Nzirorera’s Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 7; *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 Nov 2006) at paras. 8, 13; *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 3

<sup>117</sup> *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 12

<sup>118</sup> *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 13

<sup>119</sup> American Bar Association, *Standards on the Prosecution Function*, as cited in Caudill, *Professional Deregulation of Prosecutors: Defence Contact with Victims, Survivors, and Witnesses in the Era of Victims’ Rights*, *Georgetown Review of Legal Ethics*, (Fall 2003), available at [http://www.findarticles.com/p/articles/mi\\_qa3975/is\\_200310/ai\\_n9297161/pg\\_4](http://www.findarticles.com/p/articles/mi_qa3975/is_200310/ai_n9297161/pg_4)

<sup>120</sup> *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966)

<sup>121</sup> *United States v. Muirs*, 145 Fed. Appx. 208, 209 (9th Cir.2005)

<sup>122</sup> *Joseph Nzirorera’s Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras. 266-68

<sup>123</sup> *Joseph Nzirorera’s Submission to Remaining Judges in Support of a New Trial* (31 January 2007) at paras.269-71

133. The remaining Judges concluded that the right of the accused to meet with a witness had not been unfairly impaired.<sup>124</sup> This conclusion was not supported by the undisputed facts before them. Therefore, the remaining Judges erred in concluding that the interests of justice would be served by continuing the trial with a substitute Judge.

#### **Conclusion**

134. All is not well in Arusha. The trial of this case has become unwieldy, plagued by prosecutorial disclosure violations, legal errors, and permissive decisions by the Trial Chamber which bloated the trial to unmanageable proportions. It will never be completed by the end of 2008. The Appeals Chamber needs to step in and right this sinking ship.

135. It is respectfully requested that the Appeals Chamber reverse the decision of the remaining Judges and remand the matter for a new trial. Alternatively, the Appeals Chamber is requested to remand the matter to the President for the exercise of his discretion pursuant to Rule 15 *bis* (C) and for designation of a Trial Chamber to consider transfer of this case to a national jurisdiction pursuant to Rule 11 *bis*.

Word count: 8842

Respectfully submitted,



PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

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<sup>124</sup> *Decision on Continuation of the Proceedings* (6 March 2007) at para. 63

# ANNEX "A"

**PETER ROBINSON**  
*International Criminal Law*  
**P.O. Box 1844**  
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**(707) 575-0540**  
**(208) 694-6161 (fax)**  
**E-mail: [peter@peterrobinson.com](mailto:peter@peterrobinson.com)**

23 January 2006

The Honorable Eric Mose  
President  
International Criminal Tribunal for Rwanda  
P.O. Box 6016  
Arusha, Tanzania

Re: *Prosecutor v Karemera et al*  
No. ICTR-98-44-T

Dear President Mose,

I have just been informed by our Trial Chamber coordinator that on Friday, 19 January 2007, our Presiding Judge reported to you that one of the judges of our trial chamber is unable to continue to sit on the trial. The parties have not yet received a copy of this report.

Rule 15 *bis* (C) appears to give the President a modicum of discretion to order a rehearing of the case. Mr. Nzirorera strongly believes that a rehearing, and not a continuation of the trial, should occur. We would like the opportunity to make a submission to you before you make a decision or refer the matter to the remaining Judges for consideration of ordering a continuation of the trial.

The principal thrust of our submission to you will be that the trial cannot be completed within the mandate of the Tribunal even if continued. Mr. Nzirorera is hoping that the loss of a judge can be used as an opportunity to consider other alternatives than to simply continuing this unwieldy megatrial. He would like the opportunity to have you consider some of those alternatives.

The Honorable Eric Mose  
--page two--

These matters seem particularly well suited for consideration by the President in the first instance, rather than the remaining Judges.

I would be grateful if you would indicate whether you would receive submissions from the parties and if so, when they should be filed.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

cc: Constant Hometowu for distribution to the  
Judges and parties

## **ANNEX "B"**

24/1/07



**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre  
P.O. Box 6016, Arusha, Tanzania

UNITED NATIONS  
NATIONS UNIES

Tel: 255 27 2504207-11/2504367-72 or 1 212 963 2850 — Fax: 255 27 2504000/2504373 or 1 212 963 2848

*Office of the President  
Bureau du Président*

**INTEROFFICE MEMORANDUM — MEMORANDUM INTERIEUR**

**To: Mr. Jean-Pelé Fomété**  
**A: Chief, Court Management Section**

**Date: 24 January 2007**

**Ref: ICTR/PRES/004/07**

**From: Judge Erik Møse**  
**De: President** *EM*

**Cc: Judge Dennis C. M. Byron**  
**Judge Emile F. Short**  
**Judge Gberdao G. Kam**  
**Mr. Everard O'Donnell, Deputy Registrar**

**Subject:**  
**Objet: Karemera et al.**

JUDICIAL RECORDS/ARCHIVES  
UNICTR  
2007 JAN 24 1P 5:13  
*[Signature]*

Please convey the following memorandum to the parties:

On 19 January 2007, Judge Emile F. Short informed Judge Dennis C. M. Byron, who is the Presiding Judge in the Karemera *et al.* trial that he had decided to withdraw from the case, due to recent health challenges. On the same date, Judge Byron informed the President, in accordance with Rule 15 *bis* (C) of the Rules of Procedure and evidence.

Rule 15 *bis* (C) reads as follows:

If, by reason of death, illness, resignation from the Tribunal, non-re-election, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than a short duration, the presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for

in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).

I am therefore writing to clarify whether the Accused will grant their consent to the continuation of the proceedings after the assignment of a new Judge to replace Judge Short, and if not, state the reasons therefore.

Judge Short's letter and two medical reports as well as Judge Byron's letter are attached, but are only to be disclosed to the parties in the trial, not to the public.

I would appreciate to receive the responses of the parties by Monday 29 January 2007.

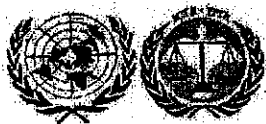
Best regards.

# ANNEX "C"

16061A

RECEIVED

6/2/07



International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

Arusha International Conference Centre  
P.O. Box 6016, Arusha, Tanzania  
Tel: 255 27 2504207-11/2504367-72 or 1 212 963 2850 — Fax: 255 27 2504000/2504373 or 1 212 963 2848

UNITED NATIONS  
NATIONS UNIES

Office of the President  
Bureau du Président

INTEROFFICE MEMORANDUM — MEMORANDUM INTERIEUR

To: Judge Dennis C. M. Byron  
A: Presiding  
  
From: Judge Erik Mose  
De: President  
  
Cc: Judge Gberdao G. Kam  
Mr. Jean-Pelé Fomété, Chief, Court Management Section  
  
Subject: Karemera *et al.* Trial  
Objet: Karemera *et al.* Trial

Date: 6 February 2007

Ref: ICTR/PROS/005/07

JUDICIAL RECORDS ARCHIVES  
17 FEB 2007  
A/9/17

My memorandum of 24 January 2007 requested the parties' clarification as to whether the Accused would grant their consent to continue the Karemera *et al.* trial with a substitute judge following the decision of Judge Emile F. Short to withdraw from the case due to recent health challenges.

It follows from the responses received that Édouard Karemera is in favour of continuing the trial with a substitute judge, subject to certain conditions. Mathieu Ngirumpatse and Joseph Nzirorera do not consent.

The responses from Defence Counsel reveal that the Accused, with one exception, are opposed to continuing the trial with a substitute judge in accordance with Rule 15 *bis* (C) of the Rules of Procedure and Evidence, which authorises the President, with the consent of the accused, to order a rehearing of a trial or assignment of a substitute judge to a case.

I have considered the submissions received by the parties and am referring the matter to the Trial Chamber in conformity with Rule 15 *bis* (D).

The CMS is kindly asked to forward this memorandum to the parties.

Best regards.



# TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

## I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input checked="" type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
<b>From:</b>	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence <b>Peter Robinson</b> (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>Joseph Nzirorera</b>		<b>Case Number:</b> ICTR-98-44-AR15bis.3	
<b>Dates:</b>	Transmitted: <b>12 March 2007</b>		Document's date: <b>13 March 2007</b>	
<b>No. of Pages:</b>	<b>40</b>	<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
<b>Title of Document:</b>	<b>JOSEPH NZIRORERA'S APPEAL FROM DECISION ON CONTINUATION OF THE PROCEEDINGS</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input checked="" type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
				<input type="checkbox"/> Submission from non-parties
				<input type="checkbox"/> Submission from parties
				<input type="checkbox"/> Accused particulars

## II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

**CMS SHALL** take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English  French  Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English  French  Kinyarwanda

**KINDLY FILL IN THE BOXES BELOW**

<input type="checkbox"/> <b>The OTP</b> is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> <b>DEFENCE</b> is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
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## III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines:



**COURT MANAGEMENT  
ADMINISTRATION DES CHAMBRES**

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P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie  
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**INTERLOCUTORY APPEALS - PROOF OF SERVICE – BY FAX  
PREUVE DE NOTIFICATION - CHAMBRE D'APPEL – PAR FAX**

Date: 12/03/07		Case Name / affaire: - Edouard KAREMERA - Joseph NZIRORERA - Mathieu NGIRUMPATSE	
		Case No / no. de l'affaire: ICTR-98-44-A	
To: A:	Appeals Chamber Support Unit, The Hague: - Mr. Koffi Afande - Mr. Patric Tchidimbo - Mr. Ramadhani T. Juma		<input type="checkbox"/> Judge / Juge <input type="checkbox"/> Judge / Juge <input type="checkbox"/> Judge / Juge <input type="checkbox"/> Judge / Juge
	<b>ACCUSED / DEFENSE</b> <input checked="" type="checkbox"/> Accused / <i>Accusé</i> KAREMERA, NGIRUMPATSE, NZIRORERA <small>see / voir CMS4</small> <input checked="" type="checkbox"/> Lead Counsel / <i>Conseil Principal</i> : D. Diagne, C. Hounkpatin, P. Robinson <input type="checkbox"/> In Arusha / à Arusha: (see / voir CMS3) <input type="checkbox"/> Fax: <input type="checkbox"/> Co-Counsel / <i>Conseil Adjoint</i> : F. Sow, F. Weyl, P. Ngimbi <input type="checkbox"/> Arusha (see / voir CMS3) <input type="checkbox"/> Fax:		
<b>OTP / BUREAU DU PROCUREUR</b> <input type="checkbox"/> Hassan Bubacar Jallow, Prosecutor <input type="checkbox"/> B. Majola, Deputy Prosecutor <input checked="" type="checkbox"/> Don Webster Senior Trial Attorney in charge of case: (input name) <input type="checkbox"/> The Hague / La Haye <input type="checkbox"/> Arusha (see / voir CMS3) <input type="checkbox"/> Kigali			
From: De:	<input type="checkbox"/> JP. Fomété (Chief, CMS) <input type="checkbox"/> Matar Diop (Chief, JPU) <input checked="" type="checkbox"/> C. Hométowu (TC III) <input type="checkbox"/> F. A. Talon (Appeals/Team IV) <input type="checkbox"/> Other		
CC:	<input checked="" type="checkbox"/> Registrar <input type="checkbox"/> OLA, NY <input checked="" type="checkbox"/> Deputy Registrar <input type="checkbox"/> Press <input checked="" type="checkbox"/> ICTR Spokesperson <input checked="" type="checkbox"/> SAR <input type="checkbox"/> WVSS <input type="checkbox"/> DCDMS <input checked="" type="checkbox"/> CSS <input checked="" type="checkbox"/> SADR <input type="checkbox"/> Other		
Subject/Objet:	Kindly find attached the following documents / <i>Veillez trouver en annexe les documents suivants</i> :		
Documents name / titre du document		Date Filed / Date enregistré	Pages
JOSEPH NZIRORERA'S APPEAL FROM DECISION ON CONTINUATION OF THE PROCEEDINGS		13/03/2007	1645/A – 1606/A

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