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International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

UNITED NATIONS  
NATIONS UNIES

**IN THE APPEALS CHAMBER** ICTR-98-44-AR15bis.3

20 April 2007

(1773/H - 1759/H)

*P.T.*

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Wolfgang Schomburg

**Registrar:** Mr. Adama Dieng

**Decision of:** 20 April 2007

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**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

ICTR Appeals Chamber  
Date: 20 April 2007  
Action: *P.T.*  
Copied To: Concerned Judges,  
Patrick, SLOS, LOS, ALOS, LSA

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

**DECISION ON APPEALS PURSUANT TO RULE 15bis (D)**

**Counsel for the Defence:**

Dior Diagne Mbaye and Félix Sow for Édouard Karemera  
Chantal Hounkpatin and Frédéric Weyl for Mathieu Ngirumpatse  
Peter Robinson and Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

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Tribunal pénal international pour le Rwanda  
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1. **THE APPEALS CHAMBER** of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "Nzirumpatse's Motion to Appeal Decision on Continuation of Proceedings" filed by Mathieu Nzirumpatse on 13 March 2007 ("Nzirumpatse Motion") and "Joseph Nzirorera's Appeal from Decision on Continuation of the Proceedings" filed on 13 March 2007 ("Nzirorera Motion") ("Motions" and "Applicants", collectively).

2. On 22 March 2007, the Prosecution filed a consolidated response to the Motions,<sup>1</sup> and Joseph Nzirorera and Matthieu Nzirumpatse filed their replies on 26 March 2007 and 29 March 2007, respectively.<sup>2</sup>

#### A. Background

3. The trial of the Applicants, who are being tried jointly with Édouard Karemera, commenced on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, Emile Francis Short and Gberdao Gustave Kam.<sup>3</sup> On 19 January 2007, Judge Short withdrew from the trial for health reasons. Judge Byron, who is the Presiding Judge, immediately informed the President of the Tribunal, Judge Erik Møse, of Judge Short's withdrawal.<sup>4</sup> President Møse then requested the Applicants and their Co-Accused to indicate whether they would consent to the continuation of the proceedings with a substitute Judge. The Applicants withheld their consent,<sup>5</sup> and President Møse then referred the matter to Judges Byron and Kam ("remaining Judges") for their determination on whether to continue the proceedings in this case with a substitute Judge.<sup>6</sup> On 6 March 2007, Judges Byron and Kam issued their "Decision on Continuation of the Proceedings" ("Impugned Decision") in which they held that:

[i]n conclusion, considering all the circumstances of the case, and in particular the fairness of the trial, the rights of each Accused to be tried without undue delay and the length of their provisional

<sup>1</sup> "The Prosecutor's Consolidated Response to Joseph Nzirorera's Appeal from Decision on Continuation of the Proceedings and to the « Mémoire pour M. Nzirumpatse sur l'appel contre la Décision relative à la continuation de la procédure et ensuite de la décision du 14 mars 2007 constituant une formation de jugement de 5 Juges », 22 March 2007 ("Prosecution Response").

<sup>2</sup> "Reply Brief: Joseph Nzirorera's Appeal from Decision on Continuation of the Proceedings", 26 March 2007 ("Nzirorera Reply"); "MEMOIRE EN REPLIQUE pour M. NGRUMPATSE SUR L'APPEL contre la Décision relative à la continuation de la procédure- article 15bis du Règlement ensuite de la décision du 14 mars 2007 constituant une formation de jugement de 5 Juges" 29 March 2007 (date of filing) ("Nzirumpatse Reply").

<sup>3</sup> Impugned Decision, para. 1.

<sup>4</sup> Impugned Decision, para. 2.

<sup>5</sup> Impugned Decision, para. 4. Édouard Karemera consented to the continuation of the trial with a substitute Judge provided the said Judge "has perfect knowledge of the case."

<sup>6</sup> Impugned Decision, para. 4.

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detention, the remaining Judges find unanimously that a continuation of the proceedings would best serve the interests of justice.<sup>7</sup>

The remaining Judges further held that "they have no power to order" the referral of this case to a national jurisdiction for trial because they have not been designated as a referral Chamber by the President.<sup>8</sup>

## B. Submissions

### 1. Ngirumpatse

4. In his Motion, Mr. Ngirumpatse argues that his appeal can only be considered by "a full bench of the Appeals Chamber", which includes Judge Andrézia Vaz. However, Judge Vaz cannot be involved in this appeal due to her previous involvement in his case.<sup>9</sup> On this basis, he argues that the Appeals Chamber will not be in a position to form a "full bench" and, as it cannot consider his appeal in the absence of one of its members, he requests the Appeals Chamber to stay the consideration of his appeal pending the designation of a substitute Judge.<sup>10</sup>

5. With respect to the Impugned Decision, Mr. Ngirumpatse argues that the remaining Judges erred in determining that his submissions were filed out of time and requests the Appeals Chamber to reverse this determination.<sup>11</sup>

6. Mr. Ngirumpatse states that he will continue to defy the continuation of the proceedings in his case with a substitute Judge even if it means sacrificing his right to "a fair trial without undue delay."<sup>12</sup> He asserts that asking him to consent to the continuation of the proceedings in his case with a substitute Judge "amounts to asking him to pre-endorse the violation of his rights since his arrest".<sup>13</sup>

7. Mr. Ngirumpatse contends that the remaining Judges erred in asserting in the Impugned Decision that 31 December 2008 for the completion of all trials is only a target date.<sup>14</sup> He submits that the reasoning of the remaining Judges in this regard is "simply speculation" and deepens his concern that the proceedings in his case will be predicated on the Tribunal's Completion Strategy.

<sup>7</sup> Impugned Decision, para. 91.

<sup>8</sup> Impugned Decision, para. 90.

<sup>9</sup> Ngirumpatse Motion, paras. 5, 6.

<sup>10</sup> Ngirumpatse Motion, paras. 6, 7.

<sup>11</sup> Ngirumpatse Motion, para. 9.

<sup>12</sup> Ngirumpatse Motion, para. 10.

<sup>13</sup> Ngirumpatse Motion, para 11.

<sup>14</sup> Ngirumpatse Motion, para. 19.

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He suggests that this will lead to a situation where the time allowed for the presentation of his case would be a fraction of the time given to the Prosecution.<sup>15</sup>

8. Further, Mr. Ngirumpatse contends that the remaining Judges erred in rejecting his request to refer his case to a national jurisdiction for trial based solely on Rule 11*bis* (A) of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>16</sup> He argues that the remaining Judges erred in their reasoning in that they failed to consider their discretion under Rule 11*bis* (B) of the Rules to order such referral.<sup>17</sup>

9. Finally, Mr. Ngirumpatse submits that the remaining Judges either misunderstood or misinterpreted his submissions on the defects in the proceedings in his case, as he has never requested the remaining Judges to review the decisions rendered by the full Bench.<sup>18</sup>

## 2. Nzirorera

10. Mr. Nzirorera raises four principal contentions in his appeal of the Impugned Decision. First, he argues that the remaining Judges erred in deciding to continue the proceedings with a substitute Judge when his request to the President to exercise his discretion and order a rehearing of the proceedings<sup>19</sup> was still pending.<sup>20</sup>

11. Second, Mr. Nzirorera contends that the remaining Judges erred in deciding to continue the proceedings in his case in the absence of a decision by the President on his request to designate a Chamber to consider the referral of his case to a national jurisdiction for trial.<sup>21</sup>

12. Third, Mr. Nzirorera contends that the remaining Judges erred in concluding that the completion of his trial by the end of 2008 was not mandatory, and that the trial could be completed without violating the rights of the accused.<sup>22</sup> Finally, Mr. Nzirorera contends that the remaining Judges erred in concluding that the proceedings in his case should continue, despite circumstances which have thus far rendered the trial unfair.<sup>23</sup>

13. In light of these contentions, Mr. Nzirorera requests the Appeals Chamber to reverse the Impugned Decision and to order a new trial in his case or alternatively, to refer the matter back to

<sup>15</sup> Ngirumpatse Motion, paras. 14 – 21.

<sup>16</sup> Ngirumpatse Motion, para. 21.

<sup>17</sup> Ngirumpatse Motion, para. 22.

<sup>18</sup> Ngirumpatse Motion, paras. 23 - 26.

<sup>19</sup> Nzirorera Motion, para. 5, referring to "Joseph Nzirorera's Submission in Support of a Rehearing", 29 January 2007.

<sup>20</sup> Nzirorera Motion, paras. 13 – 31.

<sup>21</sup> Nzirorera Motion, paras. 6, 32 – 51, referring to "Joseph Nzirorera's Request for Designation of a Trial Chamber to Consider Referral to National Jurisdiction", 29 January 2007.

<sup>22</sup> Nzirorera Motion, paras. 52 – 60.

<sup>23</sup> Nzirorera Motion, paras. 61-133.

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the President for the exercise of his discretion and a decision pursuant to Rule 15*bis* (C) of the Rules, as well as for his decision on the designation of a Trial Chamber to consider the transfer of his case to a national jurisdiction.<sup>24</sup>

### 3. Prosecution

14. According to the Prosecution, both appeals are inadmissible and are without merit.<sup>25</sup> In response to Mr. Ngirumpatse's objection relating to the composition of the Appeals Chamber, the Prosecution avers that the Tribunal's Statute states that a full bench of the Appeals Chamber comprises five Judges and not seven.<sup>26</sup> The Prosecution has not responded to the other specific grounds of appeal raised by Mr. Ngirumpatse.

15. In response to Mr. Nzirorera's appeal, the Prosecution contends first that Mr. Nzirorera is proceeding on a misapprehension of the proper interpretation of the discretionary powers provided under Rule 15*bis* (C) and (D) of the Rules.<sup>27</sup> It disputes the premise upon which Mr. Nzirorera bases his contention that the remaining Judges erred in deciding to continue the trial in the absence of an exercise of discretion by the President, and argues that Mr. Nzirorera's interpretation of Rule 15*bis* of the Rules is incorrect.<sup>28</sup>

16. Second, the Prosecution contends that Mr. Nzirorera is in error as to the relevance, scope and application of Rule 11*bis* of the Rules.<sup>29</sup> It argues that the remaining Judges were exercising jurisdiction under Rule 15*bis* and they were never legally enjoined to make any decisions or rulings under Rule 11*bis* of the Rules.<sup>30</sup>

17. Third, the Prosecution contends that the remaining Judges were correct in their determination that it was in the interests of justice to continue the trial with a substitute Judge.<sup>31</sup> According to the Prosecution, both Applicants have failed to identify any discernable error on the part of the remaining Judges.<sup>32</sup> It avers that they have failed to show that the Impugned Decision is based on an incorrect interpretation of the governing law; that it is based on a patently incorrect conclusion of fact; or that it is so unfair or unreasonable so as to amount to an abuse of discretion.<sup>33</sup>

<sup>24</sup> Nzirorera Motion, para. 135.

<sup>25</sup> Prosecution Response, para. 2.

<sup>26</sup> Prosecution Response, paras. 92, 93.

<sup>27</sup> Prosecution Response, paras. 18 – 34.

<sup>28</sup> Prosecution Response, para. 18.

<sup>29</sup> Prosecution Response, paras. 35 – 54.

<sup>30</sup> Prosecution Response, para. 35.

<sup>31</sup> Prosecution Response, paras. 55 – 91.

<sup>32</sup> Prosecution Response, para. 96.

<sup>33</sup> Prosecution Response, para. 96.

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### C. Discussion

18. The Appeals Chamber notes that the Impugned Decision was made pursuant to Rule 15*bis* (D) of the Rules, which provides that if, after the commencement of the presentation of evidence in his case, "the accused withholds his consent [for the continuation of the proceedings with a substitute Judge], 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." This rule also allows for an appeal of the Impugned Decision by either party, which the Applicants relied upon in filing their respective appeals. Some of the contentions raised by the Applicants are in common. Where this is the case, the submissions of both Applicants will be considered together.

#### 1. Standard of Review

19. Rules 15*bis* (D) of the Rules confers on the remaining Judges the discretion to determine whether to continue the trial proceedings with a substitute Judge. In exercising this discretion, the remaining Judges have "the right to establish the precise point within a margin of appreciation at which a continuation [of the proceedings] should be ordered".<sup>34</sup> The Appeals Chamber has previously stated that it can only intervene in this decision-making process in limited circumstances, as, for example, where it is of the view that there was a failure to exercise the discretion, or that the remaining Judges failed to take into account a material consideration or took into account an immaterial one and that the substance of its decision has in consequence been affected.<sup>35</sup> It is not enough to show that the Appeals Chamber would have exercised the discretion differently.<sup>36</sup>

#### 2. The Composition of the Bench

20. Mr. Ngirumpatse submits that his appeal must be considered by a "full bench" of the Appeals Chamber, which includes Judge Andréia Vaz.<sup>37</sup> He refers to Rule 15(A) of the Rules and argues that Judge Vaz cannot consider his appeal in light of her prior involvement in his case and therefore, the Appeals Chamber can neither sit as a full bench nor conduct matters in the absence of

<sup>34</sup> *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje*, Case No. ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings Under Rule 15*bis* (D), 24 September 2003 ("Butare Decision"), para. 23.

<sup>35</sup> *Butare* Decision, para. 23.

<sup>36</sup> *Butare* Decision, para. 23.

<sup>37</sup> Ngirumpatse Motion, paras. 5 -7.

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one of its members.<sup>38</sup> Mr. Ngirumpatse accordingly requests that the Appeals Chamber stay the consideration of his appeal pending the appointment of a substitute Judge in place of Judge Vaz.<sup>39</sup>

21. The Appeals Chamber notes that a decision by the remaining Judges pursuant to Rule 15*bis* (D) of the Rules may be appealed "directly to a full bench of the Appeals Chamber". This provision must be interpreted in conjunction with Article 11(3) of the Tribunal's Statute, which provides that seven permanent Judges shall be members of the Appeals Chamber but the "Appeals Chamber shall, for each appeal, be composed of five of its members". Therefore a "full bench" of the Appeals Chamber for the purposes of considering this appeal only comprises five Judges. Furthermore, it is noted that Judge Vaz has not been designated as a member of the Bench constituted to consider Mr. Ngirumpatse's appeal.<sup>40</sup> Consequently, the Appeals Chamber finds Mr. Ngirumpatse's contention to be without merit and frivolous.

### 3. The Alleged Error that Mr. Ngirumpatse's Submission was Filed Out of Time

22. Mr. Ngirumpatse submits that the Impugned Decision is erroneous in that it asserts that his submission before the remaining Judges was filed out of time, and he requests the Appeals Chamber to remedy this error.<sup>41</sup> The Appeals Chamber notes that the remaining Judges did find that Mr. Ngirumpatse's submission was filed out of time even though it may have been faxed on 31 January 2007, however the submission was considered in the "interests of justice" and in light of the "right of the Accused to be heard".<sup>42</sup> If the remaining Judges did err in finding that Mr. Ngirumpatse's submission had been filed out of time, the Appeals Chamber cannot see how this finding could invalidate the Impugned Decision given that Mr. Ngirumpatse has suffered no prejudice as a result of this finding. The Appeals Chamber accordingly finds this contention to be frivolous.

### 4. The Alleged Error that the Completion of the Trial by the End of 2008 was not Mandatory

23. Mr. Nzirorera submits that when deciding to continue his trial with a substitute Judge, the remaining Judges erred in concluding that the completion of his trial by the end of 2008 was not mandatory,<sup>43</sup> and points to an error in their assessment of Security Council resolution 1503 (2003)<sup>44</sup> and Security Council resolution 1534 (2004).<sup>45</sup> He argues that the Impugned Decision treats these

<sup>38</sup> Ngirumpatse Motion, para. 6.

<sup>39</sup> Ngirumpatse Motion, para. 7.

<sup>40</sup> See "Order Assigning Judges to a Case Before the Appeals Chamber", 14 March 2007, p. 2.

<sup>41</sup> Ngirumpatse Motion, para. 9.

<sup>42</sup> Impugned Decision, para. 5.

<sup>43</sup> Nzirorera Motion, paras. 52 - 60.

<sup>44</sup> S/RES/1503 (2003) ("Resolution 1503").

<sup>45</sup> S/RES/1534 (2004) ("Resolution 1534").

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resolutions as guidelines rather than deadlines.<sup>46</sup> The Appeals Chamber understands Mr. Nzirorera's contention to be that 31 December 2008 is mandatory for the completion of all trials and that, as such, continuing the proceedings in his case would not serve the interests of justice as his trial could not be "fairly" completed by that date.<sup>47</sup> He therefore asserts that the remaining Judges erred in concluding that his trial could be completed by the end of 2008 without violating his rights.<sup>48</sup> Mr. Ngirumpatse raises a similar contention.<sup>49</sup> Mr. Nzirorera further contends that if his trial is not completed by 31 December 2008, either he will be held hostage to a request to the Security Council for an extension of time to complete his trial or his trial will need to restart in a national jurisdiction.<sup>50</sup>

24. The Appeals Chamber notes that the remaining Judges expressed the view that the completion of all trials by 31 December 2008 is "more of a target date"<sup>51</sup> and that there was "nothing to suggest that unfair decisions and actions will be taken with regard to cases that are pending on 31 December 2008."<sup>52</sup> The Appeals Chamber also notes that resolution 1503 urges the Tribunal to formalise a strategy to enable the Tribunal "to achieve its objective" of completing all trials by the end of 2008<sup>53</sup> and calls on the Tribunal "to take all possible measures" in this regard.<sup>54</sup> The Appeals Chamber is of the view that when assessing the implications of resolution 1503 and resolution 1534 to on-going trials, the overriding consideration must be the strict adherence to the minimum guarantees afforded to accused persons pursuant to Article 20 of the Tribunal's Statute. The Appeals Chamber considers that the remaining Judges properly addressed this overriding consideration and sees no error in their interpretation of their obligations in the context of resolution 1503 and resolution 1534. The remaining Judges considered that the trial in the Applicants' case could be completed fairly and expeditiously by 31 December 2008, by using appropriate trial management methods within their discretion and taking reasonable decisions.<sup>55</sup> In the event of the trial not being completed by the end of 2008, the remaining Judges stated that "reasonable decisions will be taken in the interests of justice [and] taking into account the rights of each co-Accused."<sup>56</sup> The Appeals Chamber finds no error in this approach.

<sup>46</sup> Nzirorera Motion, paras. 54 - 57.

<sup>47</sup> Nzirorera Motion, para. 53.

<sup>48</sup> Nzirorera Motion, paras. 54 - 57.

<sup>49</sup> Ngirumpatse Motion, paras. 18 - 21.

<sup>50</sup> Nzirorera's Motion, para. 58.

<sup>51</sup> Impugned Decision, para. 87.

<sup>52</sup> Impugned Decision, para. 87.

<sup>53</sup> Resolution 1503, p. 2.

<sup>54</sup> Resolution 1503, p. 3 at para. 7; Resolution 1534, p. 2 at para. 3.

<sup>55</sup> Impugned Decision, para. 87.

<sup>56</sup> Impugned Decision, para. 87.

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5. The Alleged Error relating to the Allocation of Time for the Defence Case

25. Mr. Nzirorera argues that the continuation of his trial will not serve the interests of justice because "the trial could not be fairly completed" by 31 December 2008, as the time allocated to the Defence for the presentation of its respective cases must be proportional to that taken by the Prosecution.<sup>57</sup>

26. Mr. Nzirorera avers that the Prosecution is expected to complete the presentation of its case in December 2007, by which time the presentation of the Prosecution case would have taken twenty-six months.<sup>58</sup> He argues that this would leave the three accused with twelve months, which computes to four months each, for the presentation of their respective cases, if the trial is to be concluded by the end of 2008.<sup>59</sup> He asserts that this ratio cannot be justified.<sup>60</sup> Mr. Ngirumpatse raises a similar argument.<sup>61</sup>

27. The Appeals Chamber notes that in the *Orić* case,<sup>62</sup> the ICTY Appeals Chamber stated that:

[t]he Appeals Chamber has long recognised 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." At a minimum, "equality of arms obliges a judicial body to ensure that neither party is put at a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an [a]ccused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.<sup>63</sup>

28. The ICTY Appeals Chamber further held in the *Orić* Decision that the Trial Chamber has the authority to limit the length of time allocated to the Defence,<sup>64</sup> but that such limitations are always subject to the full respect for the rights of an accused as guaranteed in the Tribunal's Statute.<sup>65</sup> Thus, in addition to whether the time given to an accused is relatively proportional to the time given to the Prosecution, the Trial Chamber must also consider whether the amount of time is

<sup>57</sup> Nzirorera Motion, para. 53.

<sup>58</sup> Nzirorera Motion, para. 52.

<sup>59</sup> Nzirorera Motion, paras. 52, 53.

<sup>60</sup> Nzirorera Motion, para. 53.

<sup>61</sup> Ngirumpatse Motion, 15 – 17.

<sup>62</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, ("*Orić* Decision").

<sup>63</sup> *Orić* Decision, para. 7.

<sup>64</sup> *Orić* Decision, para. 8.

<sup>65</sup> *Orić* Decision, para. 8.

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objectively adequate to enable the accused to present his defence in a manner consistent with his rights.<sup>66</sup>

29. The Appeals Chamber has already noted above that the remaining Judges considered the possibility of the trial not being completed by the end of 2008 and indicated that reasonable decisions will nonetheless be taken in the interests of justice and taking into account the rights of each Accused in this case.<sup>67</sup> The remaining Judges also recognised that “[e]ach Accused has a right to adequate time and facilities to prepare his defence”<sup>68</sup> and that “[t]he actual time to be allotted to the defence of each Accused will be determined in accordance with particular circumstances and in relation to their rights”.<sup>69</sup> The Appeals Chamber sees no error in this approach and is not satisfied that the Applicants have demonstrated that the remaining Judges failed to consider that full respect for their rights to present their defence must be ensured in accordance with the precedent set in the *Orić* Decision.

6. The Alleged Error Relating to the Absence of the Exercise of Discretion and a Decision by the President

30. Mr. Nzirorera contends that the remaining Judges erred in deciding to continue the trial because the President had not exercised his discretion and had not issued a “reasoned decision” in accordance with Rule 15*bis* (C) of the Rules.<sup>70</sup> He argues that the President had the discretion to order a rehearing of his trial but instead referred the matter to the remaining Judges.<sup>71</sup> He also argues that since he “specifically requested the President to exercise his discretion and order a rehearing”,<sup>72</sup> the referral of his case to the remaining Judges “violated his statutory right to a reasoned decision”.<sup>73</sup> The Appeals Chamber will consider these two arguments in turn.

31. First, Mr. Nzirorera argues that Rule 15*bis* (C) of the Rules gives the President the “discretion to order a rehearing of the trial.”<sup>74</sup> He then raises the issue of whether the President retains the option of ordering a rehearing where the trial has already commenced and where the accused did not consent to the continuation of the trial, instead of referring the matter to the remaining Judges,<sup>75</sup> and argues that if the President does not retain this option, it could lead to an “anomalous situation that the President could order a rehearing where an accused doesn’t want one,

<sup>66</sup> *Orić* Decision, para. 8.

<sup>67</sup> See para. 25 above.

<sup>68</sup> Impugned Decision, para. 89.

<sup>69</sup> Impugned Decision, para. 89.

<sup>70</sup> Nzirorera Motion, para. 31.

<sup>71</sup> Nzirorera Motion, para. 18.

<sup>72</sup> Nzirorera Motion, para. 19.

<sup>73</sup> Nzirorera Motion, para. 21.

<sup>74</sup> Nzirorera Motion, para. 15.

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but cannot order a rehearing where an accused wants one.”<sup>76</sup> He argues that this is contrary to the purpose of the Rule, which is to provide safeguards to an accused who does not consent to the continuation of his trial.<sup>77</sup>

32. The Appeals Chamber is of the view that Rule 15*bis* (C) of the Rules confers on the President the function of assigning a Judge to a part-heard case where one of the Judges in the Trial Chamber is no longer in a position to continue. This function must be understood in the context of the President's overall responsibility of assigning Judges to the Trial Chambers<sup>78</sup> and the coordination of the work of the Chambers.<sup>79</sup> Pursuant to these responsibilities and within the ambit of Rule 15*bis* (C) of the Rules, the President may order “a rehearing or continuation of the proceedings”. However, where the opening statement is completed or the presentation of evidence has commenced, the President must seek the consent of the accused before ordering the continuation of the proceedings. The Appeals Chamber agrees with Mr. Nzirorera that where such consent is withheld, the President may either order a rehearing or refer the matter to the remaining Judges for a decision on whether to continue the proceedings with a substitute Judge. However, in the present case, the President did not exercise his discretion to order a rehearing upon establishing that the Applicants withheld their respective consent to the continuation of the proceedings. Rather, in light of the commencement of the presentation of evidence in the Applicants' case, he referred the matter to the remaining Judges for a determination on whether to continue the proceedings with a substitute Judge, which was in his discretion to do pursuant to Rule 15*bis* (D) of the Rules.

33. Second, Mr. Nzirorera submits that the failure of the President to rule on his request for a rehearing of his trial violated his right to a reasoned decision.<sup>80</sup> He argues that he is entitled to have “two chances” to oppose the continuation of his trial, first, by trying to persuade the President and if unsuccessful, by trying to persuade the remaining Judges. He now only has one opportunity due to the President's failure to exercise his discretion and deliver a reasoned decision. The Appeals Chamber notes that the President's consideration of the matter pursuant to Rule 15*bis* (C) of the Rules is triggered by the Presiding Judge reporting to him that one of the Judges is unable to continue with the case. This rule makes no provision for an accused to make a direct request to the President to order a rehearing in his case. In the present case, Mr. Nzirorera has no standing to file a detailed submission to the President requesting a rehearing of the proceedings, and he is not entitled to a reasoned decision from the President in respect of this submission. Therefore, the Appeals

<sup>75</sup> Nzirorera Motion, para. 17.

<sup>76</sup> Nzirorera Motion, para. 18.

<sup>77</sup> Nzirorera Motion, para. 18.

<sup>78</sup> Articles 13 (3) and (5) of the Tribunal's Statute.

<sup>79</sup> Rule 19 (A) of the Rules.

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Chamber finds no merit in Mr. Nzirorera's submission that the remaining Judges erroneously rejected his request to refer the matter back to the President.<sup>81</sup> The Appeals Chamber is satisfied that the remaining Judges did not err in reaching the Impugned Decision in the absence of any such reasoned decision from the President.

34. This said, the Appeals Chamber observes that Mr. Nzirorera does have "two chances" to oppose the continuation of his trial, one before the remaining Judges and the other before the Appeals Chamber. He has taken advantage of both these opportunities and has not suffered any prejudice or been denied an opportunity to raise this matter.

#### 7. Alleged Errors Relating to Rule 11bis

35. Mr. Ngirumpatse submits that the remaining Judges erred in rejecting the alternative request to refer the case to a national jurisdiction for trial, based solely on Rule 11bis (A) of the Rules.<sup>82</sup> He argues that the remaining Judges did not take into consideration their discretion to do so under Rule 11bis (B) of the Rules.<sup>83</sup>

36. The Appeals Chamber notes in this regard that the remaining Judges stated that:

[c]oncerning a referral of the Indictment to a national jurisdiction, the remaining Judges note that they have 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) of the Rules.<sup>84</sup>

The Appeals Chamber is satisfied that a "Trial Chamber" may only act in accordance with the provisions of Rule 11bis (B) where it has been designated by the President pursuant to Rule 11bis (A) of the Rules. The Appeals Chamber therefore finds no merit in Mr. Ngirumpatse's argument.

37. Mr. Nzirorera submits that the remaining Judges erred in deciding to continue the trial in the absence of the President's decision to appoint a Trial Chamber to *proprio motu* consider the transfer of his case to a national jurisdiction for trial.<sup>85</sup> Mr. Nzirorera argues that he had presented the President with a viable alternative of transferring his case to a national jurisdiction for trial,<sup>86</sup> because his trial could not reasonably be completed by the end of 2008, an issue which directly bears on the Tribunal's Completion Strategy and management of its remaining resources, and was therefore uniquely suited for consideration by the President, instead of the remaining Judges.<sup>87</sup> The

<sup>80</sup> Nzirorera Motion, paras 19, 21.

<sup>81</sup> Nzirorera Motion, para. 26.

<sup>82</sup> Ngirumpatse Motion, para. 22.

<sup>83</sup> Ngirumpatse Motion, para. 22.

<sup>84</sup> Impugned Decision, para. 90 (internal citations omitted).

<sup>85</sup> Nzirorera Motion, para. 6.

<sup>86</sup> Nzirorera Motion, para. 30.

<sup>87</sup> Nzirorera Motion, para. 29.

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remaining Judges recognised in the Impugned Decision that they were without authority to consider this alternative.<sup>88</sup> Only the President could trigger the consideration of this alternative by designating a Chamber for this purpose.<sup>89</sup>

38. The Appeals Chamber notes that Mr. Nzirorera's appeal is filed pursuant to Rule 15*bis* (D) of the Rules. Hence, the scope of his appeal should relate solely to the exercise of discretion by the remaining Judges in determining whether to continue the proceedings in his case with a substitute Judge. The allegation by Mr. Nzirorera that the remaining Judges "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"<sup>90</sup> falls outside the scope of his appeal under Rule 15*bis* (D) and is irrelevant to the question of whether or not to continue his trial with a substitute Judge. Furthermore, the Appeals Chamber notes that Rule 11*bis* of the Rules makes no provision for an accused to request the transfer of his case to a national jurisdiction for trial. Consequently, the remaining Judges were not obliged to take into consideration Mr. Nzirorera's request to the President pursuant to Rule 11*bis* of the Rules.

#### 8. The Alleged Unfairness of the Trial

39. Mr. Nzirorera contends that the remaining Judges erred in concluding that the trial should be continued despite circumstances which rendered the trial unfair.<sup>91</sup> He states that he declined to consent to the continuation of his trial because he believed the proceedings to this point had been unfair<sup>92</sup> due to the Prosecution's violation of its disclosure obligations; the admission of material facts not charged in the indictment; the unjustified use of anonymous witnesses; the Prosecution's presentation of perjured testimony; the failure of the Rwandan Government to produce statements of Prosecution witnesses; the taking of testimony of important witnesses by video-link; and the Prosecution's interference with the right of the Defence to meet witnesses.<sup>93</sup> Mr. Nzirorera avers that 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".<sup>94</sup> He argues that the trial is "too broken to fix" and that only a rehearing will guarantee him a fair trial.<sup>95</sup>

<sup>88</sup> Nzirorera Motion, para. 30.

<sup>89</sup> Nzirorera Motion, para. 30.

<sup>90</sup> Nzirorera Motion, para. 36.

<sup>91</sup> Nzirorera Motion, paras. 61-63.

<sup>92</sup> Nzirorera Motion, para. 61.

<sup>93</sup> Nzirorera Motion, para. 61 - 133.

<sup>94</sup> Nzirorera Motion, para. 63.

<sup>95</sup> Nzirorera Motion, para. 63.

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40. The Appeals Chamber notes that the remaining Judges considered these issues in the Impugned Decision and rejected Mr. Nzirorera's arguments that the trial to date had been unfair. The Appeals Chamber finds, however, that it need not review the remaining Judges' reasoning with regard to these issues. The Appeals Chamber considers the arguments with respect to alleged past violations of fair trial rights in the proceedings to be irrelevant at this stage to the sole question being considered by the remaining Judges of whether to continue the trial with a substitute Judge under Rule 15*bis* (D) of the Rules.

41. Mr. Ngirumpatse additionally submits that his rights are being sacrificed as they are being weighed against each other.<sup>96</sup> He argues that if he withholds his consent to the continuation of the proceedings in his case with a substitute Judge, he would be sacrificing his right to a fair trial without undue delay.<sup>97</sup> If he consents to the continuation of the proceedings, he would be actually consenting to having a substitute Judge who would not have "heard the testimonies of 14 witnesses in the course of 100 days" and also consenting to proceedings that will be "hasty".<sup>98</sup> He also argues that asking him to consent to the continuation of his proceedings is actually asking him to "pre-endorse the violation of his rights since his arrest."<sup>99</sup>

42. The Appeals Chamber considers that the continuation of the proceedings with a substitute Judge in a case where witnesses have already been heard does not necessarily infringe on fair trial rights. As the Appeals Chamber previously stated:

[t]here is a preference for live testimony to be heard by each and every judge. But that does not represent an unbending requirement. The Rules and the cases show that exceptions can be made. The exceptions may relate even to evidence involving an assessment of demeanour, various ways being available to assist a new judge to overcome any disadvantages.<sup>100</sup>

43. The Appeals Chamber also considers that, pursuant to Rule 15*bis* (D) of the Rules, a substitute Judge may only join the bench "after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings." These safeguards ensure that fair trial rights are not compromised. In the present case, the remaining Judges took into consideration that the substitute Judge will need to review the "records of the proceedings, including the transcripts, audio and video-recordings, to observe the demeanour of the witness" in determining that it would be in the interests of justice to continue the proceedings with a substitute Judge.<sup>101</sup>

<sup>96</sup> Ngirumpatse Motion, paras. 10 -12.

<sup>97</sup> Ngirumpatse Motion, para. 10.

<sup>98</sup> Ngirumpatse Motion, para. 10.

<sup>99</sup> Ngirumpatse Motion, para. 11.

<sup>100</sup> *Butare* Decision, para. 25.

<sup>101</sup> Impugned Decision, para. 69.

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44. On the issue of whether the proceedings in Mr. Ngirumpatse's case will be "hasty" if continued, the Appeals Chamber has already discussed above the remaining Judges' recognition of the right of the Applicants and their Co-Accused to have adequate time and facilities to prepare their respective defences.<sup>102</sup> Based on the approach adopted by the remaining Judges, there is no reason to believe that Mr. Ngirumpatse's rights to a fair trial will be infringed. Furthermore, as mentioned above,<sup>103</sup> any consideration of Mr. Ngirumpatse's argument relating to the alleged violation of rights since his arrest exceeds the scope of appeal envisaged in Article 15bis (D) of the Rules and will therefore not be considered.

45. In sum, the Appeals Chamber finds no merit in the arguments raised by the Applicants with respect to alleged errors by the remaining Judges in concluding that the continuation of their trial would not result in a failure to uphold the Applicant's fair trial rights. Furthermore, the Appeals Chamber considers the arguments with respect to alleged past violations of fair trial rights in the proceedings to be irrelevant at this stage to the sole question being considered by the remaining Judges of whether to continue the trial with a substitute Judge under Rule 15bis (D) of the Rules.

#### 9. Conclusion

46. Having considered the submissions made by the Parties, the Appeals Chamber finds that the continuation of the Applicants' trial would not result in a failure to uphold their fair trial rights. The Impugned Decision therefore stands.

#### D. Disposition

47. For the aforementioned reasons, the Appeals Chamber:

**DISMISSES** the appeals filed by Mathieu Ngirumpatse and Joseph Nzirorera;

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

Dated this the 20 day of April 2007,  
at The Hague,  
The Netherlands.



[Seal of the Tribunal]

Judge Fausto Pocar,  
Presiding

<sup>102</sup> See *supra* para. 28 - 30.

<sup>103</sup> See *supra* para. 40.



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

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		Case No / no. de l'affaire: <b>ICTR-98-44-AR15bis.3</b>	
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