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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-AR15*bis*.2

IN THE APPEALS CHAMBER

Before: The Judges of the Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 23 July 2004

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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APPEAL FROM SECOND DECISION RELATIVE  
A LA CONTINUATION DU PROCES

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The Office of the Prosecutor:

Mr. Don Webster

Ms. Dior Fall

Ms. Holo Makwaia

Mr. Gregory Lombardi

Defence Counsel:

Mr. Peter Robinson

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera

Mr. David Hooper and Mr. Andreas O'Shea for Andre Rwamakuba

Mr. Charles Roach and Mr. Frederick Weyl for Mathieu Ngirumpatse

## **Introduction**

1. Joseph Nzirorera hereby appeals, pursuant to Rule 15 *bis* (D), from the second *Decision Relative A La Continuation Du Proces* issued by the two remaining Judges of the Trial Chamber on 16 July 2004.

## **Procedural History**

2. The procedural history prior to 31 May 2004 is set forth in Mr. Nzirorera's first appeal at paragraphs 5-13. On 21 June 2004, the Appeals Chamber remanded the matter to the two remaining Judges so that the parties could have an opportunity to be heard before the Judges rendered their decision.<sup>1</sup>

3. On 16 July 2004, the first day following the submission of all written briefs<sup>2</sup>, the two remaining Judges issued the *Decision Relative a La Continuation du Proces*. (the "Impugned Decision") in which they ordered a continuation of the trial. This is a timely appeal from that decision.

## **Applicable Provisions**

4. Rule 15 *bis* (D) provides 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 decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarized himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made."

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<sup>1</sup> *Decision in the Matter of Proceedings Under Rule 15 bis (D)*

<sup>2</sup> The written briefs were: *Joseph Nzirorera's Submissions in Support of Restarting the Trial* (6 July 2004); *Karemera's Memorie Relative au Recommencement du Process* (6 July 2004), *Submissions on Behalf of Dr. Andre Rwamakuba to Remaining Judges* (6 July 2004); *Prosecutor's Submissions under Rule 15 bis (D)* (6 July 2004); *Joseph Nzirorera's Reply in Support of Re-Starting His Trial* (12 July 2004); *Reply on Behalf of Dr. Andre Rwamakuba to Prosecutor's Submissions in Respect of Rule 15 bis (D)* (12 July 2004); *Mathieu Ngirumpatse's Response to Prosecutor's Submissions in Respect of Rule 15 bis (D)* (13 July 2004); *Karemera's Replique a la Prosecutor's Submissions Under Rule 15 bis (D)* (15 July 2004) and *Prosecutor's Consolidated Response to Defence Submissions of 6 July 2004 Under Rule 15 bis* (12 July 2004).

5. Rule 15 *bis* (E) provides in pertinent part that:

“Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision.”

### **Grounds for Appeal**

6. Mr. Nzirorera submits the following grounds for appeal:

- (1) The remaining Judges misdirected themselves as a matter of law by placing the burden on the party seeking to begin the trial again, rather than on the party seeking to continue the trial;
- (2) The remaining Judges misdirected themselves as a matter of law by giving insufficient weight to the importance of demeanor in the conduct of trials at the Tribunal;
- (3) The remaining Judges misdirected themselves as a matter of law in determining that the accused had sufficient notice that they were charged under a joint criminal enterprise form of liability by virtue of the Prosecutor’s pre-trial brief;

### **Standard of Review**

7. On appeal, it must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of its discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.<sup>3</sup>

### **Argument**

#### **(1) Ground of Appeal #1—Shifting the Burden**

8. The notion that a finder of fact will decide a criminal case without being present for all of the testimony is an extraordinary one. In common law systems, if one out of 12 jurors is not present for even part of the testimony of a single witness, a mistrial is declared and the trial starts anew.<sup>4</sup> That is why millions of dollars or pounds are spent every year impaneling alternate jurors. If all this expense is borne so that 1 of 12 finders of fact can see and hear every witness in a shoplifting case, surely the Tribunal must give

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<sup>3</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.3, *Decision on Mugiraneza Interlocutory Appeal Against Decision of Trial Chamber on Exclusion of Evidence* (15 July 2004) at para. 12

<sup>4</sup> *Patton v United States*, 281 U.S. 276 (1930)

serious consideration to bearing the minor inconvenience of starting this genocide trial over so that 1 of 3 finders of fact will not have missed the 13 witnesses who have already testified.

9. Rule 15 *bis*, as originally enacted, required the consent to the accused to continue a trial for more than three days in the absence of a Judge. The Rule was amended in 2003 when the ICTR found itself in a situation where a long trial was jeopardized by the failure of the Security Council to authorize one of the Judges to continue, and the accused declined to consent.<sup>5</sup>

10. Although it eliminated the veto power of the accused over the continuation of a trial with a substitute Judge, Rule 15 *bis* (D) retained several important safeguards for the accused. The text of the Rule requires that the remaining Judges “tak[e] all the circumstances into account” and that they make a unanimous determination that continuing the trial “would serve the interests of justice”.

11. Therefore, the context of Rule 15 *bis* (D), as well as its text, reflects that continuing the trial with a substitute Judge without consent of the accused is an extraordinary measure that should only be resorted to when it can be demonstrated that doing so would serve the interests of justice. The burden, therefore, rests with the proponent of continuing the trial to demonstrate that doing so would serve the interests of justice.

12. This reflects the choice by the drafters of the Rules in favor of the principle of orality.<sup>6</sup> This principle is found throughout the Rules, such as in Rule 90(A).<sup>7</sup>

13. The placement of this burden is consistent with other provisions of the Rules where the term “interests of justice” is used. Rule 71 allows a deposition in the interests of justice, placing the burden on the party seeking the deposition to show exceptional circumstances. Rule 79 places the burden on the party seeking a closed session to

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<sup>5</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-AR15bis, *Decision in the Matter of Proceedings Under Rule 15 bis* (24 September 2003) (the “Butare” case)

<sup>6</sup> See *Prosecutor v Norman et al*, No. SCSL-4-14-PT (16 July 2004) at para. 25: (“The Special Court adheres to the principle of orality whereby witnesses shall, in principle, be heard directly by the court.”); *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, Dissenting Opinion of Judge Patrick Robinson (16 February 1999) at para. 28 (vi).

<sup>7</sup> Rule 90(A) provides that “witnesses shall, in principle, be heard directly by the Chambers, unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.”

demonstrate that it is in the interests of justice.<sup>8</sup> A similar burden to establish the “interests of justice” is placed upon the party seeking protective measures for witnesses.<sup>9</sup>

14. Another pertinent example is Rule 73 *bis* (E), which provides that:

“After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber to reinstate the list of witnesses or to vary his decision as to which witnesses are being called.”

15. In *Prosecutor v Bagosora et al*, No. 98-41-T (14 July 2004), the Trial Chamber interpreted this rule as follows:

“Rule 73bis(E) is an exceptional measure where the interests of justice mandate a departure from Rule 66. The Chamber considers that it would be unfair to the Defence to be faced with entirely new witnesses when their reasonable expectation would be that the Prosecution is closing its case and the Defence is already aware of all the evidence to be called. If the witnesses were to be added, the Defence would have been deprived of the opportunity to use the evidence of these new witnesses to cross-examine previous Prosecution witnesses who testified to similar issues, in order to test the totality of the evidence and the credibility of all the witnesses testifying to similar issues. The Chamber therefore finds that there are no grounds for reconsideration and will not proceed to examine the merits of the motion.”

16. It is submitted that the remaining Judges in our case erred in the impugned decision by placing on the party seeking to re-start the trial, the burden of showing that it was in the interests of justice to do so. The remaining Judges rejected most of the contentions of the defence with the refrain that it had failed to show “prejudice”.

17. For example, the remaining Judges dismissed Mr. Nzirorera’s argument that the testimony of Witnesses GBG and GBV were taken at a time when the parties were proceeding on an indictment that has since been amended, and that the meetings testified

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<sup>8</sup> *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Protective Measures Concerning a Humanitarian Organization* (1 April 2003)

<sup>9</sup> *Prosecutor v Brdjanin & Talic*, No. IT-99-36-PT, *Decision on Motion by Prosecution for Protective Measures* (3 July 2000) and *Decision on Second Motion by Prosecution for Protective Measures* (27 October 2000)

to by those witnesses are not included in the amended indictment. The Judges held the defence had not shown “prejudice”.<sup>10</sup>

18. The remaining Judges dismissed Mr. Nzirorera’s argument that for all but one of the witnesses who had testified so far, the Prosecutor had violated the disclosure rules and had not provided timely or complete disclosure of the statements of the witnesses. The Judges acknowledged the violation of the Rules by the Prosecutor, but held that the defence had not shown “prejudice”.<sup>11</sup>

19. The remaining Judges dismissed Mr. Nzirorera’s complaint that all of the witnesses had been allowed to testify to new material not contained in their statements. The Judges held that the defence had not shown “prejudice”.<sup>12</sup>

20. The remaining Judges dismissed Mr. Nzirorera’s argument that his cross-examination of witnesses had been prematurely terminated by erroneous rulings of the Presiding Judge and Trial Chamber. The Judges held that the defence had not shown “prejudice”.<sup>13</sup>

21. The remaining Judges dismissed Mr. Nzirorera’s argument that the Presiding Judge and Trial Chamber had erroneously proceeded in the absence of the accused and in closed sessions. The Judges held that the defence had not shown “prejudice”.<sup>14</sup>

22. Therefore, when exercising its discretion to determine whether the interests of justice would be served by continuing the trial with a substitute Judge, the remaining Judges misdirected themselves as a matter of law by placing the burden on the defence to show how it would be “prejudiced” by continuation of the trial.

23. The remaining Judges failed to require that there be some particular circumstances existing in this case that would justify departure from the usual practice that all finders of facts observe the demeanor of all witnesses. The facts it relied upon to justify continuation of the trial—the risk that witnesses may not come back to testify,<sup>15</sup>

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<sup>10</sup> para. 73

<sup>11</sup> para 78

<sup>12</sup> para 80

<sup>13</sup> para 87

<sup>14</sup> para 88

<sup>15</sup> para 83

judicial economy,<sup>16</sup> an expeditious trial,<sup>17</sup> and the disturbance of decisions already rendered<sup>18</sup> are general considerations present in every case.<sup>19</sup>

24. Rule 15 *bis* (D) specifically requires that the Trial Chamber take all of the “circumstances” into account. The circumstances unique to the present case include the unavailability of video recording of the testimony, limitations on cross-examination due to untimely disclosure, mid-trial amendment of the indictment, and a spate of questionable rulings against the defence made by a Presiding Judge who resigned amid allegations of bias.

25. By requiring the defence to demonstrate prejudice from these circumstances, the remaining Judges turned the Rule on its head. It applied an after-the-fact harmless error standard appropriate for appeal, rather than the presumption of prejudice from the violation of the Rules, such as that applied in *Bagosora*, above at para. 15.

26. Just as in *Bagosora*, the accused in this case are inherently disadvantaged by the late disclosure of witness statements, by proceeding on charges dramatically different than those in existence during the beginning of the case, and by testimony of “new material” not disclosed in advance. Like the accused in *Bagosora*, the defence in this case is entitled to know the prosecution’s case from the beginning so that it may prepare and execute a coherent defence strategy and use evidence from later witnesses to cross-examine the witnesses who testify earlier.

27. In *Prosecutor v Niyitegeka*, No. ICTR-96-14-A (9 July 2004), the Appeals Chamber recently held:

“As a general matter, ‘the Prosecution is expected to know its case before it goes to trial’ and cannot expect to ‘mould’ the case against the accused in the course of the trial depending on how the evidence unfolds. If the Defence is denied the material facts of the accused’s alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct

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<sup>16</sup> para 107

<sup>17</sup> paras 108-09

<sup>18</sup> para 110

<sup>19</sup> In fact, the prosecution failed to make any submissions that any of its witnesses had refused to return to testify or would encounter danger in so doing and noted that some of the witnesses have already returned to the Tribunal to testify at multiple trials. *Prosecutor’s Submissions Under Rule 15 bis (D)*(6 July 2004) at para. 10

a meaningful investigation prior to the commencement of the trial. The Trial Chamber must consider whether proceeding to trial in such circumstances is fair to the accused.”<sup>20</sup>

28. The remaining Judges ignored this principle, and shifted the burden to the accused to demonstrate how it would be “prejudiced” by continuing the trial

29. Even if a showing of prejudice were required, the remaining Judges erred in finding that prejudice had not been shown. Annex “A” to this appeal contains a list of witnesses called during the trial and enumeration of the specific prejudice suffered by the defence from the violations of disclosure or erroneous rulings of the Trial Chamber. It should be noted that as a result of the late disclosure, the defence has been unable to complete its investigations concerning witnesses GFA and GBU and further examples of prejudice may well be uncovered.

30. Because the remaining Judges misdirected themselves as a matter of law when shifting the burden of demonstrating the “interests of justice” to the accused, their decision rests on an erroneous legal premise and should be reversed.

### **Ground of Appeal #2—The Importance of Demeanor**

31. The remaining Judges erred in law when they minimized the importance of demeanor evidence before the International Tribunals. The Judges found a reduced value of demeanor evidence where the witnesses testified in a language different than the trier of fact, and noted this as a legitimate distinction between the practice at the ICTR and national jurisdictions which require live testimony.<sup>21</sup>

32. This reasoning is fallacious and undermines the very foundations upon which the Tribunals operate. There are no Kinyarwandan-speaking Judges at the ICTR, nor any Bosnian/Croatian/Serbian-speaking Judges on the ICTY. Yet the decisions of both Tribunals have stressed the importance of demeanor evidence. In fact, the Appeals Chamber, knowing that Trial judges do not speak the language of the witnesses, nevertheless has held:

“The Appeals Chamber expects a Trial Chamber to be influenced by the demeanor of the witness in assessing

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<sup>20</sup> Para 194

<sup>21</sup> Decision at para 103

the credibility of his or her evidence.”<sup>22</sup>

33. If there is little value to observing the demeanor of witnesses who speak a foreign language, why should an Appeals Chamber give any deference to a Trial Chamber’s factual findings? In national jurisdictions, especially those located in border areas, why should an accused receive a mistrial when a juror is lost if witnesses have testified through an interpreter? Did the ICTY Trial Chamber err when it recently relied upon its observation of General Strugar’s demeanor when determining he was competent to stand trial, despite the fact that the Judges spoke no Serbian?<sup>23</sup> Did Judge Shahabuddeen, a non-Serbian speaker, err in the *Milosevic* case when he opined that cross-examination was an effective tool for exposing the Judges to the demeanor of a witness so as to allow admission of a witness statement in lieu of direct examination?<sup>24</sup>

34. The foreign language distinction drawn by the remaining Judges makes little sense and is not supported by any authority.

35. The remaining Judges also minimized the lack of any video recordings in this case that the substitute Judge could use to evaluate the demeanor of the 13 witnesses. In the Butare case, the Appeals Chamber recognized the importance of all three Judges being able to assess the demeanor of the witnesses. It expressed great concern that video recordings were not available for 22 out of the 23 witnesses because they were protected witnesses who were routinely not filmed at ICTR trials. In upholding the decision of the Trial Chamber to continue the trial, the Appeals Chamber ordered special measures to be taken to recall witnesses whose demeanor was important to the assessment of their credibility.<sup>25</sup> The Appeals Chamber also held that:

“The Tribunal should endeavor to make available to the Trial Chambers the video-recordings of witnesses, in particular of protected witnesses.”<sup>26</sup>

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<sup>22</sup> *Prosecutor v Kupreskic*, No. IT-95-16-A (23 October 2001) at para. 138

<sup>23</sup> *Prosecutor v Strugar*, No. IT-01-42-T, *Decision re the Defence Motion to Terminate Proceedings* (26 May 2004) at para. 51

<sup>24</sup> *Prosecutor v Milosevic*, No. IT-02-54-AR73.4, Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber’s Decision Dated 30 September 2003 on Admissibility of Evidence-in-Chief in the form of Written Statements at para 14

<sup>25</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. 35.

<sup>26</sup> Para. 33

36. This admonition was apparently not taken seriously. The Registrar informed the remaining Judges that it did not videotape protected witnesses in this case because it utilized the equipment in the *Bizimungu* trial.<sup>27</sup> Yet the *Bizimungu* trial was not held during the entire second session of this trial, a period that Witness GFA and GBU testified, as well as three witnesses against Rwamakuba.<sup>28</sup> Notably, Mr. Nzirorera's specific request that Witness GBU be videotaped in the absence of Judge Lattanzi was rejected out of hand.<sup>29</sup>

37. It was noted in the Butare case that taping of protected witnesses was routine at the ICTY<sup>30</sup> The ICTR is apparently now videotaping protected witnesses.<sup>31</sup> However, it is undisputed that this was not done in this case. Therefore the substitute Judge will have no means of observing the testimony of the 13 witnesses.

38. The Appeals Chamber in the Butare case allowed the trial to continue in the absence of video recordings for two reasons. First, it noted that the lack of video recordings had not been raised in the Trial Chamber.<sup>32</sup> In our case, the issue was squarely raised.<sup>33</sup> Second, it held out the possibility that witnesses could be recalled by the Trial Chamber. That possibility has proved illusory<sup>34</sup>, as predicted by Judge Hunt.<sup>35</sup> Given the remaining Judges' attitude towards demeanor evidence in our case, as well as their failure to grant any requests to recall witnesses so far<sup>36</sup>, the accused are necessarily

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<sup>27</sup> Decision, at fn 46

<sup>28</sup> See case minutes of *Prosecutor v Bizimungu*, No. ICTR-99-50-T on ICTR web site.

<sup>29</sup> Transcript of 19 April 2004 at pages 48-50

<sup>30</sup> *Dissenting Opinion of Judge Hunt* at fn 42: "The position in the Yugoslav Tribunal is different. When a protected witness gives evidence in public session, the face of the witness as shown to the public is distorted. One camera focussed on the witness nevertheless records on a separate video-tape the undistorted picture of the witness, and this undistorted version is always available to enable a judge to see the witness giving evidence again (or for the first time)."

<sup>31</sup> See, for example, minutes of *Bagosora* trial for 6 May 2004: "The testimony of Witness XXH was recorded to enable Judge Reddy to observe the demeanor of the witness," or 28 June 2004: "The testimony of Witness DCH was recorded to enable Judge Mose to observe the demeanor of the witness,"

<sup>32</sup> para. 31

<sup>33</sup> *Joseph Nzirorera's Submissions in Support of Re-Starting His Trial* (6 July 2004) at para. 50

<sup>34</sup> *Prosecutor v Nyiramasuhuko*, No. ICTR-97-25-T, *Decision on Defence Motion for Recall of Witnesses TA, QJ, TK, SJ, SU,SS,QBP, RE.FAP,SD,and QY* (6 May 2004); *Prosecutor v Ntahobali*, No. ICTR-97-25-T, *Decision on Ntahobali's Motion for Recall of Witnesses* (29 June 2004).

<sup>35</sup> *Dissenting Opinion of Judge Hunt* at para 35

<sup>36</sup> See Decision denying Nzirorera's *Motion to Strike New Elements of Witness GBG Testimony or to Recall Witness* (Transcript of 11 December 2003 at pg. 47-48; Ngirumpatse's *Motion to Recall Witness GBG* (15 April 2004) (not ruled on)

sanguine about the prospects of any witnesses being recalled in this case if the trial is continued.

39. The remaining Judges erred by giving diminished weight to the role of demeanor in the trial and the absence of video recordings of the proceedings.

### **Ground of Appeal #3—The Mid-Trial Addition of Joint Criminal Enterprise**

40. The remaining Judges rejected Mr. Nzirorera’s argument that the trial should be re-started because 8 of 13 witnesses testified before the indictment was amended to add the joint criminal enterprise form of liability. The Judges held that Mr. Nzirorera was on notice from the Prosecutor’s pre-trial brief that he must defend against the joint criminal enterprise form of liability even though it had not been alleged in the indictment.<sup>37</sup>

41. This ruling is wrong as a matter of law and factually unfair.

42. It is well settled in the jurisprudence of the Tribunals that the joint criminal enterprise form of liability must be alleged in the indictment.<sup>38</sup> Therefore, the remaining Judges have erred as a matter of law in their conclusion that Mr. Nzirorera should have defended against the joint criminal enterprise form of liability simply because it was contained in the Prosecutor’s pre-trial brief.

43. This error is particularly unfair because Mr. Nzirorera specifically made a motion before commencement of the trial requesting the Trial Chamber clarify whether joint criminal enterprise was in the case or not.<sup>39</sup> During a status conference before the trial commenced, counsel for Mr. Nzirorera reiterated his request:

“I understand very clearly Mr. Webster intends to prosecute under joint criminal enterprise, but he can't because the jurisprudence says that it has to be in the indictment. It's not good enough for it to be in the pre-trial brief. The indictment is an instrument for which there is a confirmation process. The Prosecutor can't decide what he

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<sup>37</sup> Impugned Decision at para. 69

<sup>38</sup> *Prosecutor v Krnojelac*, No. IT-97-25-A (17 September 2003), paras 142-44 (upholding the Trial Chamber’s decision that the “extended” form of joint criminal enterprise was not part of the case where, although included in the Pre-Trial brief, it was not contained in the Indictment); and *Prosecutor v Simic et al*, No. IT-95-9-T (17 October 2003), paras 146 and 155 (noting that “Trial Chambers have refused to rely on an “extended” form of joint criminal enterprise in the absence of an amendment to the Indictment expressly pleading it,” and refusing to apply it in its case.)

<sup>39</sup> *Notice of Intention to Make Oral Motion to Preclude Reference to or Reliance Upon “Extended” form of Joint Criminal Enterprise Liability* (24 November 2003); Transcript of 27 November 2003 Status Conference at pg. 10.

wants to charge in an indictment by simply filing a pre-trial brief, otherwise it would make the confirmation process meaningless. So we need to know from the Trial Chamber, is this Trial Chamber, as a matter of law, telling us that there is joint criminal enterprise that we have to defend against, because the jurisprudence says it has to be in the indictment and we all agree it's not.”<sup>40</sup>

44. Despite these repeated pleas, the Trial Chamber declined to rule on the motion.<sup>41</sup> Now, the remaining Judges claim that Mr. Nzirorera should have defended against joint criminal enterprise liability even though it was not alleged in the indictment.

45. This decision of the remaining Judges on 16 July 2004 is ever the more perplexing because the day before, on 15 July 2004, the same Judges reached the opposite conclusion in their *Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment* in the case of *Prosecutor v Zigiranyirazo*.<sup>42</sup>

46. There, the Trial Chamber cited *Prosecutor v Mrksic*<sup>43</sup> for the principle that “the prosecution cannot cure a defective indictment by its supporting material and pre-trial brief,” and went on to say:

“The Chamber reiterates that the Prosecutor’s right to cure—in exceptional cases—the lack of precision in an indictment does not imply that all of his accusatory instruments are equivalent. The indictment remains the primary accusatory instrument and all material aspects must be pleaded in it with sufficient particularity.”<sup>44</sup>

47. There is no explanation for why Mr. Zigiranyirazo is entitled to a specific indictment including details of the joint criminal enterprise allegations and Mr. Nzirorera is supposed to have proceeded to defend himself solely on the allegations of joint criminal enterprise found in the Prosecutor’s pre-trial brief. One can only assume from the dichotomy that the remaining Judges simply want to continue Mr. Nzirorera’s trial at all costs. But the Appeals Chamber has recently reversed a decision where a Trial

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<sup>40</sup> Transcript of 27 November 2003 Status Conference at page 26

<sup>41</sup> Transcript of 27 November 2003 Status Conference at page 28

<sup>42</sup> No. ICTR-01-73-I

<sup>43</sup> No. IT-95-13/1, *Decision on Form of the Indictment* (19 June 2003) at para 13

<sup>44</sup> paras 49-50

Chamber reached different results when applying the same issue to different accused,<sup>45</sup> and it should reverse this decision as well.

48. This clear error of law invalidates their decision to continue the trial. Five witnesses testified under the old indictment to crimes committed by Andre Rwamakuba, a Minister from the MDR party, at a hospital in Butare, in the south of Rwanda. Mr. Nzirorera, the Secretary-General of the MRND party from Ruhengeri, in the north of Rwanda, had no concern with the alleged acts of Rwamakuba under the old indictment and made no effort to investigate, prepare, or contest these allegations. It was only when the amended indictment was allowed, after these witnesses had testified, that liability for the acts of Rwamakuba first attached to Mr. Nzirorera.<sup>46</sup>

49. Therefore, because the remaining Judges erred as a matter of law in concluding that Mr. Nzirorera should have defended against the joint criminal enterprise allegations contained only in the pre-trial brief, their decision to continue the trial should be reversed.<sup>47</sup>

### **The Appeals Chamber Should Decide that the Trial be Re-Started**

50. In light of the legal errors made by the remaining Judges, the Appeals Chamber should decide the matter itself.<sup>48</sup> The following chart summarizes the circumstances in favor and against continuing the trial:

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<sup>45</sup> *Prosecutor v Bizimungu et al*, No. IT-99-50-AR73.3 and 4, *Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence* (15 July 2004) at paras 21-24.

<sup>46</sup> The same holds true for the other accused. See Ngirumpatse's *Motion to Recall Witness GBG* (15 April 2004)

<sup>47</sup> Since the remaining Judges are operating under the view that Mr. Nzirorera should have defended against the joint criminal enterprise allegations even though not in the indictment, they are unlikely to allow any of these witnesses to be recalled.

<sup>48</sup> *Prosecutor v Sainovic & Ojdanic*, No. IT-99-37-AR65 (30 October 2002) at para.12; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-AR15bis, *Dissenting Opinion of Judge Hunt* (24 September 2003) at para. 35

Pro	Con
1. Inconvenience to witnesses and victims <sup>49</sup>	1. Absence of video-recordings and loss of ability to assess demeanor <sup>50</sup>
2. Judicial economy <sup>51</sup>	2. 8 of 13 witnesses testified under obsolete indictment <sup>52</sup>
3. More expeditious trial <sup>53</sup>	3. Inadequate and untimely disclosure for all but 1 witness <sup>54</sup>
4. Non-disturbance of judicial decisions <sup>55</sup>	4. Admission of new material during trial testimony <sup>56</sup>
	5. Limitation on cross-examination <sup>57</sup>
	6. Conduct of sessions in absence of accused and in secret <sup>58</sup>
	7. Violation of Rule 15 <i>bis</i> (A) <sup>59</sup>
	7. Preclusion of right to challenge nature of armed conflict <sup>60</sup>
	8. Taking testimony before disposing of preliminary motions in violation of Rule 72(A) <sup>61</sup>
	9. These and other rulings tainted by allegations of the appearance of bias against the Presiding Judge <sup>62</sup>
	10. Risking a mistrial later because no

<sup>49</sup> Impugned Decision at para. 83

<sup>50</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras. 49-54

<sup>51</sup> Impugned decision at paras. 107-112

<sup>52</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 31-48

<sup>53</sup> Impugned Decision at para 109

<sup>54</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 4-27

<sup>55</sup> Impugned Decision at para 110

<sup>56</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 28-29

<sup>57</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras. 57-63

<sup>58</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 64-70

<sup>59</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 71-73

<sup>60</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 74-78

<sup>61</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 79-85

<sup>62</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at para 55

second substitution can be made  
under Rule 15 *bis* (D)<sup>63</sup>

51. Both quantitatively and qualitatively, the interests of justice cannot be said to favor a continuation of this trial, plagued as it has been with disclosure violations, mid-trial amendment of the indictment, controversial evidentiary rulings, and culminating with the resignation of the Presiding Judge amid allegations of a close personal and professional relationship with one of the prosecutors on the trial team.

52. Mr. Nzirorera does not seek to unduly prolong his trial. He just wants a trial that is fair. “The interests of justice cannot be served where the accused is denied a fair trial.”<sup>64</sup>

53. The Appeals Chamber should quash the decision of the remaining Judges and order that the trial begin anew.

Respectfully submitted,

PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

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<sup>63</sup> *Joseph Nzirorera’s Reply in Support of Restarting His Trial* (12 July 2004) at para. 4

<sup>64</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-AR15bis, *Dissenting Opinion of Judge Hunt* (24 September 2003) at para. 16

# **ANNEX “A”**

## PREJUDICE CHART

Event	Prejudice
<i>First Trial Session</i>	
1. Opening Statement	<p>a) Did not address joint criminal enterprise since it was not part of indictment at that time<sup>65</sup></p> <p>b) Represented that Witness GBU would not be called as a witness not knowing that Witness GBU was actually the same person as Witness GAO in <i>Kajelijeli</i> trial as OTP had not disclosed all of his prior testimony.<sup>66</sup></p> <p>c) Did not address statements of the accused contained in OTP exhibits as OTP did not provide copies of these statements or other exhibits on its list until June 2004.<sup>67</sup></p>
2. Witness Antonio Lucassen	<p>a) Could not cross-examine him on the contents of the videotape he made while touring the crime scenes with OTP witnesses because it was not disclosed until after his testimony.<sup>68</sup></p>
3. Witness GBG <sup>69</sup>	<p>a) If given an appropriate amount of time for cross-examination, Mr. Nzirorera would have established the following facts:</p> <p><u>The alleged meeting at Gisesero:</u></p> <p>i) In his written statement about this meeting, the witness said:</p>

<sup>65</sup> Request to give a supplemental opening statement after amended indictment was approved was denied by the Trial Chamber, (Transcript of 1 April 2004 at pg 3)

<sup>66</sup> Transcript of 27 November 2003 at page 44

<sup>67</sup> See *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras. 23-27

<sup>68</sup> *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at para 10.

<sup>69</sup> See *Offer of Proof in Support of Motion to Recall Witness GBG* (8 December 2003) and *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at para 28, 57-58

“I heard a speech by Joseph Nzirorera, whom I knew as a prominent figure occupying an important political office. In his speech, he said that he was going to form a group of Interahamwe youths to search for Intokanyi accomplices from among the people.”

ii) The witness said nothing in his statement about Nzirorera promising to provide uniforms, vehicles, or weapons to the Interahamwe.

iii) The witness was questioned extensively about this alleged meeting during his testimony in *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T. (12-17 July 2001). During that testimony he never claimed that Nzirorera had promised to provide vehicles, or weapons to the Interahamwe.<sup>70</sup>

iv) During his direct testimony, the witness claimed that Nzirorera said that some of the accomplices had already been found, but it was necessary to find the rest. In his written statement, the witness attributed this statement to Kajelijeli.<sup>71</sup>

v) The witness also attributed the promise to provide uniforms to Kajelijeli in his written statement, not to Nzirorera.<sup>72</sup>

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<sup>70</sup> Transcript of 12 July 2001 at page 39.

<sup>71</sup> See Statement of Witness GBG, attached to *Offer of Proof in Support of Motion to Recall Witness GBG* (8 December 2003) at Annex “A”, page 1, para. 3

<sup>72</sup> *Id.*, Annex A at page 1, para 3

Distribution of Weapons:

i) In his testimony, witness GBG claimed to have observed Mr. Nzirorera give a pistol to a man named Muhumbo.

ii) In his statement, Witness GBG stated that he had observed Muhumbo with a weapon at the Interahamwe “headquarters”, however, he never claimed that he had witnessed Nzirorera give him the weapon.<sup>73</sup>

iii) Further, Witness GBG stated explicitly in his statement as to the Interahamwe that: “I never witnessed the training or the manner in which they obtained their weapons.”<sup>74</sup>

iv) Witness GBG never testified to seeing Nzirorera distribute weapons to Muhombo or anyone else in his testimony at the *Kajelijeli* trial.

v) The defence never had the opportunity to ask the witness who else he observed at the Isimbi building when Nzirorera distributed the weapon to Muhombo, who was with him when he made the observation, and the place, distance, and conditions from where he made his observations. This deprived the defence of the opportunity to identify other witnesses who could contradict the testimony of witness GBG, or to cast doubt upon his credibility if he cannot name another person there.

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<sup>73</sup> Id, Annex A, at page 1, para 3

<sup>74</sup> Id, Annex A at page 2, para 7

Providing of MINITRAPE truck:

- i) In his testimony, witness GBG claimed to have observed a truck of the Ministry of Public Works had been given to the Interahamwe for their use in 1993.
- ii) The witness had made no mention of this in his statement or in his testimony in the *Kajelijeli* trial.
  
- iii) Mr. Nzirorera had not been Minister of Public Works since 1990 and had no means or opportunity to provide the Interahamwe with such a vehicle.
  
- iv) Because this surfaced for the first time during GBG's trial testimony, the defence had no opportunity to investigate this allegation.

Distribution of Uniforms:

- i) In his testimony, witness GBG claimed to have observed Mr. Nzirorera distribute uniforms to the Interahamwe at their "headquarters".
  
- ii) In his statement, he attributed this solely to Kajelijeli.
  
- iii) In his testimony at Kajelijeli's trial, Witness GBG testified that: "He [Kajelijeli] is the one who gave them the uniforms, and I saw myself, as he gave the uniforms, what I am saying is what I personally saw. It is not what somebody else told me."<sup>75</sup>

Nzirorera at ISAE:

- i) In his testimony, witness GBG claimed to have observed Mr. Nzirorera on the road, meeting with Mr. Kajelijeli while witness GBG and other Tutsis were taking refuge

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<sup>75</sup> Transcript of 12 July 2001 at page 53

at the ISAE school. He testified that immediately thereafter, Kajelijeli came to the ISAE and forced the refugees to leave.

ii) Witness GBG never linked Mr. Nzirorera to the displacement of the refugees at the ISAE, either in his statement to the ICTR or his sworn testimony in the *Kajelijeli* trial.

iii) When describing the departure of the refugees from the ISAE in his statement, witness GBG said: “A time went by and Kajelijeli came to force us out of the institute, saying that the institution was due to open soon and we had to leave the premises. When we refused to move, he had us removed by his armed gendarmes.”

iv) The buildings at the ISAE from where GBG would have made his observations are a considerable distance from the road and it is questionable at best if he had the ability to see Mr. Nzirorera or Mr. Kajelijeli on the road.

v) Witness GBG testified that the refugees were at ISAE for most of the year of 1992. At the *Kajelijeli* trial, he testified they were there for only three weeks.<sup>76</sup>

vi) Had Mr. Nzirorera been able to question the witness about the dates he was at ISAE and made this alleged observation, he may have been able to refute this testimony with proof that he was elsewhere at the time.

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<sup>76</sup> Transcript of 16 July 2001 at page 108

Events at Munyemvano's Compound:

i) Witness GBG testified that Kajelijeli began the assault on Munyemvano's compound by shooting one Gatyeteyi, a shooting that the witness clearly observed.

Two other eyewitnesses to this event. Prosecution witness ACM and defence witness RHU-25 testified in the *Kajelijeli* trial that they observed a man named Felix Ndayambaje shoot Gatyeteyi.<sup>77</sup>

4. Witness GBV<sup>78</sup>

- a) On 8 August 2003, the Trial Chamber ordered OTP to disclose all witness statements within 15 days.<sup>79</sup>
- b) Rule 66(A)(ii) required disclosure of all witness statements 60 days before the commencement of trial.
- c) It is undisputed that OTP violated both the order and the Rule.
- d) The witness was not listed as a witness in OTP's pre-trial brief filed on 15 March 2002. Mr. Nzirorera first learned he would be a witness on 21 October 2003—a month before the trial.
- e) All of his prior statements were not disclosed until 21 October 2003, two months after the deadline established by the Trial Chamber's order of 8 August and one month after the deadline established by Rule 66(A)(ii)

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<sup>77</sup> Transcript of 12 December 2001 at page 74(ACM) and Transcript of 21 November 2002 at page 12 (RHU-25). The Trial Chamber in *Kajelijeli* ultimately found that the allegation that Kajelijeli shot Gatyeteyi to not have been proved. *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T (1 December 2003) at para. 595.

<sup>78</sup> See *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 11, 28

<sup>79</sup> *Decision on Motion for Disclosure of Witness Statements* (8 August 2003)

- f) Mr. Nzirorera lacked sufficient time to investigate his allegations and his background and his cross-examination was hindered by not having specific facts with which to confront the witness.
- g) Since his testimony, Mr. Nzirorera's investigators have interviewed many people who say that the meetings testified to by Witness GBV never occurred.
- h) Witness GBV was also allowed to testify to the killings of Bagogwe Tutsis in 1991, a new matter not contained in his statement or alleged in the indictment.<sup>80</sup>
- i) Mr. Nzirorera had insufficient notice of this topic and had not conducted any investigation or preparation.
- j) Information obtained from two leaders of the Interahamwe since GBV testified indicates that the Interahamwe were not involved in those attacks.

- 5. Witness RO
- 6. Witness GIO
- 7. Witness HF
- 8. Witness TM<sup>81</sup>

- a) These witnesses address allegations that Dr. Rwamakuba participated in killings at Butare Hospital.
- b) Because the joint criminal enterprise form of liability was not charged in the indictment at the time they testified, Mr. Nzirorera had no reason to concern himself with their credibility.

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<sup>80</sup> Transcript of 4 December 2003 at pages 8-10

<sup>81</sup> See *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 43-45

- c) He therefore conducted no investigation and engaged in no preparation such as to enable him to conduct a competent cross-examination on the substance of their allegations—for which he can now be convicted under the joint criminal enterprise form of liability subsequently added to the indictment.

*Second Trial Session*

9. Witness GFA<sup>82</sup>

- a) On 8 August 2003, the Trial Chamber ordered OTP to disclose all witness statements within 15 days.<sup>83</sup>
- b) Rule 66(A)(ii) required disclosure of all witness statements 60 days before the commencement of trial.
- c) It is undisputed that OTP violated both the order and the Rule.
- d) The witness was not listed as a witness in OTP's pre-trial brief filed on 15 March 2002. Mr. Nzirorera first learned he would be a witness on 21 October 2003—a month before the trial.
- e) All of his prior statements were not disclosed until March 2004, seven months after the deadline established by the Trial Chamber's order of 8 August and six months after the deadline established by Rule 66(A)(ii).
- f) Eight statements made by Witness GFA to Rwandan authorities were not disclosed until after the witness had completed his direct examination and on the eve of cross-examination.

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<sup>82</sup> See *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras. 12-14, 28

<sup>83</sup> *Decision on Motion for Disclosure of Witness Statements* (8 August 2003)

- g) During his cross-examination, Witness GFA testified to having made additional statements which were not disclosed. One of those statements has now been disclosed by OTP in June, 2004 in Kinyarwanda.<sup>84</sup>
- h) Witness GFA testified about the 15 November 1992 MRND rally at Ruhengeri Stadium at which President Habyarimana spoke. The defence had been requesting disclosure of the videotape of this meeting for more than one year, so as to have an accurate record of what was actually said.<sup>85</sup> According to Witness GFA, President Habyarimana encouraged the Interahamwe to join him in fighting the “Inkotanyi”.<sup>86</sup>
- i) OTP finally disclosed this videotape on the day before Witness GFA started testifying.<sup>87</sup> The videotape shows, contrary to Witness GFA’s testimony, that President Habyarimana encouraged the Interahamwe to join him in campaigning for re-election.<sup>88</sup> The translation of the videotape, including the speech of President Habyarimana, the accused Ngirumpatse, and others still has not been completed.
- j) During his testimony, Witness GFA

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<sup>84</sup> The defence is unable to assess the need for further cross-examination based upon this new disclosure until the statement is translated.

<sup>85</sup> See *Motion for Inspection of Videotapes of MRND Meetings or in Which the Accused Appear* (15 December 2003) at para. 11

<sup>86</sup> Transcript of 30 March 2004 at page 20

<sup>87</sup> Transcript of 30 March 2004 at page 21

<sup>88</sup> Transcript of 13 April 2004 at pages 6-8

was allowed to testify to an allegation not contained in any of his prior statements; that the accused Ngirumpatse had personally signed his Interahamwe membership card.<sup>89</sup>

- k) The defence had no opportunity to investigate or prepare for cross-examination on this new material.
- l) Since the testimony was given, the defence has been able to determine that officers of the National Interahamwe Committee indicate that the membership cards were signed by the President of the Interahamwe and not Mr. Ngirumpatse.
- m) The defence is still investigating to attempt to locate the further statements Witness GFA claims he made to Rwandan officials.

10. Witness GBU<sup>90</sup>

- a) On 8 August 2003, the Trial Chamber ordered OTP to disclose all witness statements within 15 days.<sup>91</sup>
- b) Rule 66(A)(ii) required disclosure of all witness statements 60 days before the commencement of trial.
- c) It is undisputed that OTP violated both the order and the Rule.
- d) The witness was not listed as a witness in OTP's pre-trial brief filed on 15 March 2002. Mr. Nzirorera first learned he would be a witness on 21 October 2003—a month before the trial.

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<sup>89</sup> Transcript of 31 March 2004 at pages 24-27

<sup>90</sup> See *Joseph Nzirorera's Submissions in Support of Restarting His Trial* (6 July 2004) at paras 15-17, 28, 73

<sup>91</sup> *Decision on Motion for Disclosure of Witness Statements* (8 August 2003)

- e) All of his prior statements were not disclosed until April 2004, eight months after the deadline established by the Trial Chamber's order of 8 August and seven months after the deadline established by Rule 66(A)(ii).
- f) On 19 December 2003, the prosecution disclosed for the first time that Witness GBU had testified in the case of *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, under a different pseudonym. Mr. Nzirorera applied for the closed session testimony and exhibits under seal for this witness on 22 December 2003. However, the prosecution did not respond to this motion until 24 February 2004 (a violation of Rule 73(E))
- g) Consequently, the Trial Chamber in the *Kajelijeli* case did not rule on the motion until 8 March 2004, when it granted it. The closed session testimony and 7 statements made by witness GBU to Rwandan judicial authorities were disclosed for the first time on 15 March 2004. An additional two statements made to Rwandan authorities were disclosed by the prosecution on 13 April 2004—two days before the witness testified.<sup>92</sup>
- h) The witness was also allowed to testify to new material which was not contained in any of his statements—that Mr. Nzirorera threatened the local MRND President Niyoyita and that he ordered the killings at Rwankeri secteur of refugees from the ISAE<sup>93</sup>

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<sup>92</sup> Transcript of 15 April 2004 at pp 10-11

<sup>93</sup> Transcript of 15 April 2004 at pp 31-37

- i) As a result of the late disclosure of statements, and the new material contained in the trial testimony, Mr. Nzirorera had not investigated these matters and was not prepared to adequately cross-examine Witness GBU on them.
- j) Witness GBU's cross-examination took place in the absence of Judge Lattanzi. Mr. Nzirorera's motion to videotape the testimony was refused. As a result, only one of the remaining Judges will have had an opportunity to observe his demeanor, which was hostile, aggressive, and defensive.

#### 11. Overall Defence Strategy

- a) As a result of late disclosures of witness statements, exhibits, and frequent changes in the witness list, the defence has never had the opportunity to analyze the Prosecutor's case from the outset, plan a cohesive strategy, and use material from other prosecution witnesses to confront those who testify before all disclosure is made.
- b) Instead, this trial has been a series of frenetic sessions where the defence scrambled to digest last minute disclosures and struggled to prepare for the following day, let alone for the trial as a whole.
- c) As a result, Mr. Nzirorera has not received a fair trial-that is the ultimate prejudice from this long list of particulars.