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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

Or: ENG

TRIAL CHAMBER II

Before: Judge William H Sekule, *Presiding*
Judge Arlette Ramaroson

Registrar: Mr Adama Dieng

Date: 15 July 2003

The PROSECUTOR *v* Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T
The PROSECUTOR *v* Sylvain NSABIMANA & Alphonse NTEZIRYAYO
Case No. ICTR-97-29A&B-T
The PROSECUTOR *v* Joseph KANYABASHI
Case No. ICTR-96-15-T
The PROSECUTOR *v* Elie NDAYAMBAJE
Case No. ICTR-96-8-T

[Joint Case No. ICTR-98-42-T]

DECISION

IN THE MATTER OF PROCEEDINGS UNDER RULE 15*BIS*(D)

Prosecution Counsel
Silvana ARBIA
Jonathan MOSES
Gregory TOWNSEND
Adesola ADEBOYEJO
Manuel BOUWKNECHT (*Case Manager*)

Defence Counsel for Ndayambaje
Pierre BOULE
Defence Counsel for Kanyabashi
Michel MARCHAND
Michel BOYER
Defence Counsel for Nyiramasuhuko
Nicole BERGEVIN
Guy POURPART
Defence Counsel for Ntahobali
Duncan MWANYUMBA
Normand MARQUIS
Defence Counsel for Nsabimana
Josette KADJI
Charles Patie TCHACOUNTE
Defence Counsel for Nteziryayo
Titinga Frédéric PACERE
Richard PERRAS

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the 'Tribunal'),

SITTING as Trial Chamber II composed of Judges William H SEKULE, *Presiding*, and Arlette RAMAROSON (the 'Chamber'), pursuant to Rule 15*bis*(D) of the Rules of Procedure and Evidence;

RECALLING that

(a) The joint trial of the cases of the *Prosecutor v Nyiramasuhuko* and five other Accused[1] (the '*Butare* Cases') started on 12 June 2001 before Judge William H SEKULE, *Presiding*, Judge Winston C Matanzima MAQUTU, and Judge Arlette RAMAROSON;

(b) Following the elections of the Tribunal's judges at the UN General Assembly on 31 January 2003 for the new mandate beginning on 25 May 2003, Judge Maqutu was not re-elected, with his term of office due to expire on 24 May 2003;

(c) On 26 March 2003, President Navanethem PILLAY (as she then was) wrote to the UN Secretary-General for purposes of requesting the Security Council to, among other things, extend Judge Maqutu's term at the Tribunal in order to enable him finish the trial of the *Butare* Cases, the *Kamuhanda* Case and the *Kajelijeli* Case, all of which are part-heard trials on the panel of which Judge Maqutu sat;

(d) In the meantime, in an urgent communication dated 1 May 2003, President Pillay caused the Defence Counsel in the *Butare* Cases to be asked whether they would give their consent to the possible substitution of a new judge to replace Judge Maqutu, under the old Rule 15*bis*(C), for purposes of continuing the trial of the *Butare* Cases;

(e) In their responses to President Pillay's communication of 1 May 2003, none of the Accused gave the consent in question;

(f) On 19 May 2003, the Security Council passed Resolution 1482, *inter alia*, extending Judge Maqutu's term for purposes of finishing only the *Kamuhanda* and the *Kajelijeli* trials—but not the *Butare* trial;

(g) In his capacity as the Presiding Judge in the *Butare* Cases, Judge Sekule formally reported to President Pillay on 21 May 2003 that as of 24 May 2003 Judge Maqutu would be unable to sit in the *Butare* Cases as his mandate for that case would expire on that date;

(h) On 26 May 2003, Judge Erik MØSE was elected the new President of the Tribunal, following the expiry of the tenure of Judge Pillay as President;

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(i) On 27 May 2003, Rule 15*bis* was amended, empowering the remaining judges of a Trial Chamber, under the new Rule 15*bis*(D), to decide to continue a part-heard trial with a substitute judge if, taking all the circumstances into account, they determined unanimously that it served the interest of justice so to continue;

(j) On 28 May 2003, President Møse authorised the Trial Chamber to conduct routine matters, in conformity with Rule 15*bis*(F);

(k) Also on 28 May 2003, acting in his capacity as the Presiding Judge in the *Butare* Cases, Judge Sekule caused the Parties in the case to be informed that the resumption of the proceedings for the session of 9 June 2003 to 10 July 2003 would not take place as earlier scheduled and, therefore, Counsel should not come to Arusha and witnesses not be brought; and that the Parties would be informed in due course of any further scheduling;

(l) On 6 June 2003, President Møse wrote enquiring whether the Parties would be willing to reconsider their position and consent to a continuation of the trial with a judge replacing Judge Maqutu, in view of the fact that the Security Council had actually, finally declined to extend Judge Maqutu's mandate for purposes of finishing the trial of the *Butare* Cases. And on 10 June 2003, President Møse supplemented his communication of 6 June 2003 by requiring the Parties to communicate their position by 16 June 2003;

(m) In response to President Møse's communication of 6 June 2003 (as amended on 10 June 2003), Defence Counsel for the Accused Sylvain NSABIMANA and the Prosecution indicated their consent to continue the trial with a substitute judge, one Defence Counsel did not consent, while the other Defence Counsel stated that the question posed to them was so important that they would need to consult extensively with their clients before making a decision;

(n) On 19 June 2003, President Møse communicated to Counsel an extension of time (to 25 June 2003) within which to indicate their positions, as well as his assurances that the administrators of the UN Detention Facility in Arusha would extend reasonable cooperation to Counsel, in order to enable Counsel to consult with their clients by telephone. According to President Møse, the financial costs of a visit by Defence Counsel to the UNDF to have face-to-face discussions with their clients would be very high, noting that it would appear sufficient that arrangements are made to ensure ample time for consultations (by telephone) between Counsel and client;

(o) In the meantime, certain Defence Counsel filed motions, with the Prosecution responding to at least one of those motions, engaging the question of the jurisdiction of the Chamber to proceed in the circumstances;

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(p) On 25 June 2003, in view of the motions of the Parties indicated above, Judge Sekule caused the Parties to be informed that pending the decision on which way to go under Rule 15*bis*, other proceedings in the case are at a standstill; and that the Parties would be informed of any further scheduling in respect of these cases;

(q) On 26 June 2003, President Møse communicated to Judge Sekule and Judge Ramaroson (the 'Remaining Judges' in the trial) that only one of the six Accused gave consent to continue the trial with a substitute judge, while the remaining five Accused were opposed to continuing the trial in that manner;

(r) On the same 26 June 2003, Presiding Judge Sekule and Judge Ramaroson issued a Scheduling Order, inviting submissions from the Parties on whether or not it is in the interest of justice to continue the trial with a substitute judge under Rule 15*bis*(D);

(s) On 3 July 2003, Presiding Judge Sekule and Judge Ramaroson issued a Further Scheduling Order clarifying that there was not yet a decision on the question whether the amended Rule 15*bis*(D) is applicable to the *Butare* Case in the present circumstances: this Further Scheduling Order was necessitated by certain processes filed since the Scheduling Order of 26 June 2003 in which it had been submitted that the Scheduling Order of 26 June 2003 warranted the conclusion that the Chamber had settled the question whether the new Rule 15*bis*(D) applies for purposes of that Scheduling Order, thereby rendering that particular question moot;

BEING NOW SEISED of the questions whether Rule 15*bis*(D) (as amended during the 13th Plenary Session held on 26 and 27 May 2003) is applicable to the *Butare* Case in the circumstances; whether the operation of Rule 15*bis*(D) will prejudice the rights of the Accused; and, whether it is in the interest of justice to continue the trial with a substitute judge under the amended Rule 15*bis*(D);

NOTING that in a communication dated 11 June 2003, the Defence of the Accused Sylvain NSABIMANA consented to the continuation of the trial with a substitute judge, provided that the substitute judge is given sufficient time to become familiar with the record of proceedings thus far;

TAKING INTO ACCOUNT the submissions in the following processes as filed by the rest of the Accused, all of whom have withheld consent (the 'Non-Consenting Accused'), and as filed by the Prosecution, to the extent that those submissions are relevant to the questions now at issue:

(i) Ntahobali's '*Soumissions à la Chambre II faisant suite au "Scheduling Order in the Matter of Proceedings Under Rule 15*bis*(D)"*' filed on 3 July 2003;

(ii) Ntahobali's '*Réponse à la requête de Pauline Nyiramasuhuko en arrêt des procédures pour abus de procédures (délais déraisonnables et procès inéquitable)*' filed on 3 July 2003, in which he subscribes to the submissions made by Nteziryayo, Ndayambaje and Nyiramasuhuko, without identifying the particular documents containing those submissions;

(iii) Ntahobali's '*Requête d'extreme urgence d'Arsène Shalom Ntahobali visant l'arrêt des procedures et en déclaration de non applicabilité du nouvel amendement à l'article 15*bis *du règlement*' filed on 1 July 2003 ;

(iv) Nteziryayo's '*Réponse d'Alphonse Nteziryayo au* Scheduling Order in the Matter of Proceedings under Rule 15*bis*(D)' filed on 30 June 2003;

(v) Nteziryayo's '*Requête en extrême urgence d'Alphonse Nteziryayo aux fins de faire déclarer que l'article 15*bis*(C) et (D) du règlement de procédure et de preuve tel qu'amendé le 27 mai 2003 ne lui est pas opposable et requête, en conséquence, d'une ordonnance de recommencement du procès*' filed on 24 June 2003;

(vi) Nyramasuhuko's '*Requête de Pauline Nyiramasuhuko en arrêt des procédures pour abus de procédures (délais déraisonnables et procès inéquitable)*' filed on 25 June 2003;

(vii) Nyramasuhuko's '*Requête de Pauline Nyiramasuhuko aux fins de constater l'absence de juridiction sur sa personne et d'ordonner l'arrêt des procédures*' filed on 27 June 2003;

(viii) Ndayambaje's '*Réponse d'Elie Ndayambaje au "Scheduling Order in the Matter of Proceedings Under Rule 15*bis*(D)"*' filed on 3 July 2003, in which Ndayambaje reiterated his submissions in his '*Requête afin de reconnaître l'illégalité de la non prolongation du mandat du juge Winston Churchill M. Maqutu et afin de déclarer l'article 15*bis*(D) tel qu'amendé le 27 mai 2003, non applicable à la situation actuelle du requérant*' filed on 24 June 2003;

(ix) Ndayambaje's '*Requête afin de reconnaître l'illégalité de la non prolongation du mandat du juge Winston Churchill M. Maqutu et afin de déclarer l'article 15*bis*(D) tel qu'amendé le 27 mai 2003, non applicable à la situation actuelle du requérant*' filed on 24 June 2003;

(x) Kanyabahsi's '*Réponse de Joseph Kanyabashi à l'ordonnance intitulée "Scheduling Order in the Matter of Proceedings Under Rule 15*bis*(D)"*' filed on 4 July 2003;

(xi) Kanyabashi's '*Réplique à la réponse du procureur relativement à la requête demandant que le procès se poursuive devant la Chambre II, composée des honorables Juges Sekule, Maqutu et Ramaroson et en arrêt des procédures*' filed on 30 June 2003;

(xii) Kanyabashi's '*Requête en extrême urgence de Joseph Kanyabashi demandant qu'il soit statué en priorité sur sa requête déposée le 16 juin 2003 et quant à l'applicabilité de l'article 15bis du règlement, tel qu'amendé le 27 mai 2003*' filed on 27 June 2003;

(xiii) Kanyabashi's '*Requête demandant que le procès se poursuive devant la Chambre II, composée des honorables Juges Sekule, Maqutu et Ramaroson et en arrêt des procédures*' filed on 16 June 2003;

(xiv) the 'Prosecutor's Submissions in respect of the Matters Raised in the Scheduling Order dated 26 June 2003' filed on 3 July 2003, in which the Prosecution deals with the submissions made by the Defence in all the foregoing processes to the extent that is relevant to the two questions involved in the present proceeding;

(xv) the 'Prosecutor's Response to Ntahobali's Motion for a Stay of Proceedings and Order for the Non-Applicability of the Newly Amended Rule 15*bis*' filed on 3 July 2003;

(xvi) the 'Prosecutor's Response to Kanyabashi's Motion requesting Continuation of the Trial before Trial Chamber II Composed of Honourable Judges Sekule, Maqutu and Ramaroson and a Stay' filed on 20 June 2003;

(xvii) the 'Prosecutor's Response to Nteziryayo's Motion Seeking Appointment of Third Judge, Declaration that Amended Rule 15*bis* Should Not Apply and that the Former Rule 15*bis* Should be Given Effect' filed on 30 June 2003;

(xviii) the 'Prosecutor's Response to Kanyabashi's Urgent Motion Seeking a Ruling in respect of His Motion dated 15 June and Declaration as to Whether the Amended Rule 15*bis* Should be Given Effect' filed on 30 June 2003;

(xix) the 'Prosecutor's Response to Ndayambaje's Motion Requesting Declaration that the Security Council Decision Not to Extend Judge Maqutu is Illegal, that the New Rule 15*bis* Should Not Apply and a Stay' filed on 30 June 2003;

(xx) the 'Prosecutor's Response to Nyramasuhuko's Motion for a Stay of Proceedings and Abuse of Process' filed on 30 June 2003;

(xxi) the 'Prosecutor's Response to Nteziryayo's Motion in Response to the Scheduling Order in the Matter of Proceedings under Rule 15*bis*(D)' filed on 1 July 2003;

(xxii) the 'Prosecutor's Response to Kanyabashi's Reply Requesting Continuation of the Trial before Trial Chamber II Composed of the Honourable Judges Sekule, Maqutu and Ramaroson and a Stay' filed on 2 July 2003;

SEEING FIT to indicate that the foregoing processes have been considered only to the extent that the submissions therein made are relevant for the narrow purposes of the present decision; those motions going beyond the present adjudication will be considered in due course;

HEREBY RENDERS ITS DECISION.

I. PRELIMINARY MATTERS

1. During the 13th Plenary Session of this Tribunal held on 26 and 27 May 2003, Rule 15*bis* was amended. The trial of the *Butare* Cases was pending at the time. Before the new amendment, accused persons in this Tribunal were able to force a part-heard trial to start afresh by simply withholding consent to continue the trial with a substitute judge, if one of the judges in the case was unable to continue sitting in the trial. The Rule 15*bis* in place before May 2003 provided as follows:

> (C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

2. Under the new Rule 15*bis* as amended on 27 May 2003, the accused may no longer force a part-heard trial to restart if one of the judges in the case is unable to continue sitting in the trial. The new rule now reads as follows:

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

3. In his document entitled '*Soumissions à la Chambre II faisant suite au* "Scheduling Order in the Matter of Proceedings Under Rule 15*bis*(D)"' filed on 3 July 2003, the Accused Ntahobali argues as a starting point that before dealing with the question whether or not it is in the interest of justice to continue the trial with a substitute judge under Rule 15*bis*(D), it is essential to settle the question whether that rule which was amended in May 2003 is applicable at all to the *Butare* Cases.

4. Ntahobali is quite right that there is a need first to settle the question as to the applicability of the new Rule 15*bis*(D).

5. Two additional preliminary points have been stated by the Defence. First, it has been submitted that given the Security Council's non-renewal of Judge Maqutu's mandate in the *Butare* Cases, the two judges remaining in the Chamber (the 'Remaining Judges') have lost jurisdiction to conduct proceedings, even for purposes of determining the narrow question of whether or not the new Rule 15*bis*(D) applies to the *Butare* Cases in the present circumstances.[2] And, secondly, some of the Non-Consenting Accused have submitted that a third Judge ought to be found to constitute a panel of three judges for purposes of determining the question of applicability of the new Rule 15*bis*(D);[3] while others have submitted that the proper forum to settle this preliminary question of the applicability of the new Rule 15*bis*(D) is the Bureau of the Tribunal.[4]

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[2] See '*Réponse de Joseph Kanyabashi à l'ordonnance intitulée "Scheduling Order in the Matter of Proceedings Under Rule 15*bis*(D)"*' filed on 4 July 2003. We note that in the 'Prosecutor's Response to Kanyabashi's Motion requesting Continuation of the Trial before Trial Chamber II Composed of Honourable Judges Sekule, Maqutu and Ramaroson and a Stay' filed on 20 June 2003, the Prosecution have argued that in the circumstances prevailing in the *Butare* Cases as of 20 June 2003 when they filed that response, 'under the new Rule 15*bis*, the remaining two judges from the Butare trial are unable to determine this *Motion* or any other pending *motion*, without a direction from the President of the Tribunal.' [Emphasis added.] (Para 6). It appears from the emphasized words that the Prosecution is not saying here that the Remaining Judges, faced with the question of application *vel non* of Rule 15*bis*(D), lack jurisdiction to determine the question of applicability of the new Rule 15*bis*(D) in the first place: rather, what the Prosecution appears to be submitting is that the Remaining Judges lack jurisdiction to adjudicate the entire Motion to which they were responding, being a wholesome Motion raising assorted issues including the repudiation of actions of the UN Security Council. (See para 8.)

[3] See '*Requête en extrême urgence d'Alphonse Nteziryayo aux fins de faire déclarer que l'article 15bis(C) et (D) du règlement de procédure et de preuve tel qu'amendé le 27 mai 2003 ne lui est pas opposable et requête, en conséquence, d'une ordonnance de recommencement du procès*' filed on 24 June 2003.

[4] See for example Ntahobali's '*Soumissions à la Chambre II faisant suite au* "Scheduling Order in the Matter of Proceedings Under Rule 15*bis*(D)"' filed on 3 July 2003,

(a) Does the Whole Chamber in a Part-heard Case Lose All Jurisdiction in Virtue of the Non-Renewal of the Mandate of One Judge?

6. Turning first to the submission that in virtue of the non-extension of Judge Maqutu's mandate the Remaining Judges have lost jurisdiction, we find this submission difficult to accept. In our view, the submission is not borne out by a proper construction of the Rules of the Tribunal. In the discussion of the applicability of the new Rule 15*bis*(D), one must consider the significance of Rule 6(C). The new Rule 15*bis*(D) gives the Remaining Judges the power to determine whether or not it is in the interest of justice to continue the part-heard trial with a substitute judge, where the accused withhold their consent in that regard. Since the new Rule 15*bis*(D) was amended while the *Butare* Case was pending, it means that one must look at Rule 6(C) which deals with the application of new amendments. And Rule 6(C) provides as follows:

> An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

7. We note that none of the Accused has attacked Rule 6(C).[5] Quite the contrary, they have relied on it to argue that the new rule is inapplicable since the *Butare* trial was pending when the new rule was adopted. Upon careful reading, however, it is apparent that Rule 6(C) requires *immediate* application of a new amendment even in pending cases, provided that the new amendment does 'not operate' to prejudice the right of the accused in a pending case. It follows, in our view, that the question whether the new rule is entirely and automatically excluded from application is a question that does not even arise, inasmuch as that question is based upon a construction of Rule 6(C). What is at issue really is how to *operate* the immediately applicable new amendment in a manner that does no prejudice to the rights of the accused in a pending case.[6] This construction leaves no room, in our view, for a separate legal proceeding to determine whether or not the new amendment is entirely and automatically excluded from application as a matter of law.

8. Moreover, to the extent that the applicability of Rule 15*bis*(D) arises as a separate question, it will only be a threshold or preliminary question to the larger question which the Remaining Judges must answer under Rule 15*bis*(D). In other words, noting that Rule 15*bis*(D) gives the Remaining Judges the power to decide whether or not it is in the interest of justice to continue a part-heard case with a substitute judge, the question of whether or not Rule 15*bis*(D) is applicable at all in the first place is clearly an incidental

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[5] As will be seen below, the legal foundations of Rule 6(C) are quite sound in law. The *presumption* against retrospective application of new law is only a rebuttable one: see *Wright v Hale* (1860) 39 LJ Ex 40, per Wilde B and *AG v Vernazza* [1960] AC 965, per Lord Denning.

[6] In *Prosecutor v Delalić & Ors* (*Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case*) dated 19 August 1998, an ICTY Trial Chamber applied recently amended rules to a pending case, determining that to do so would not cause prejudice to the rights of the accused. See also *Prosecutor v Delalić & Ors* (*Scheduling Order*) dated 10 September 1998; *Prosecutor v Furundzija* (*Scheduling Order*) dated 17 July 1998.

question to the main question. As such, it is an integral part of the process of answering the larger question, and thus, should be answered by the Remaining Judges seised of the main question.

9. Viewed in the foregoing manner, there is no scope for the submission that the Remaining Judges lack the jurisdiction to determine whether or not the new Rule 15*bis*(D) is applicable to the *Butare* Cases in the present circumstances. We therefore reject the submission.

(b) Is the Bureau or a Separate Panel of Three Judges the Proper Forum to Determine the Preliminary Question of Applicability of Rule 15bis(D)?

10. We next pass on the issue taken by the Non-Consenting Accused that the proper forum to settle this preliminary question is the Bureau of the Tribunal or a separate panel of three judges. Since we have decided that the Remaining Judges have jurisdiction to answer the question of applicability, and will do so, we see no need to pronounce on what other forums may be proper to decide the question.

II DOES RULE 15*BIS*(D) APPLY TO THE *BUTARE* CASES IN THE PRESENT CIRCUMSTANCES?

11. We will now consider the question whether the new Rule 15*bis*(D) is applicable to *Butare* Cases in the present circumstances.

12. The Non-Consenting Accused[7] argued almost in unison that since the new rule was adopted as the *Butare* trial was pending, it will be unlawful to apply it to the *Butare* Cases. They argue that to apply it will offend the presumption against retrospective application of legislation. And they base themselves on the provisions of Rule 6(C), arguing that to apply the new rule will result in prejudice to their rights as accused persons in a pending case.

13. In response to this position, the Prosecution argued that to apply the new rule does not offend the presumption against retrospective application of legislation; that the amendment is only of a procedural regulation; that Rule 6(C) will not be offended, for it is settled law that no party has a vested right in any particular course of procedure; and, that even a substantive right may be taken away retrospectively where the law clearly says so.

[7] Nsabimana did not make submissions in this regard. As he gave his consent pursuant to Rule 15*bis*(C), we do not take him to have taken a position in this debate either way.

14. We will discuss this matter under two broad subheadings: (a) the applicability *simpliciter* of the new rule, and (b) whether or not its application will prejudice the rights of the Accused in the pending *Butare* Cases.

(a) The Applicability Simpliciter *of the New Rule*

15. The question of whether or not Rule 15*bis*(D) is applicable is best answered by recalling here our view on the proper construction of Rule 6(C): to the effect that a new amendment is immediately applicable in a pending case. As we said, what Rule 6(C) seeks to prevent is the *operation* of such new amendment in a manner that prejudices the rights of the accused in a pending case. Hence, we are of the view that Rule 15*bis*(D) is immediately applicable to the *Butare* Cases in the present circumstances.

16. Notwithstanding the foregoing, the question whether or not prejudice will result to the Accused, pursuant to Rule 6(C), were the new rule to be applied immediately to the *Butare* Cases, still remains a relevant consideration here. That question will be examined in the next paragraphs.

(b) Whether or Not There is Prejudice to the Rights of the Accused in the Pending Butare *Cases Resulting From the Change in the Rules*

17. As indicated above, some of the Non-Consenting Accused have argued that under the old Rule 15*bis* in force at the start of the *Butare* trial, it was possible to continue a part-heard trial with a substitute judge *only* if the accused gave consent; that under the new Rule 15*bis*(D) the Remaining Judges now have the power to decide to continue the trial with a substitute judge where the accused withhold consent; and, that the mere fact of this change in the law amounts to prejudice to the Accused, for they have lost a 'right' they had when the trial started.

18. On this issue, we are persuaded by the Prosecution submission that no party has a vested right in any particular course of procedure.

19. For purposes of the presumption against retrospective application of laws, enactments which create, modify or abolish substantive rights or liabilities are to be distinguished from enactments which deal *purely* with practice and procedure before the courts. While the presumption may bar new enactments in the former class, it does not forbid, *prima facie*, the application of new rules of practice and procedure in pending cases.[8] In *Maxwell on Interpretation of Statutes*, the matter is stated as follows:

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[8] In *Ex parte Collett,* 337 US 55, 71, 69 S Ct 944, 93 L Ed 1207 (1949), the United States Supreme Court held that a revised judicial code providing that for the convenience of parties and witnesses, a District Court may transfer any civil action to any other district or division where it might have been brought, is a remedial provision applicable to pending actions. And in *Landgraf v USI Film Products*, 511 US 244, 114

> The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. *No person has a vested right in any course of procedure*, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode.[9] [Emphasis added.]

20. In *Wright v Hale*, Lord Penzance (Wright B as he then was), in a much quoted pronouncement, stated the principle as follows:

> The rule applicable in cases of this sort is that, when a new enactment deals with rights of action, *unless it is so expressed in the Act*, an existing right of action is not taken away. *But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act.*[10] [Emphases added.]

21. Two legal principles are clear from that pronouncement: (a) the presumption against retrospective application of new law does not, *prima facie*, forbid application of procedural enactments in pending cases, and (b) the presumption also does not operate where there is express provision giving the new law retrospective effect. Hence, the presumption against retrospective application of new law is a rebuttable one. In *AG v Vernazza*,[11] the House of Lords had occasion to pronounce upon the matter. As part of his opinion in that case, Lord Denning (sitting in the House of Lords at the time) wrote as follows:

> If the new Act affects Mr Vernezza's substantive rights, it will not be held to apply to proceedings which have already commenced, *unless a clear intention to that affect is manifested*, see *Colonial Sugar Refining Co Ltd v Irving* [*Footnote 27]. *But if the new Act affects matters of procedure only, then prima facie it applies to all actions, pending as well as future*: for, as Lord Blackburn said: "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be," see *Gardner v Lucas*. [**Footnote 28.] [Emphases added.]

S Ct 1483 (1994), the same court noted as follows at footnote 28: 'While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case. See, *eg, Dobbert v Florida,* 432 US 282, 293—294, 97 S Ct 2290, 2298—2299, 53 L Ed 2d 344 (1977); see also *Collins v Youngblood,* 497 US 37, 110 S Ct 2715, 111 L Ed 2d 30 (1990); *Beazell v Ohio,* 269 US 167, 46 S Ct 68, 70 L Ed 216 (1925).'

[9] St J Langan, *Maxwell on Interpretation of Statutes* (12th edn, 1969), p 222. See also G P Singh, *Principles of Statutory Interpretation* (8th edn, 2001), pp 404—406.

[10] *Wright v Hale* (1860) 39 LJ Ex 40, per Wilde B.

[11] [1960] AC 965. The facts are as follows. In April 1959, the Attorney-General obtained an order from the High Court, pursuant to the Supreme Court of Judicature Act 1925, declaring Mr Vernezza a vexatious litigant and prohibiting him from *instituting* new proceedings without leave. In May the Supreme Court of Judicature Act was amended and the High Court was given power also to prohibit the *continuance* of existing suits of a vexatious litigant without leave. Mr Vernezza appealed the prohibitive order of April and the Attorney-General used the opportunity of Mr Vernezza's appeal to ask the Court of Appeal to make an order under the new powers of the High Court to prohibit the continuance of existing suits of Mr Vernezza without leave. The House of Lords held that the Court of Appeal could indeed make that order under the new power.

[*] [1905] AC 369.

[**] (1878) 3 App Cas 582 at 603, HL.

22. We agree with these observations. We are mindful, however, that there may be occasion when changes in seemingly procedural laws may affect interests that are too fundamental to deem mere matters of procedure. In *Newell v The King*,[12] for instance, at issue was the applicability of a change in legislation whereby the jury may now convict by a majority of ten jurors, replacing the regime of unanimous verdict in place at the start of the trial. On appeal to the High Court of Australia, Latham CJ wrote as follows:

> The right to a jury is one of the fundamental rights of citizenship and not a mere matter of procedure ... and further, the right to have only the verdict of the full twelve was an essential part of the right to trial by jury which the accused had before the amendment was made. It is not merely a procedural matter.

23. Similarly, the regime of a statute of limitation (or *prescription*) is often regarded as something in the nature of procedure. Nonetheless, the courts will be less inclined to apply in a pending case a statute of limitation which has been amended so as to revive or extinguish the right to institute a proceeding or to take a critical step in it.[13] The decision of ICTR Trial Chamber II in *Prosecutor v Kajelijeli (Decision on Kajelijeli's Motion for Partial Acquittal Pursuant to Rule 98*bis*)* is consistent with this sensitivity to revival or extinguishment of rights under a statute of limitation. That case concerned the right of the Defence to bring a motion for acquittal at the end of the case for the prosecution. Under the version of Rule 98 in force from the beginning to the end of the case for the prosecution in the *Kajelijeli* trial, there was no time-limit within which the Defence could bring such a motion. But during the period of adjournment at the end of the case for the prosecution, the rule was amended and the new Rule 98*bis* now imposed a time-limit of seven days within which the accused must file a motion for acquittal. *Kajelijeli* filed his motion outside of that time-limit. The Chamber received Kajelijeli's motion for acquittal, holding that a strict application of the new Rule 98*bis* in the circumstances would prejudice the right of the accused.

24. We have cautioned ourselves accordingly.[14] We are, however, satisfied that notwithstanding the foregoing qualifications, the procedural ability of accused persons

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[12] (1936) 55 CLR 707. Newell was indicted in February 1936 in the Supreme Court of Tasmania (Australia) and charged with manslaughter. He was arraigned in March 1936 whereupon he pleaded 'not guilty' and pursuant to s 359 of the Criminal Code of Tasmania, the issues were then joined and he was deemed to have demanded that the issues thus raised should be tried by a jury and he was entitled to have a jury try those issues. The jury was then empanelled and he was duly tried. At the end of this trial, the jury did not agree on a verdict. He was thus put to a new trial and was granted bail. The new trial commenced in June 1936, but had to adjourn because of absence of a material witness. On 10 August 1936, the Jury Act 1936 came into force, removing the requirement of jury unanimity for purposes of conviction. Under the new Act, conviction required only a majority of ten jurors after two hours of deliberation.

[13] See G P Singh, *Principles of Statutory Interpretation* (8th edn, 2001), p 406—409.

[14] We have also noted the recent pronouncements of the United States Supreme Court in *Landgraf v USI Film Products*, 511 US 244, 114 S Ct 1483 (1994), in which they cautioned at footnote 29 that '[...] the mere fact that a new rule is procedural does not mean that it applies to every pending case', following their main pronouncement as follows:

> Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. For example, in *Ex parte Collett,* 337 US 55, 71, 69 S Ct 944,

under the old Rule 15*bis* to withhold consent and force the recommencement of a part-heard case in the circumstances of the *Butare* Cases does not qualify as a fundamental right of the *Newell* variety; nor does it belong to the order of the protection afforded under a statute of limitation, such as in *Kajelijeli (Decision on Kajelijeli's Motion for Partial Acquittal Pursuant to Rule 98*bis*)*.

25. Furthermore, even if the ability of accused persons under the old Rule 15*bis* to withhold consent and force the recommencement of a part-heard case were to be deemed a substantive right, it would still not be taken in isolation. There are other rights (even of the accused) and other interests of justice which must be considered; for it has long been recognised in both this Tribunal and the ICTY that the administration of justice does not demand an isolated view of any particular right of the accused person.[15] In our discussions below, we will review other considerations that put the rights of the accused in the proper legal context.

III DOES THE OPERATION OF RULE 15*BIS*(D) PREJUDICE ANY *SUBSTANTIVE* RIGHT OF THE ACCUSED?

26. The next question becomes this: Does the operation of the new Rule 15*bis*(D) put to prejudice any *substantive* rights of the Accused? This question logically arises from the conclusions in the previous section to the effect that the 'rights' contemplated by Rule 6(C) are only vested rights of a *substantive* nature—and not mere expectations that cases will be conducted in a certain way; and, that the Accused had no vested right in the purely procedural ability, now superceded, to withhold consent and force recommencement of the trial.

27. Before proceeding further, it is perhaps important to stress at this juncture that it should not be presumed, as the Parties appear to have done in their submissions, that the operation of Rule 15*bis*(D) will lead invariably to a decision by the Remaining Judges to continue the case with a substitute judge. It should be noted that it is also an operation of Rule 15*bis*(D), if after considering all the circumstances of the case, as they are required to do, the Remaining Judges (a) decide unanimously that it is not in the interest of justice to continue the case with a substitute judge, or (b) do not achieve unanimity in a decision to continue the case with a substitute judge.

28. In considering then whether or not the application of Rule 15*bis*(D) will prejudice any substantive right of the Accused, it is perhaps a starting point to recall the rights of

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952—953, 93 L Ed 1207 (1949), we held that 28 USC § 1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interests in matters of procedure. 337 US, at 71, 69 S Ct, at 952—953. [FN28] Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

[15] See for example *Prosecutor v Bagasora & Ors (Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses*) dated 5 December 2001 (Trial Chamber III), para 14; *Prosecutor v Tadic* (*Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*) dated 10 August 1995 (Trial Chamber) paras 24—27.

the Accused as contained in the Statute of the Tribunal. We do so by setting out the full text of Article 20 of the Statute which, under the title 'Rights of the Accused', provides as follows:

> **Article 20: Rights of the Accused**
>
> 1. All persons shall be equal before the International Tribunal for Rwanda.
> 2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
> 3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
>
> (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
>
> (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
>
> (g) Not to be compelled to testify against himself or herself or to confess guilt.

29. There is room, of course, to interpret other provisions of the Statute as affording other rights to the accused.

30. Looking at these provisions, however, it becomes difficult to state simply that applying Rule 15*bis*(D) will violate any substantive right of the Accused. Furthermore, proper administration of justice does not require a consideration of any of these rights in isolation, even where any such right is seen to be engaged. There are other important considerations which must be taken into account. All these important considerations, including any relevant right of the accused, fall to be taken into account in considering what the interest of justice requires in the circumstances.

31. It becomes clear then that the question whether the operation of the new Rule 15*bis*(D) will prejudice any *substantive* rights of the Accused may not be fully and efficiently considered without practically considering also the question which the Remaining Judges must answer within the terms of Rule 15*bis*(D) itself. That is to say: Is it in the interest of justice to continue the case with a substitute judge—or indeed to restart the case? The matter of prejudice to the accused person in a pending case is always a matter of interest to the administration of justice.

32. It is, thus, our view that the question of whether the operation of Rule 15*bis*(D) will prejudice the rights of the Accused pursuant to Rule 6(C) cannot be fully and efficiently considered in a vacuum devoid of a Rule 15*bis*(D) inquiry. In the following

discussion, therefore, we will consider together the question of prejudice to the substantive right of the Accused and the question of interests of justice.

IV TAKING ALL THE CIRCUMSTANCES INTO ACCOUNT, IS IT IN THE INTEREST OF JUSTICE TO CONTINUE THE CASE WITH A SUBSTITUTE JUDGE?

33. Rule 15*bis*(D) requires the Remaining Judges to take all the circumstances into account in order to decide whether or not it is in the interest of justice to continue the *Butare* trial with a substitute judge. The following then are the totality of the circumstances that we take into account in reaching our decision in this matter:

(a) We begin with the familiar consideration of speedy trial. Article 19(1) of the Statute of the Tribunal enjoins the Chamber to 'ensure that a trial is fair and expeditious.' Along with this, Article 20(4)(c) of the Statute gives to the Accused the right 'to be tried without undue delay'.

(b) In view of our obligation to consider *all the circumstances*, we cannot ignore the recent matter of *Prosecutor v Bagosora & Ors*[16] [the '*Military I*' Cases]. The procedural circumstances of that case are, in a sense, even more remarkable than those of the *Butare* Cases. In the *Military* Cases, the trial was transferred to a new Trial Chamber, and the entire bench was reconstituted with three fresh judges, after the case had commenced and two witnesses had completed their testimonies. But, notwithstanding that there was no procedure in the Rules for such *en banc* reconstitution of judges in a pending case, all of the Accused strongly argued for the case to be continued before the new Bench; the Prosecution, on the other hand, preferred the case to start afresh. As the Trial Chamber observed: 'All Defence Counsel expressed virtually identical positions, and subscribed to one another's submissions. Citing the lengthy detention of their clients, all Defence Counsel expressed their strong preference for, and consent to, resumption of the trial from the point of adjournment. [Footnote omitted.] Though neither the Statute nor the Rules directly address the issue at hand, continuation would be in the *interests of the Accused, of justice, and of judicial economy*. [*Footnote 6].' [Emphasis added.] In their decision to continue the case from where it stopped, the Trial Chamber pronounced as follows, among other things:

> *Substantial interests and important rights* subscribe the consent of the Accused here. The reason for consent, stated by Defence Counsel in open court, is the desire—indeed the

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[16] *Prosecutor v Bagosora & Ors (Decision on Continuation or Commencement* De Novo *of Trial)* dated 11 June 2003.

* Transcripts of 9 June 2003, pp. 8-9, 12. According to the estimates of one Counsel, the commencement *de novo* of the trial would mean to "throw through the window" almost 200.000 USD because of fees paid in connection with trial hearings to Counsel, co-Counsel, and Defence assistants (p. 8).

> right—of the Accused to be tried without undue delay. [**Footnote 13] Two of the Accused have been in the Tribunal's custody since the beginning of 1997, some six and a half years. *A decision that the rights of the Accused to a fair trial require a trial* de novo, *notwithstanding the preference of the Accused for a continuation, would impair their right to be tried without undue delay. Defence counsel insisted that their clients would suffer no prejudice from a continuation of proceedings. They argued forcefully that further delay would prejudice the rights of the Accused.* [***Footnote 14]. [Emphasis added.]

Surely, this decision in the *Military I* Cases is one juridical expression that may not be ignored when one is considering what may advance or impair 'the rights of the accused' and what is in the 'interest of justice', in what are at least similar circumstances as in the *Butare* Cases.

Similarly, in *Prosecutor v Blaškić*,[17] the ICTY President ordered the substitution of a judge after the conclusion of the case for the prosecution, with the consent of the Defence, enabling the trial to continue.[18] In that case the Defence also appeared to have been readier and more willing than the Prosecution to proceed with a substitute judge. It is a reasonable assumption that the Defence's readiness and willingness to continue the trial with a replacement judge must have been actuated by what was described in the *Military I* decision, noted above, as '*substantial interests and important rights*' that *subscribed the consent of the Accused.*

We note also that in *Prosecutor v Kupreškić*, both the Prosecution and the Defence had consented to the Order of the Chamber for the trial to continue temporarily by way of deposition in the temporary absence of one of the judges for health reasons. In the Order, the Chamber considered as follows:

** Transcripts of 9 June 2003, pp. 8, 16.

*** *Ibid.*, pp. 8, 15.

[17] *Prosecutor v Blaškić (Order of the President for the Assignment of a Judge to the Trial Chamber)* dated 29 January 1999.

[18] In that case, Judge Fouad Riad had, for medical reasons, been unable to continue with the trial, after the case for the prosecution, and was required to be away from work for more than three months. In his report of 26 January 1999 on the matter to the President of ICTY, Judge Claude Jorda wrote as follows:

> [...]
> Under these conditions, after having discussed the matter with my colleagues, I asked the parties to the case to indicate how our work might be orgnised. From the opinions expressed, I should point out that the Prosecutor would prefer a solution permitting Judge Riad to continue to hear the case until its completion in the first instance. The Defence, however, although wishing our colleague a speedy recovery, has opted for having a replacement Judge found for Judge Riad so long as the said replacement Judge assumes his/her duties as quickly as possible. The accused confirmed his agreement orally.
>
> The question was discussed for the last time at a status conference held on 21 January 1999 (provisional transcripts: French, pp 12894—12900; English, pp 17543—17553, copies of which have been submitted in confidential annex1), during which the parties stood by their respective positions and during which the Defence specified precisely the conditions for its agreement.
> [...]

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> [T]he unavailability of one of the members of the Trial Chamber must not prejudice the right of the accused to be tried without undue delay, as provided in Article 21(4)(c) of the Statute of the International Tribunal.[19]

(c) We also note that the Accused Nsabimana, like the accused in the *Military I* Cases, the *Blaškić* Case and the *Kupreškić* Case noted above, has given his consent to continue the *Butare* trial with a substitute judge.

(d) We note that in his consent, Nsabimana indicated that it is important that the substitute judge be given sufficient time to become familiar with the record of the proceedings thus far. That indeed is an important consideration.

(e) In contrast, we note that the Non-Consenting Accused have expressed their strong desire to start the trial afresh. Their chief argument in this connection is that Article 19(1) affords the Accused the right to a 'fair' trial: and a fair trial includes a trial in which every judge in the case is given an opportunity to observe for himself or herself the demeanour of every witness called in the case. This indeed is an important consideration. It is, however, one that needs to be reconciled with other considerations, including, for example, the right to speedy trial. In this regard, we note, first, that the records of the proceedings do exist. Hence, in our view, it will be possible for a substitute judge to review these records as part of his or her duty and to draw inferences from them, even in the matter of witness demeanour. It is particularly presumed that this will be possible—and will be done—when the Parties make submissions on the matter of demeanour of particular witnesses at the end of the trial. Secondly, we are still in the case for the Prosecution and only twenty-three witnesses have been called so far. The Prosecution estimate that they have about sixty more witnesses to call. This means that any substitute judge assigned to the case at this point in the evidence will then be in a position to observe for himself or herself the larger bulk of the witnesses for the Prosecution and all the witnesses for the Defence. Thirdly, we stress that it is important for any judge in a case to observe every witness as they testify. Against this consideration, we also note the submission of the Prosecution to the effect that the *Butare* trial, as with every trial in this Tribunal, is conducted before a panel of three judges; and that it is only one of them that may be substituted under Rule 15*bis*(D) in order to continue with the trial. Fourthly, while consideration of the need for every judge to assess demeanour is certainly a very important one, we note that it must be considered with care, for any precedent that sets it up as the overriding consideration of what it means to have a fair trial will make it extremely difficult—if not impossible—ever to order continuation of a trial pursuant to Rule 15*bis*(D).

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[19] *Prosecutor v Kupreškić & Ors (Decision on Prosecution and Defence Requests to Proceed by Deposition)* dated 11 February 1999 (Trial Chamber).

(f) Where there is a conflict, as appears to exist in the circumstances, between the right to speedy trial and the inability of a substitute judge to observe the demeanour of any witness who has testified, it is easier to take steps (in the *Butare* Case as it now stands) to redress the problem of one judge not sitting in the case during the testimony of some witnesses—a minority of them for that matter—than it is to redress the problem of delay in the trial. As indicated above, the records will be reviewed and counsel could make submissions to assist the Substitute Judge and the other Judges to determine this issue. But it is more difficult to recoup wasted time, in view of the right to speedy trial, if time is lost as a result of recommencement of the trial.

(g) Also in taking all the circumstances into account in determining what is in the interest of justice, as well as in considering the rights of the Accused, we also consider that the right of due process of the law is not unique to accused persons in pending trials. Accused persons whose trials have not yet begun also do have a right to trial without undue delay. While about 18 accused persons (including the *Butare* Accused) are currently on trial, a far greater number (about 31 at the moment) are still in this Tribunal's detention awaiting the commencement of their own trials. Any undue delay in the trial of an ongoing case will, in turn, affect the speedy trial rights of other accused persons awaiting trial.

(h) In this exercise, we also need to consider that while providing for the rights of the accused, the drafters of the Statute made sure that due regard is had to the interests of the victims and witnesses in the process of administration of justice in this Tribunal. As Article 19(a) provides:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused *and due regard for the protection of victims and witnesses.* [Emphasis added.]

In the course of the *Butare* trial, many witnesses have testified. Some of them were vulnerable witnesses to whom the experience of testimony was a trying affair. Does it serve the interests of justice to have to restart the *Butare* trial and expose the witnesses and victims to a repeat of their testimony? We recall that this Tribunal and ICTY have had occasion in the past to pronounce upon the need to avoid duplication or repetition of evidence, minimise hardship to witnesses and have regard to judicial economy.[20] As this Tribunal pronounced when joining the *Butare* case into one trial:

> The Tribunal considers that the argument raised by the Prosecutor relating to the need to protect victims and witnesses is of utmost importance and particularly relevant and, as such, cannot be entirely subordinated to the rights of the accused. There must, however, be a balance between these rights and the protection of the witnesses. To this end, the

[20] See eg *Prosecutor v Simić, Zarić & Ors (Decision on Motion for Separate Trial for Simo Zarić)* 3 February 2000 (ICTY).

> Trial Chamber holds the same view as Trial Chamber I in its Decision of 6 November 1996 in the case of *Prosecutor v Kayishema* ... that "the requested joinder would allow for a better administration of justice by ensuring [...] a better protection of victims' and witnesses' physical and mental safety, and by eliminating the need for them to make several journeys and to repeat their testimony.[21]

That pronouncement applies with necessary variation to the issues now at hand. Furthermore, it is conceivable that the personal circumstances of some of these witnesses may have changed, so much so that they may not return to testify. Some may have died. Is it in the interest of justice to expose this search for truth and justice to circumstances where witnesses who testified before may not appear again?

(i) We also note the following recent pronouncement of ICTY Trial Chamber II in *Prosecutor v Seselj* considering the phrase 'interests of justice':

> The phrase 'in the interests of justice' potentially has a broad scope [and] includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account.[22]

We fully agree with this pronouncement.

(j) The Non-Consenting Accused desire the trial to restart. Indeed, a Rule 15*bis*(D) inquiry also contemplates the possibility of restarting the trial if the judges do not unanimously decide that it is in the interest of justice to continue with a substitute judge. Yet it is important to ask: What does restarting the case mean? And what are the procedural consequences of doing so? Does restarting mean another pre-trial conference, new witness lists, fresh motions for provisional releases, new witness protection motions, new opening statements, etc? And what will happen in the meantime? Will all the decisions thus far rendered in the case—and they are many—have to be swept aside and fresh ones made? In the *Seselj* decision, the ICTY Trial Chamber II said, and we agree, that in the context of a fair trial, the length of the case and its complexities need to be taken into account. The *Butare* Cases with six accused persons is certainly a very complex case, and has so far proven a lengthy one, with the rest of the Prosecution case (and all of the case for the six Accused) still ahead. Will restarting the case assist the length and complexities of this case or make things worse? We cannot, in the circumstances, ignore the concern that it may take a long time to bring the trial to where it is now, if the trial were to start afresh.

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[21] *Prosecutor v Nyiramasuhuko and Ntahobali; Prosecutor v Nsabimana and Nteziryayo; Prosecutor v Kanyabashi; and Prosecutor v Ndayambaje (Decision on the Prosecutor's Motion for Joinder of Trials)* dated 5 October 1999.

[22] *Prosecutor v Seselj (Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence)* dated 9 May 2003 (Trial Chamber II) para 21.

(k) We also take due note of the financial costs to the public.[23] While monetary costs may not be an overriding consideration in the administration of justice, they may not, on the other hand, be ignored altogether.

(l) Finally, we also note that it is an important consideration to the administration of justice that proceedings must not be allowed to drag on endlessly. They must come to an end at some point.

34. Taking the totality of the circumstances into account, we find as follows:

i. On the question whether the operation of Rule 15*bis*(D) does prejudice the substantive rights of the Accused, we are of the view that the recommencement of the *Butare* trial, pursuant to Rule 15*bis*(D), will prejudice the rights of the Accused more than it will advance them. Our finding remains the same even if the previous ability of the Accused (under the old Rule 15*bis*) to withhold consent and force a recommencement of a part-heard trial were to be deemed a substantive right, considering that rights of the accused must be viewed in context.

ii. On the question whether it is in the interest of justice to continue the case with a substitute judge, taking all the circumstances into account, we find that the interests of justice are best served by continuing the trial with a substitute judge.

[23] We note with interest that in the context of the *Military I* decision discussed above, one of the reasons advanced by the Defence Counsel for their desire to continue the trial was the cost. They candidly estimated that about US$200,000.00 had been paid to their four teams of Defence for about 36 days of hearing alone. [*Prosecutor v Bagosora & Ors (Decision on Continuation or Commencement De Novo of Trial)* dated 11 June 2003, footnote 6.] In comparison, we note that in the *Butare* Cases, there are six Defence teams and they have conducted over 100 days of trial.

FOR THE ABOVE REASONS, WE

DECIDE unanimously that, taking all the circumstances into account, it serves the interests of justice to continue the trial with a substitute judge, in terms of Rule 15*bis*(D), on the basis of the existing trial record and decisions in the case.

WE REMIND the Non-Consenting Accused of their right to appeal this decision pursuant to Rule 15*bis*(D), if it is their wish to do so.

Arusha, 15 July 2003

William H Sekule
Presiding Judge

Arlette Ramaroson
Judge

(Seal of the Tribunal)

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Date:	Transmitted: 15 July 2003	Document's date: 15 July 2003	No. of Pages: 22
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- PAULINE NYIRAMASUHUKO
- ARSENE SHALOM NTAHOBALI
- SYLVAIN NSABIMANA
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☒	**Judge A. Gunawardana**	16.7.03	☒	
☒	**Judge A. Ramaroson**	16.7.03	☒	16.7.03
☒	**C. Eboe-Osuji, SLO**		☐	
☒	**A. Leroy , Co-ordinator**	16.7.03	☐	
☐	TC3			
☐	Judge L. G. Williams	16.3.03	☐	16.7.03
☐	Judge A. Vaz		☐	
☐	Judge S.A. Egorov (Temporarily)		☐	
☐	..... Co-ordinator			

☒ **OTP / *BUREAU DU PROCUREUR***

☒ Trial Attorney in charge of case: **SILVANA ARBIA** received by 15/07/03

☒ **DEFENCE / *DÉFENSE*:** 16/07/03

☒ Accused / *Accusé*: **NDAYAMBAJE, KANYABASHI, NYIRAMASUHUKO, NTAHOBALI, NSABIMANA AND NTEZIRYAYO** complete / *remplir* "CMS4 FORM"

☒ Lead Counsel / *Conseil Principal*: **BOULE, MARCHAND, BERGEVIN, MWANYUMBA, KADJI AND PACERE**

■ In / à Arusha .....(signature) ☐ by fax complete / *remplir* "CMS3bis FORM"

☒ Co-Counsel / *Conseil Adjoint*: **BOYER, POUPART, MAQUIS, TCHACOUNTE, PERRAS AND DESROCHERS**

■ In / à Arusha .....(signature) ☐ by fax complete / *remplir* "CMS3bis FORM

All Decisions: ☐ Appeals Chamber Unit, The Hague ☒ Suzanne Chenault, Jurist Linguist

All Decisions & Important Public Documents: ☐ Press & Public Affairs ☒ Legal Library 16/7/

From: *De:*	☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC 1) ☒ **R. Nouambo (TC 2)** ☐ F. Talon (TC 3) ☐ F. Talon (Appeals)
Cc:	☐ A. Dieng ☐ A. Miller, OLA, NY ☐ L. G. Mutlo 15/7/03 ☐ M. Niang ☐ S. Van Driessche
	☐ WVSS- D ☐ WVSS-P ☐ E. O'Donnell 15/7/03 ☐ DCMS ☐ P. Nyambe ☐ P. Enow
Subject *Objet:*	**Kindly find attached the following document(s) / *Veuillez trouver en annexe le(s) document(s) suivant(s):***

Documents name / *titre du document*	Date Filed / *Date enregistré*	Pages
DECISION IN THE MATTER OF PROCEEDINGS UNDER RULE 15 *BIS* (D)	**15/07/2003**	**22**

ICTR-98-42-T
15. 7. 2003
(7433 — 7412)
7433 ombga

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

Or: ENG

TRIAL CHAMBER II

Before: Judge William H Sekule, *Presiding*
Judge Arlette Ramaroson

Registrar: Mr Adama Dieng

Date: 15 July 2003

The PROSECUTOR *v* Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T
The PROSECUTOR *v* Sylvain NSABIMANA & Alphonse NTEZIRYAYO
Case No. ICTR-97-29A&B-T
The PROSECUTOR *v* Joseph KANYABASHI
Case No. ICTR-96-15-T
The PROSECUTOR *v* Elie NDAYAMBAJE
Case No. ICTR-96-8-T

[Joint Case No. ICTR-98-42-T]

2003 JUL 15 P 4:49

DECISION

IN THE MATTER OF PROCEEDINGS UNDER RULE 15*bis*(D)

Prosecution Counsel
Silvana ARBIA
Jonathan MOSES
Gregory TOWNSEND
Adesola ADEBOYEJO
Manuel BOUWKNECHT (*Case Manager*)

Defence Counsel for Ndayambaje
Pierre BOULE
Defence Counsel for Kanyabashi
Michel MARCHAND
Michel BOYER
Defence Counsel for Nyiramasuhuko

****
*** TX REPORT ***
****

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ICTR-98-42-T
15. 7. 2003
(7433 — 7412)

7433 onwards

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The PROSECUTOR *v* Joseph KANYABASHI
Case No. ICTR-96-15-T
The PROSECUTOR *v* Elie NDAYAMBAJE
Case No. ICTR-96-8-T

[Joint Case No. ICTR-98-42-T]

DECISION

IN THE MATTER OF PROCEEDINGS UNDER RULE 15*BIS*(D)

Prosecution Counsel
Silvana ARBIA
Jonathan MOSES
Gregory TOWNSEND
Adesola ADEBOYEJO
Manuel BOUWKNECHT (*Case Manager*)

Defence Counsel for Ndayambaje
Pierre BOULE
Defence Counsel for Kanyabashi
Michel MARCHAND
Michel BOYER
Defence Counsel for Nyiramasuhuko
Nicole BERGEVIN

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Tel: 255 57 504207-11 504367-72 or 1 212 963 2850 Fax: 255 57 504000/504373 or 1 212 963 2848/49

PROOF OF SERVICE TO DETAINEES
PREUVE DE NOTIFICATION D'ACTES AUX DETENUS

Upon signature of the detainee, please return this sheet to the originator as proof of service.
Formulaire à être renvoyé à l'expéditeur dûment signé par le détenu.

Date: **15/07/2003**		Case Name / *Affaire:*	**The Prosecutor v.** **- ELIE NDAYAMBAJE** **- JOSEPH KANYABASHI** **- PAULINE NYIRAMASUHUKO** **- ARSENE SHALOM NTAHOBALI** **- SYLVAIN NSABIMANA** **- ALPHONSE NTEZIRYAYO**
		Case No / *Affaire Nr::*	**ICTR-98-42-T**

To: *A:*	Name of detainee / nom du détenu **NYIRAMASUHUKO**	**TO BE FILLED IN BY THE DETAINEE** ***A COMPLETER PAR LE DETENU***		
		I confirm reception of the document(s) listed below. *Je confirme réception du/des documents mentionné(s) ci-dessous.*	Signature N	Date, Time / *Heure* 16/07/03
Via:	**Security Officer** **Commanding Officer, UNDF**	Print name / nom ..... for **SAIDOU GUINDO**	Signature	Date , Time / *Heure* 16/07/03

From: *De:* ☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC 1) ☒ **R. Kouambo (TC2)** ☐ F. Talon (TC3) ☐ F. Talon (Appeals) ☐ Other / *Autre* .....

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

Documents name / *titre du document*	Date Filed / *Date enregistré*	Pages
DECISION IN THE MATTER OF PROCEEDINGS UNDER RULE 15 *BIS* (D)	**15/07/2003**	**22**

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Date: **15/07/2003**		Case Name / *Affaire:*	**The Prosecutor v.** - **ELIE NDAYAMBAJE** - **JOSEPH KANYABASHI** - **PAULINE NYIRAMASUHUKO** - **ARSENE SHALOM NTAHOBALI** - **SYLVAIN NSABIMANA** - **ALPHONSE NTEZIRYAYO**
		Case No / *Affaire Nr.:*	**ICTR-98-42-T**

To: *A:*	Name of detainee / nom du détenu	**TO BE FILLED IN BY THE DETAINEE** ***A COMPLETER PAR LE DETENU***		
	NTAHOBALI	I confirm reception of the document(s) listed below. *Je confirme réception du/des documents mentionné(s) ci-dessous.*	Signature	Date, Time / *Heure* 16/07/03 à 18h00
Via:	**Security Officer**	Print name / nom	Signature	Date , Time / *Heure* .....
	Commanding Officer, UNDF	p.o. SAIDOU GUINDO		16/07/03
From: *De:*	☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC 1) ☒ R. Kouambo (TC2) ☐ F. Talon (TC3) ☐ F. Talon (Appeals) ☐ Other / *Autre*			
Subject *Objet:*	**Kindly find attached the following documents / *Veuillez trouver en annexe les documents suivants.***			

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Date: **15/07/2003**	Case Name / *Affaire:*	**The Prosecutor v.**	**- ELIE NDAYAMBAJE** **- JOSEPH KANYABASHI** **- PAULINE NYIRAMASUHUKO** **- ARSENE SHALOM NTAHOBALI** **- SYLVAIN NSABIMANA** **- ALPHONSE NTEZIRYAYO**
	Case No / *Affaire Nr:*	**ICTR-98-42-T**	

To: *A:*	Name of detainee / nom du détenu **NSABIMANA**	**TO BE FILLED IN BY THE DETAINEE** ***A COMPLETER PAR LE DETENU*** I confirm reception of the document(s) listed below. *Je confirme réception du/des documents mentionné(s) ci-dessous.*	Signature	Date, Time / *Heure* 15/7/03 17h20
Via:	**Security Officer**	Print name / nom	Signature	Date , Time / *Heure* .....
	Commanding Officer, UNDF	for SAIDOU GUINDO		16/07/03
From: *De:*	☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC1) ☒ R. Kouambo (TC2) ☐ F. Talon (TC3) ☐ F. Talon (Appeals) ☐ Other / *Autre*			
Subject *Objet:*	**Kindly find attached the following documents / *Veuillez trouver en annexe les documents suivants.***			

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Date: **15/07/2003**		Case Name / *Affaire:* **The Prosecutor v.**		**- ELIE NDAYAMBAJE** **- JOSEPH KANYABASHI** **- PAULINE NYIRAMASUHUKO** **- ARSENE SHALOM NTAHOBALI** **- SYLVAIN NSABIMANA** **- ALPHONSE NTEZIRYAYO**
		Case No / *Affaire Nr:* **ICTR-98-42-T**		
To: *A:*	Name of detainee / nom du détenu **NTEZIRYAYO**	**TO BE FILLED IN BY THE DETAINEE** ***A COMPLETER PAR LE DETENU*** I confirm reception of the document(s) listed below. *Je confirme réception du/des documents mentionné(s) ci-dessous.*	Signature	Date, Time / *Heure* 16/07/03 17h30
Via:	**Security Officer** **Commanding Officer, UNDF**	Print name / nom ..... **SAIDOU GUINDO**	Signature	Date , Time / *Heure* 16/07/03
From: *De:*	☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC1) ☒ **R. Kouambo (TC2)** ☐ F. Talon (TC3) ☐ F. Talon (Appeals) ☐ Other / *Autre*			
Subject *Objet:*	**Kindly find attached the following documents / *Veuillez trouver en annexe les documents suivants.***			

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Date: **15/07/2003**	Case Name / *Affaire:*	**The Prosecutor v.**	**- ELIE NDAYAMBAJE** **- JOSEPH KANYABASHI** **- PAULINE NYIRAMASUHUKO** **- ARSENE SHALOM NTAHOBALI** **- SYLVAIN NSABIMANA**
	Case No / *Affaire Nr.*	**ICTR-98-42-T**	**- ALPHONSE NTEZIRYAYO**

To: *A:*	Name of detainee / nom du détenu **NDAYAMBAJE**	**TO BE FILLED IN BY THE DETAINEE** ***A COMPLETER PAR LE DETENU*** I confirm reception of the document(s) listed below. *Je confirme réception du/des documents mentionné(s) ci-dessous.*	Signature	Date, Time / *Heure* 16/7/03 18h00
Via:	**Security Officer** **Commanding Officer, UNDF**	Print name / nom ..... for SAIDOU GUINDO	Signature	Date , Time / *Heure* 16/07/03

From: *De:* ☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC 1) ☒ R. Konambo (TC2) ☐ F. Talon (TC3) ☐ F. Talon (Appeals) ☐ Other / *Autre* .....

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Date: **15/07/2003**		Case Name / *Affaire:* **The Prosecutor v.**	**- ELIE NDAYAMBAJE** **- JOSEPH KANYABASHI** **- PAULINE NYIRAMASUHUKO** **- ARSENE SHALOM NTAHOBALI** **- SYLVAIN NSABIMANA** **- ALPHONSE NTEZIRYAYO**
		Case No / *Affaire Nr.* **ICTR-98-42-T**	
To: *A:*	Name of detainee / nom du détenu **KANYABASHI**	**TO BE FILLED IN BY THE DETAINEE** ***A COMPLETER PAR LE DETENU*** I confirm reception of the document(s) listed below. *Je confirme réception du/des documents mentionné(s) ci-dessous.*	Signature 16/7/2003 12h30 — Date, Time / *Heure*
Via:	**Security Officer** **Commanding Officer, UNDF**	Print name / nom ..... for **SAIDOU GUINDO**	Signature	Date , Time / *Heure* 16/07/03
From: *De:*	☐ JP. Fomété (Chief, CMS) ☐ N. Diallo (TC 1) ☒ B. Kouambo (TC2) ☐ F. Talon (TC3) ☐ F. Talon (Appeals) ☐ Other / *Autre*			
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