

ICTR-98-44-A15BIS

21 June 2004

(643/H-637/H)

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UNITED  
NATIONS  
NATIONS UNIES

Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before :

Judge Theodor MERON, Presiding  
Judge Mohamed SHAHABUDEEN  
Judge Mehmet GÜNEY  
Judge Wolfgang SCHOMBURG  
Judge Inès Monica WEINBERG DE ROCA

Registrar:

Mr. Adama DIENG

Decision of:

21 June 2004

**THE PROSECUTOR**

v/

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA  
André RWAMAKUBA

Case No. ICTR-98-44-A15bis

ICTR Appeals Chamber  
Date: 21 June 2004  
Action: PG  
Copied To: Concerned Judge  
Parties, Judicial Architect  
LOs, LSS  
[Signature]

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ORIGINAL RECORDS

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

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For Karemera: Ms. Dior Diagne Mbaye and Mr. Félix Sow  
For Ngirumpatse: Mr. Charles Roach and Mr. Frédéric Weyl  
For Nzirorera: Mr. Peter Robinson  
For Rwamakuba: Mr. David Hooper and Mr. Andreas O'Shea

Case No. ICTR-98-44-A15bis

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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DATE: 21 June 2004

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1. This appeal concerns the issue of continuation of a trial where one of the three Judges of the Trial Chamber seised of the case has withdrawn from the bench pursuant to Rule 15*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("Tribunal" and "Rules", respectively).
2. The trial in the case against Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, and André Rwamakuba ("Appellants") commenced on 27 November 2003 before a section of Trial Chamber III of the, composed of Judge Andréia Vaz, presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey. The latter two judges are *ad litem* Judges assigned to the Trial Chamber ("Remaining Judges").
3. During the hearing of 27 April 2004, the Appellant Nzirorera made an oral request, pursuant to Rule 15 of the Rules, for disqualification of the presiding Judge of Trial Chamber III, on the basis of an alleged association between the Judge and a member of the Prosecution team working on the case.<sup>1</sup> The request was treated as a motion and was dismissed by the Trial Chamber.<sup>2</sup> Following the dismissal of the request, the Appellant filed a written motion before the Bureau of the Tribunal to the same effect,<sup>3</sup> followed by a similar application by the Appellant Rwamakuba to the Bureau.<sup>4</sup> Before the determination of those motions by the Bureau, Judge Vaz informed the President of the Tribunal in a letter dated 14 May 2004 that she withdrew herself from the case. Following that withdrawal, in a decision of 17 May 2004 rendered pursuant to Rule 15 (B), the Bureau, composed of President Erik Møse and the Presiding Judge of Trial Chamber II, Judge William Sekule, dismissed both motions on the ground that "it is not necessary for the Bureau to determine the matter".<sup>5</sup> The Bureau declared the motions moot.
4. Following the Bureau's decision of 17 May 2004, the President of the Tribunal, on the same day, requested responses from the Appellants in the present case as to

<sup>1</sup> T. 28, 27 April 2004.

<sup>2</sup> T. 29-30, 27 April 2004.

<sup>3</sup> "Supplemental Motion for Disqualification of Judge Andréia Vaz", filed on 29 April 2004.

<sup>4</sup> "Request and Argument on Behalf of Dr. Andre Rwamakuba Seeking the Recusal or Disqualification of Her Honour Judge Andréia Vaz", filed on 11 May 2004.

<sup>5</sup> "Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz", filed 17 May 2004. The decision stated that the Bureau was convened with two members in accordance with Rule 23

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whether they would consent to the continuation of the proceedings with a substitute Judge in place of the outgoing Judge, namely, Judge Vaz.<sup>6</sup> The Appellants responded on 17 and 20 May 2004 indicating their withholding of consent to continue the proceedings with a substitute Judge.<sup>7</sup> On 20 May 2004, the President of the Tribunal transmitted the response of the Appellants to the Remaining Judges.<sup>8</sup> On 21 May 2004, the President indicated in a letter to the Remaining Judges that the proceedings could not continue due to the application of Rule 15*bis* (D).<sup>9</sup> Following that letter, pursuant to Rule 15*bis* (D) of the Rules, the Remaining Judges on 24 May 2004 rendered the Impugned Decision, whereby they decided to continue the proceedings in the present case with a substitute Judge to be designated by the President of the Tribunal.

5. Upon receiving the Impugned Decision, the Appellants filed notices of appeal or appeal briefs on 31 May 2004.<sup>10</sup> On 10 June 2004, the Prosecution filed the "Prosecutor's Consolidated Response to Appeals from *Décision Relative à la Continuation du Procès*" ("Prosecution's Response"). On 14 June 2004, the Appellant Nzirorera filed his reply brief ("Nzirorera's Reply"). On 16 June 2004, the Appellant Rwamakuba filed his reply.<sup>11</sup> The other two Appellants have not filed any reply.

6. The Appellant Nzirorera presents four grounds of appeal. His first ground is that the Remaining Judges erred in law by deciding to continue the trial without giving him an opportunity to be heard.<sup>12</sup> As a result, he submits, he "was never able to present the arguments contained in this appeal to the two remaining Judges in the first instance".<sup>13</sup>

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(A) of the Rules, with Judge Vaz, Vice-President of the Tribunal, recusing herself from considering the motions.

<sup>6</sup> "*Décision relative à la continuation du procès*", rendered by the remaining Judges of the Trial Chamber seized of this case, 24 May 2004, p.2 ("Impugned Decision").

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> "Appel de la *Décision relative à la continuation du procès du 24 mai 2004*", filed by Karemera, 31 May 2004; "Appeal from *Décision relative à la continuation du procès*", filed by Nzirorera, 31 May 2004 ("Nzirorera's Appeal"); "Notice of Appeal from decision of Trial Chamber III of May 24, 2004 to continue Trial", filed by Ngirumpatse, 31 May 2004; "Appeal on behalf of Dr. Andre Rwamakuba against Decision of the Remaining Judges to Continue", filed by Rwamakuba, 31 May 2004, with a "Corrigendum to Appeal on behalf of Dr. Andre Rwamakuba against Decision of the Remaining Judges to Continue", also dated 31 May 2004.

<sup>11</sup> "Reply on behalf of Dr. André Rwamakuba to Prosecutor's Consolidated Response to Appeals from *Décision Relative à la Continuation du Procès*", filed 16 June 2004.

<sup>12</sup> Nzirorera's Appeal, paras. 20-29.

<sup>13</sup> *Ibid.*, para. 24.

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The Prosecution responds that between 17 May, when Judge Vaz informed the parties of her withdrawal from the case, and the issuing of the Impugned Decision on 24 May by the Remaining Judges, the Appellant had seven days to submit any argument he wished to present, and that "[t]he fact that he did not avail himself of that time does not mean that he was denied an opportunity to be heard".<sup>14</sup> The Prosecution also points out that, in the Impugned Decision, the Remaining Judges did acknowledge the Appellants' submissions.<sup>15</sup> It submits that, even if the Appellant is correct in his argument concerning the denial of an opportunity to be heard, "he must establish that this error invalidates the decision", but that "he cannot meet this burden".<sup>16</sup> In reply, the Appellant sets out a sequence of events prior to the issuing of the Impugned Decision to show that both he and the Prosecution had timely requested to be heard by the Remaining Judges in relation to the procedure under Rule 15bis (D).<sup>17</sup>

7. The Appeals Chamber notes that the Remaining Judges stated in the Impugned Decision that they noted the responses of the Appellants to the memorandum of the President of the Tribunal dated 17 May 2004, in which the Appellants indicated their opposition to the continuation of the trial with a substitute Judge.<sup>18</sup> Those responses are, however, distinct from submissions on the question of whether it is in the interests of justice to continue the trial with a substitute Judge. Further, the Appeals Chamber notes that the Remaining Judges were served with both an electronic and a hard copy of an e-mail message from the counsel for the Appellant Nzirorera, dated 19 May 2004.<sup>19</sup> In the message, the counsel requested that, once the President of the Tribunal determined that the parties did not consent to the continuation of the trial, the parties be given a schedule for the submission of briefs to the Remaining Judges regarding the question of resuming or restarting the trial, pursuant to Rule 15bis (D).<sup>20</sup> Moreover, the Appeals Chamber notes that the Prosecution sent a letter dated 22 May 2004 to the President of the Tribunal, which was copied to Judge Vaz and the Remaining Judges as well as to the

<sup>14</sup> Prosecution's Response, para. 18.

<sup>15</sup> Ibid., para. 20.

<sup>16</sup> Ibid., para. 21.

<sup>17</sup> Nzirorera's Reply, para. 4.

<sup>18</sup> Impugned Decision, p. 2.

<sup>19</sup> Annex "C" to the Nzirorera's Appeal.

<sup>20</sup> Annex "A" to the Nzirorera's Appeal.

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counsel for the Appellants.<sup>21</sup> In the letter, the Prosecution requested a period of "at least" three weeks in which to consider the matter and to make a further written submission to the Remaining Judges. It is clear that the Appellant Nzirorera and the Prosecution had prior to the issue of the Impugned Decision requested an opportunity to be heard. There had been, however, no response from the Remaining Judges in respect of the Appellant Nzirorera's message or the Prosecution's letter before they issued the Impugned Decision.

8. The issue before the Appeals Chamber is therefore whether the parties should be given the opportunity to be heard under the procedure of Rule 15*bis* (D). The answer is in the affirmative for several reasons.

9. First, it is a matter of principle that the parties to a case have a right to be heard before a decision is made which can affect their rights. The ICTY Appeal Judgment in *Jelisić* states thus:

In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.<sup>22</sup>

10. Secondly, Rule 15*bis* (D) provides for a *right* of appeal from a decision made by the remaining judges of a Trial Chamber pursuant to that provision. The existence of such a right of appeal itself implies that the parties have a right to be heard at the making of the decision from which they appeal.

11. Thirdly, both the Impugned Decision and the Nzirorera's Appeal rely on the precedent of a previous decision rendered by the Appeals Chamber in the interlocutory

<sup>21</sup> Annex "B" to the Nzirorera's Appeal.

<sup>22</sup> *Judgement*, Case No. IT-95-10-A, 5 July 2001, para. 27.

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appeal in *Nyiramasuhuko et al.*<sup>23</sup> The precedent concerns the application for the first time of Rule 15bis (D). In that case, the mandate of one of the members of the Trial Chamber expired. After receiving the transmission by the President of the Tribunal of the withholding of consent by the accused to continue the trial with a substitute Judge, the remaining Judges gave the parties the opportunity to be heard *before* they issued their decision under Rule 15bis (D). The Appeals Chamber quotes what was said by the remaining Judges in a scheduling order:

“ ...

MINDFUL of the need to consider and decide whether or not it is in the interest of justice to continue the trial with a substitute judge under Rule 15bis (D);

CONSIDERING that the written submissions of the Parties will assist the remaining Judges in the Chamber in their deliberations on the matter;

HEREBY,

I. ORDERS the Parties to make their submissions accordingly, if any, in writing....”<sup>24</sup>

To dispel any doubt in this regard, the remaining Judges in the case issued a second scheduling order on 2 July 2003. In this second order, the Judges specifically ruled that “the Chamber has not decided upon the question whether the amended Rule 15bis (D) is applicable to the *Butare* Case in the present circumstances”, and directed that “the Parties may, if they see fit, include that discussion in the submissions called for by the Scheduling Order of 26 June 2003”. In their appeals from the subsequent decision to continue the trial, rendered by the remaining Judges in the case on 15 July 2003, there was no ground of appeal brought by the five Appellants complaining of a denial of an opportunity to be heard.<sup>25</sup> That precedent does not, therefore, support the approach of the Remaining Judges in issuing the Impugned Decision without hearing the parties on the

<sup>23</sup> *Prosecutor v. Pauline Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-A15bis, *Decision in the Matter of Proceedings under Rule 15bis (D)*, 24 September 2003.

<sup>24</sup> *Prosecutor v. Pauline Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-T, *Scheduling Order in the Matter of Proceedings under Rule 15bis (D)*, 26 June 2003, p.4.

<sup>25</sup> *Prosecutor v. Pauline Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-A15bis, *Decision in the Matter of Proceedings under Rule 15bis (D)*, 24 September 2003, para.8.

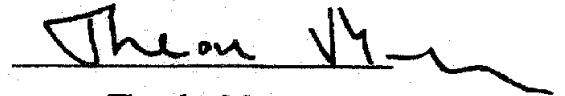
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question whether it was in the interests of justice to continue the trial in this case with a substitute Judge.

12. The Prosecution argues in this appeal that the Appellant Nzirorera did not submit any argument during the period of time between the withdrawal of Judge Vaz from the bench and the issuing of the Impugned Decision. The Appeals Chamber considers that it does not appear from the facts of this case, as set forth above, that the Appellant had any particular opportunity within which he could exercise his right to be heard by the Remaining Judges.

13. For the foregoing reasons, the Appeals Chamber allows the appeal of the Appellant Nzirorera, and remands the matter to the Remaining Judges for reconsideration in light of any submissions of the parties to the present case with regard to the question whether it is in the interests of justice to continue the trial with a substitute Judge. Although the right to be heard was not raised as a ground of appeal by the other Appellants in their appeal briefs, the Appeals Chamber considers that they have that right as a matter of law. All the appeals are allowed on this ground. The Remaining Judges are accordingly directed to consider any submissions the Appellants and the Prosecution may wish to make before them.

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



Theodor Meron  
Presiding Judge of the Appeals Chamber

Dated this twenty-first day of June 2004,  
At The Hague,  
The Netherlands

