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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

ENGLISH
Original: FRENCH

Before: Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registry: Adama Dieng

Date filed: 16 July 2004

THE PROSECUTOR

v.

Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Andre RWAMAKUBA

Case No. ICTR-98-44-T

DECISION ON CONTINUATION OF TRIAL
Rule 15bis(D) of the Rules of Procedure and Evidence

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Translation certified by LSS, ICTR

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

SITTING as the remaining Judges of the section of Trial Chamber III seized of the case of *Karemera et al,* in the persons of Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Judges"), pursuant to Rule 15*bis*(D) of the Rules of Procedure and Evidence (the "Rules");

RECALLING

(a) That Judge Andrésia Vaz informed the President of the Tribunal in a letter dated 14 May 2004 that she had decided to withdraw from the present case, and recalling that the Bureau of the Tribunal had taken formal note of her decision in its *Decision on Motion by Nzirorera and Rwamakuba for Disqualification of Judge Vaz,* issued on 17 May 2004;

(b) That during the informal meeting which the Chamber held with the Prosecutor and the Defence teams on17 May 2004, Judge Andresia Vaz informed the parties of her decision to withdraw from the case, and that some Defence teams stated that they favoured a continuation of the trial until the end of the current session before the Chamber as previously constituted;

(c) That the Bureau dismissed, in three decisions taken on 17 May 2004, the motions by Counsel for Nzirorera, Karemera and Ngirumpatse for disqualification of the three Judges comprising the Chamber;

(d) That the President of the Tribunal, in a memorandum of 17 May 2004, requested the Accused to indicate no later than 20 May 2004, whether they consented to the continuation of the trial with a substitute Judge;

(e) That in their responses to the President's memorandum[1], the Accused withheld their consent to continue the proceedings with a substitute Judge, stating reasons therefore;

(f) That in his letter of 20 May 2004, the President informed the Judges that the Accused had withheld their consent to continue the trial with a substitute Judge, and recalling that in a letter to the said Judges on 21 May 2004, the President indicated that they could decide to continue the proceedings, pursuant to Rule 15*bis*(D) of the Rules;

(g) That in a letter dated 22 May 2004, the Prosecutor argued for the continuation of the trial;

(h) That the Judges, in a Decision rendered on 24 May 2004, decided that continuing the trial would best serve the interests of justice.

[1] Nzirorera filed his response on 17 May 2004, while Ngirumpatse, Karemera and Rwamakuba filed theirs on 20 May 2004.

(i) That the four Accused appealed the *Decision on continuation of Trial* rendered on 24 May 2004.[2]

(j) That in its 21 June 2004 *Decision in the matter of proceedings under Rule 15*bis*(D)*, the Appeals Chamber, considering that the Judges should have allowed the parties to present their arguments before them before taking the *Decision on continuation of Trial,* remanded the matter to the Judges, directing them to consider any submissions the parties might wish to make;

(k) That on 29 June 2004, the Judges issued a Scheduling Order by which they requested the parties to file their submissions no later than 6 July 2004, and gave them up to 12 July 2004 to file responses to each other's submissions;

(l) That on 12 July 2004, the Defence for Karemera filed a "*Motion for Extension of the time limit*", by which it requested the Judges to grant it an extension of time to respond to the Prosecutor's submissions, the French version of which it received only on 12 July 2004;

(m) That in the *Order for extension of time* issued on 12 July 2004, the Judges extended the time limit until 15 July 2004 for Karemera's Defence to file its response;

SEIZED AT PRESENT of the issue of determining if, in the instant case and, taking all the circumstances into account, continuing the proceedings would best serve the interests of justice pursuant to Rule 15*bis*(D) of the Rules;

TAKING INTO ACCOUNT the submissions made in the following documents filed by the various Defence Counsel for the Accused and by the Prosecutor:

(a) *Brief for a Trial de novo* filed by the Defence for Karemera on 6 July 2004;

(b) *Joseph Nzirorera's Submission in Support of Re-starting his Trial* filed on 6 July 2004;

(c) *Submissions on behalf of Dr. Andre Rwamakuba to the remaining Judges as to why there should be a fresh start with the new Judge President,* filed on 6 July 2004;

(d) *Prosecutor's Submissions under Rule 15*bis*(D)*, filed on 6 July 2004;

(e) *Reply to the Prosecutor's submissions under Rule 15*bis*(D)*, filed by the Defence for Karemera on 15 July 2004;

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[2] "*Appel de la Décision relative à la continuation du procès du 24 May 2004*" lodged by Defence for Karemera on 31 May 2004; "Notice of Appeal from decision of Trial Chamber III of May 24 2004 to continue trial", lodged by the Defence for Ngirumpatse on 31 May 2004; "Appeal from *Décision relative à la continuation du process*", filed on 31 May 2004 by the Defence for Nzirorera; "Appeal on behalf of Dr. Andre Rwamakuba against Decision of the remaining Judges to continue", filed by the Defence for Rwamakuba on 31 May 2004; "Corrigendum to Appeal on behalf of Dr. Andre Rwamakuba against Decision of the remaining Judges to continue", filed by Defence for Rwamakuba on 31 May 2004.

(f) *Mathieu Ngirumpatse's response to Prosecutor's submissions under Rule 15*bis*(D)* filed on 13 July 2004. In spite of its belated filing, this response will be taken into consideration by the Judges in the interests of justice;

(g) *Joseph Nzirorera's reply in support of re-starting his trial,* filed on 12 July 2004.

(h) *Reply on behalf of Dr. Andre Rwamakuba to Prosecutor's submissions in respect of Rule 15*bis*(D)*, filed on 12 July 2004;

(i) *Prosecutor's Consolidated Response to Defence Submissions of 6 July 2004 under Rule 15*bis, filed on 12 July 2004;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence, particularly, Rule 15*bis*(D) of the Rules.

DECIDES as follows, based solely on the written briefs of the parties, in accordance with Rule 15*bis*(D) of the Rules.

Submissions of the parties

The Defence for Karemera

1. The Defence alleges that in the absence of the Presiding Judge of the Chamber, who is, of course, a permanent Judge, the Chamber will be improperly constituted under Articles 11(2), 12*quarter* and 13(7) of the Statute, and would therefore be unable to function. Consequently, the Defence challenges the jurisdiction of the Judges to rule on the continuation of trial. The Defence further submits that pursuant to Rule 15*bis*(D) of the Rules, the trial should have continued and the President should have immediately assigned a substitute Judge to the existing bench. According to the Defence, it is this re-constituted Chamber, and not the President, that should have heard the parties on the continuation of the trial.

2. The Defence therefore requests a re-trial in view of the following irregularities and objections:

(i) five preliminary motions relating to the Indictment are still pending before the Appeals Chamber, the main purpose of which is to quash the Indictment. It would therefore be necessary to re-start the trial on a "fresh basis", instead of continuing the trial on the basis of a contested indictment;

(ii) The Defence is of the opinion that the eighty decisions rendered in this case are, for the most part, contested and submits that the appeals lodged against them are still pending;

(iii) The Defence alleges that it was unable to adequately prepare the case of the Accused since it was limited in its cross-examinations;

(iv) The Defence complains about the conduct of proceedings in the part-heard case and objects to the trial continuing before the same Judges. It submits, in support of this objection, that the Defence for all the Accused had moved the Bureau of the Tribunal for the disqualification of the three Judges of the Chamber and that the Bureau's decisions of 17 May 2004 denying the motions for disqualification, had been remitted to the Plenary session of the Tribunal for approval.

3. The Defence alleges bias on the part of the Judges, and advances the following arguments in support of the allegation:

(i) In most of their decisions, the Judges failed to take into account the unavailability of relevant documents in the language that the Accused understands, that is, French. That allegedly prevented Counsel from adequately preparing the case of the Accused. This issue had been raised in several motions that are still pending;

(ii) The Chamber's systematic dismissal of requests for certification of appeals constitutes, in the opinion of the Defence, a "complete obstruction", making it impossible for the Defence to file its submissions with the Appeals Chamber;

(iii) The fact that the Judges stated that witnesses who had already testified could be recalled during fresh hearings and that the Defence could be granted additional time to carry out fresh investigations shows that the Judges were aware of the inequality of arms;

(iv) The Defence alleges that in view of the constant variations on the list of witnesses by the Prosecution, Rule 68 of the Rules would lose its meaning.

4. The Defence for Karemera requests the Judges to withdraw from the case in order to facilitate a fresh start of the trial.

The Defence for Nzirorera

5. The Defence for Nzirorera requests the Judges to exercise their discretion pursuant to Rule 15*bis*(D) of the Rules not to continue the proceedings, and submits that the interests of justice would be best served by starting the trial anew.

6. The Defence advanced the following reasons for starting the trial anew:

(i) The Prosecution's frequent violation of its disclosure obligation has made the proceedings to date unfair;

(ii) Half of the trial has proceeded under an obsolete Indictment;

(iii) The failure to videotape the proceedings has deprived the parties of an evaluation of important demeanour evidence by the full Trial Chamber;

(iv) In case of the trial continuing, the errors by the Presiding Judge and the Trial Chamber would remain uncorrected and would render the final judge in this case unsafe.

Alleged violations of disclosure obligations by the Prosecutor

7. The Defence claims that whereas disclosure of all statements of Prosecution witnesses should have been completed on 28 September 2003, the Prosecution complied with the obligation in Rule 66(A)(ii) of the Rules only in respect of one witness out of the 80 witnesses on the list submitted. Despite all the efforts made by the Defence for Nzirorera, disclosure is still incomplete, as new witness statements are routinely provided before each trial session.

(a) The Defence submits that the Prosecutor violated Rule 66(A)(ii) and Rules 66(B) and 68 in respect of Witnesses Antonio Lucassen, GBG, GBV, GFA and GBU;

(b) The Defence contends that the Prosecution has frequently changed its witness list, thereby frustrating its ability to be adequately prepared for trial.

(c) The Defence also alleges that the Prosecution has been allowed to systematically violate Rule 73*bis*(B) of the Rules, and that it was not until 2 April 2004 that the Trial Chamber ordered the Prosecution to provide copies of all of its exhibits to the Defence. Since the Prosecution provided the said copies of the exhibits only after the second trial session, the Defence was unable to use them.

(d) The Defence also alleges that the Chamber has allowed the Prosecution on several occasions, particularly in the case of Witnesses GBG, GBV, GFA and GBU, to introduce new material during the trial that had never been disclosed to the Defence. The Defence contends that this practice, which is contrary to that permitted in other cases before the Tribunal, caused prejudice to the Defence in preparing for the trial.

The allegation that half of the trial proceeded under an obsolete Indictment

8. The Defence recalls that between 27 November and 11 December 2003, the trial proceeded under the indictment that was confirmed in 1998 and amended in 2001. Eight witnesses were questioned during that period. On 18 February 2004, the Prosecutor filed an amended indictment, pursuant to the Chamber's decision of 13 February 2004 granting leave to file the said indictment. The Defence notes that the amended indictment differs considerably from the original Indictment in that it is more specific, and because it makes Nzirorera liable for acts of his co-Accused through the joint criminal enterprise form of liability. The Defence further notes that out of the eight witnesses who testified under the original indictment, only two gave substantive testimony against Nzirorera and that neither of them testified in relation to the allegations concerning the events that fall under the period referred to in the amended indictment (particularly, the allegations relating to the meeting in 1992 at Gisesero and that of the MRND at Ruhengeri stadium soon after the RPF attack in

1993). The Defence submits that as a result, these testimonies would be inadmissible under the amended indictment. It also submits that the fact that the Chamber refused to strike the testimonies after the amended Indictment was approved, stating that it would consider the matter when rendering the final judgment, amounts to causing prejudice to the Accused. A new trial would remedy such prejudice.

9. The Defence submits that the addition of the joint criminal enterprise form of liability in the amended indictment puts Nzirorera in a materially different position. Therefore, he now has a materially different interest in cross-examining the witnesses who testified against Rwamakuba during the first trial session, in order to show that Rwamakuba did not commit the alleged acts and that, consequently, the acts cannot be charged against Nzirorera on the basis of the joint criminal enterprise form of liability.

10. Consequently, the Defence informs the Judges that, in the event of a continued trial, four of the five witnesses who testified against Rwamakuba during the first session will have to be recalled to testify. The Defence also requests the Judges to rule that in the event of a continued trial, eight of the 13 witnesses who have so far testified did so on the basis of an obsolete indictment, or that, in case of a trial *de novo*, some of these testimonies will not be admissible.

11. The Defence further contends that the amendment of the Indictment and the Prosecutor's theory on the joint criminal enterprise form of liability render the Defence's opening statement obsolete.

Need for the new Bench of the Trial Chamber to assess the Witness's demeanour

12. The Defence notes that in the *Butare* case, the Appeals Chamber recognized the importance of assessing the demeanour of witnesses during their testimony, and also stated that the Tribunal should endeavour to video-tape their testimonies, including those of protected witnesses[3]. No such decision was made in *Karemera*. The Defence also recalls that the Chamber denied its request to video-tape GBU's testimony during Judge Lattanza's absence pursuant to Rule 15*bis*(A) of the Rules. As far as the Defence is concerned, it is particularly important in the instant case to evaluate the witness' demeanour during the hearing, given that the Prosecution relies heavily on the testimonies of murderers and disreputable witnesses to support its allegations. The Defence gives the example of Witnesses GFA and GBU, who repeatedly lied before the Rwandan judicial authorities, and who were openly hostile towards the Defence during their testimony.

13. According to the Defence, the argument that the assessment of demeanour is less important when the witness testifies in a foreign language is fallacious and contrary to the Appeals Chamber's opinion[4].

Allegations relating to the errors committed by the Chamber

[3] *The Prosecutor v. Nyiramasuhuko et al,* Case No. ICTR-98-42-AR15*bis*, "Decision in the Matter of Proceedings Under Rule 15*bis*(D)", 24 September 2003, para. 35.
[4] *Prosecutor v. Kupreskic et al,* Case No. IT-95-16-A, Judgement, 23 October 2001(Ch.), para. 138.

14. The Defence recalls that the presiding Judge withdrew from this case in order to dispel any possible doubt about the integrity of the proceedings. However, the Defence contends that continuation of the trial will not cure any possible taint resulting from the decisions the presiding Judge made during the trial, and which will be the subject of an appeal against the Judgement. The Defence mainly takes issue with the following decisions:

(a) the limitations imposed on the Defence in the cross-examination of Witnesses GBG and TM, as a result of which Nzirorera was deprived of his right to a fair trial;
(b) the decisions to hold two pre-trial conferences in camera, which even the Accused was not even allowed to attend, in violation of Rules 78 and 79 of the Rules and Articles 19 and 20 of the Statute;
(c) The testimony given in the absence of Judge Lattanzi by Witness GBU, a murderer, whose credibility was highly contested and who, should the case continue, will have been heard by only one Judge;
(d) the exclusion of evidence as to the international nature of the Rwandan armed conflict, including the application of double standards: on the one hand, the admission of evidence of the uncharged murder of Bagobwe Tutsi in 1991, and on the other hand, the fact that it was held that President Habyarimana's assassination on 6 April 1994 was irrelevant to the trial;
(e) the fact that testimony was taken during the second session, contrary to Rule 72 (A) of the Rules, since there were pending preliminary motions on this matter, which testimony the Defence contends is null and void.

15. The Defence concludes that the errors committed or the persistent appearance of bias could give rise to a trial *de novo* after the Judgement. Consequently, the Defence opines that, in terms of judicial economy and an expeditious trial, it would be wiser to restart the trial at this point.

Rwamakuba's Defence

16. André Rwamakuba's Defence also requests a trial *de novo*.

17. The Defence submits that the present case is different from the other cases in which the decision to continue the proceedings has always been taken subsequent to the loss of a Judge, and not on account of his or her withdrawal from the case. In the opinion of the Defence, the proceedings in the instant case will always be affected by an appearance of bias on the part of the Chamber. In its appeal against the Chamber's decision of 24 May 2004 to which it refers in its submissions, the Defence alleges that appearance of bias on the part of the Chamber affects the fairness of the proceedings to a degree that could eventually give rise to the Trial judgement being quashed on appeal.

18. The Defence submits that the Accused's right to a fair trial requires that his case be heard by a full bench of Judges, from the beginning to the end, and that a retrial be ordered in the event of the withdrawal of one of the Judges.

19. The Defence stresses the importance of the requirement that all the Judges should have the opportunity to assess the credibility of all the witnesses based on their personal observations. The Defence further underscores the importance of assessing witness credibility in this case, insofar as its submission is based on the fact the credibility of the witnesses already heard is in issue. The Defence therefore contends that failure by the substitute Judge to assess the demeanour of all the witnesses will cause considerable prejudice to the Accused.

20. It is the Defence submission that recalling witnesses in the event of a continuation of trial would have the disadvantage of separating cross-examination from evidence-in-chief. However, the Defence indicates that it will need to recall at least four witnesses who testified against the Accused, in order to confront them with the previous statements they made before Rwandan authorities, since the said statements made were not available at the time of their testimony.

21. The Defence submits that in the event of a trial *de novo*, it would not be necessary to bring afresh most of the motions which have already been decided in this case, and which arose from the late amendment of the indictment and the Prosecution's failure to observe disclosure time limits.

22. The Defence submits that the trial has not reached a sufficiently advanced stage, as there have only been 24 days of hearing in all. The Defence therefore contends that a trial *de novo* would not entail a significant loss of time. The dictates of judicial economy rather favour a trial *de novo*, considering that a decision to continue the proceedings would be appealed and would involve the Tribunal in proceedings that could be avoided.

23. The Defence submits that the interests of justice would be better served by a trial *de novo* because the fairness of the proceedings has been considerably impaired by:

(a) Unfair rulings of the Chamber, for which certification of appeal was refused;

(b) The very belated disclosure of documents by the Prosecution, which caused prejudice to the Accused;

(c) The untimely amendment of the Indictment during the second session of the trial;

(d) The prejudice suffered by the Accused, resulting from ability to effectively cross-examine witnesses because of time constraints placed on cross-examination and the unavailability of the statements previously made by witnesses before the Rwandan authorities.

The Prosecution

24. The Prosecution requests the Chamber to continue the trial.

25. The Prosecution submits that a trial *de novo* would adversely affect the pace of the trial and amount to unreasonable use of the Tribunal's resources. Thus, if a retrial were ordered, the resources expended by the Tribunal over the past six months would be lost.

26. The Prosecution stresses that owing to the numerous Defence motions and subsequent appeals, it took six months for 13 witnesses to testify in 32 days of hearings. The Prosecution therefore concludes that the Chamber can reasonably expect to continue hearing evidence at a slow pace.

27. The Prosecution points that that it has called less than a sixth of its witnesses. After comparing the number of witnesses who have testified and those expected to testify, the Prosecution submits that the substitute Judge will have the opportunity to personally hear most of the witnesses in this case.

28. The Prosecution raises the possibility of recalling some witnesses who testified in the first two sessions, should the substitute Judge deem it necessary. The Prosecution stresses that the possibility of recalling witnesses is an issue which must be raised not in connection with the decision to continue the trial, but rather in relation to the need for the substitute Judge to familiarize himself or herself with the record of the proceedings. Moreover, the Prosecution submits that recalling the witnesses would not entail loss of time compared to the amount of time that would be lost were the trial to be restarted.

29. The Prosecution submits that in case of a trial *de novo*, there is a risk that some evidence will be lost, as some witnesses might no longer be available.

30. The Prosecution draws attention to the large number of decisions rendered in the instant case by the Trial Chamber and the Appeals Chamber. It asserts that the decisions resolved many controversial issues between the parties. According to the Prosecution, many motions would be filed again if a retrial were ordered.

31. The Prosecution submits that a continuation of the trial would afford greater protection to the victims and witnesses.

The Parties' Responses

Karemera's Defence

32. The Defence contends that there is no precedent in the Tribunal's case law where proceedings continued after the withdrawal of the presiding Judge.

33. The Defence emphasizes that none of the Judges can preside over the proceedings of the Chamber.

34. The Defence recalls that the proceedings are at an early stage.

35. The Defence claims that, in the absence of video recordings, the substitute Judge will not be able to assess the credibility of the witnesses.

Ngirumpatse' s Defence

36. The Defence indicates that it will appeal any decision by the Judges to continue the trial, and draws attention to the loss of time that such an action would entail.

37. The Defence submits that in a trial *de novo*, the reasons that underpinned most of its motions, namely the Prosecution's late disclosures and untimely amendment of the Indictment, would no longer obtain. The Defence further argues that a trial *de novo* would make the trial less complex and expedite future proceedings.

38. The Defence indicates that it will recall Witness GBG.

Nzirorera's Defence

39. The Defence submits that a trial *de novo* would make it possible to resume hearings in late August, which would be impossible were the trial to continue.

40. The Defence reiterates that contrary to the Prosecution's arguments, there is nothing to suggest that a trial *de novo* would entail the risk of losing some evidence.

41. The Defence recalls that pursuant to Rule 15*bis*(D) of the Rules, a substitution of a judge can be done only once. The Defence submits that it is better to preserve that substitution for a later stage in the proceedings.

42. The Defence maintains that all the Judges must have seen and heard all the witnesses.

43. The Defence stresses that there is no compelling reason to disregard the fact that all the Accused do not consent to the continuation of the trial with a substitute Judge.

Rwamakuba's Defence

44. In response to the Prosecution's contention that the Chamber will continue to hear evidence at a slower pace, the Defence submits that in a trial *de novo*, the pace would be quicker because the cause of the delays, namely the Prosecutor's belated disclosures and late amendment of the Indictment, would no longer affect the proceedings.

45. The Defence stresses that the Prosecution has not clearly shown that it would lose evidence in a trial *de novo*.

46. The Defence maintains that, in the instant case, hearings can resume only in late August if the Judges decide to order a retrial.

The Prosecution

47. The Prosecution recalls that the Rules permit the replacement of a Judge and that the substitute Judge 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.

48. The Prosecution reiterates that at this stage of the proceedings, it must always be ensured that the substitute Judge will have heard most of the witnesses. According to the Prosecution, the fact that the trial is at its early stage supports its motion for continuation of trial.

49. The Prosecution submits that with regard to the assessment of the credibility of protected witnesses, a video-recording of their testimony is desirable, but not obligatory. It contents that the Rules provide for the possibility of continuing a trial without necessarily requiring video recording. Moreover, witness credibility can be assessed not only on the basis of trial transcripts, but also on the basis of their pre-trial statements.

50. The Prosecution submits that, before the commencement of hearings, the Accused were given notice of its intention to rely on the concept of joint criminal enterprise. In the Prosecution's view, the concept of joint criminal enterprise was implicitly indicated in the initial Indictment and explicitly mentioned in its *Supplemental Pre-Trial Brief* of 13 October 2003 and in its Opening Statement of 27 November 2003.

51. The Prosecution submits that the submissions made under Rule 15*bis*(D) of the Rules should not be used as a basis for requesting reconsideration of all the previous decisions of the Chamber. The decision on the continuation of trial does not entail a right to appeal all the previous decisions of the Chamber.

52. The Prosecution reiterates that the Chamber has never limited the Defence in its cross-examination in an unreasonable or unfair manner.

53. The Prosecution submits that the holding of status conferences in the absence of the accused is normal practice of the Tribunal and will not be changed by a trial *de novo*. The Prosecution recalls that on 29 April 2004, the Chamber decided to make public the record of the in camera proceedings of 27 April 2004.

54. The Prosecution does not discern any error of law in the Chamber's decision to continue sitting, pursuant to Rule 15*bis*(A) of the Rules, during the temporary absence of one of its Judges.

55. The Prosecution submits that the Defence allegations regarding an appearance of bias on the part of the Chamber do not warrant a trial *de novo*. The Prosecution emphasises that the fact that the Chamber did not grant a motion by one party or the other does not mean that it is biased or that it erred in law.

56. The Prosecution contends that it has systematically fulfilled its disclosure obligations, as prescribed by the Rules and the relevant decisions of the Tribunal. The Prosecution submits that the Defence motions for disclosure exceeded the limits of its duties and referred to documents like the internal memoranda of the Office of the

Prosecutor. The Prosecution contends that it did not systematically violate Rule 73*bis* of the Rules with respect to exhibits.

57. The Prosecution recalls that the Judges have the discretion to make decisions, pursuant to Rule 15*bis*(D) of the Rules.

Deliberations

I. Discretion of the Judges to decide to continue the proceedings with a substitute Judge where such Decision would serve the interests of justice

58. The Judges recall that pursuant to Rule 15*bis*(D) of the Rules, they have the discretion to decide to continue the proceedings with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice.

59. Karemera's Defence contests such discretion, insofar as the "Chamber" did not have a proper composition of the bench, due to the absence of a permanent Judge. The Judges recall that in the instant case, the issue is not competence of the Chamber nor that of a bench. Rule 15*bis*(C) of the Rules clearly provides for a situation where a judge is unable to continue sitting, as a result of which the bench becomes inexistent. The said Rule provides that the President of the Tribunal may assign[5] another Judge to the case and order a continuation of the proceedings with the consent of the accused. In the present case, this procedure was duly followed by President Møse who, in his letter of 17 May 2004, asked whether the Accused had consented to the continuation of the proceedings. In this particular case, since the Accused withheld their consent, the Judges, pursuant to Rule 15*bis*(D), have the discretion to 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. Thus, the Defence assertions run counter to the letter and spirit of Rule 15*bis*(D) of the Rules.

60. The Judges note that the fact that they are *ad litem* Judges does not affect their competence to decide as a bench. In this regard, they refer to the Appeals Chamber's decision of 11 June 2004.[6]

61. The Judges consider that under Rule 15*bis*(D), they have a margin of discretion to determine whether, taking all the circumstances into account, continuing the trial with a substitute judge would serve the interests of justice.[7] In the exercise of that discretion, the Judges will take into account all the circumstances of the case particularly in the light of the submissions and responses of the parties. As regards the said submissions and responses, the Judges note that certain issues that were raised therein have already been addressed by other organs of the Tribunal, such as the Bureau or even the Appeals Chamber, or are pending before the Appeals Chamber.

[5] After the opening statements or the beginning of presentation of evidence.

[6] *Karemera and Nzirorera v. The Prosecutor,* Case No. ICTR-98-44-AR73.4, "Decision on Interlocutory Appeals regarding participation of *ad litem* Judges".

[7] See Decision of the Appeals Chamber in *The Prosecutor v. Nyiramasuhuko and others,* Case No. ICTR-98-42-A15*bis*, "Decision on Matter of Proceedings under Rule 15*bis*(D)", 24 September 2003 (A. Ch.), para. 22.

However, the Judges consider that it would be proper to equally address those issues, but will limit themselves to those they consider relevant to the question of continuation or restart of the trial. They recall, once more, that certain issues, particularly the issue relating to the assessment of the demeanour of witnesses during testimony and to their credibility, will also be considered by the substitute Judge assigned by the President since the said Judge will have familiarized himself or herself with the record of the proceedings (in compliance with Rule 15*bis*(D) of the Rules).

II. That the trial proceeded under an "obsolete" indictment and following an obsolete opening statement, and that the Defence lacked information on the charges of joint criminal enterprise

(a) *That the trial proceeded under "obsolete" indictment*

62. On 8 October 2003, the Trial Chamber granted the Prosecutor leave to amend part of the Indictment of 21 November 2001.[8] The Prosecutor filed an amended Indictment, compliance with that Decision,[9] but also appealed the decision granting leave to amend part of the Indictment.[10] On 27 November 2003, the trial commenced on the basis of the Indictment of 13 October 2003. On 19 December 2003, the Appeals Chamber vacated the Trial Chamber's Decision of 8 October 2003, and invited the Trial Chamber to consider whether, in the light of its observations, the amended Indictment was otherwise in compliance with Rule 50 of the Rules and, if so, to allow it.[11] On 13 February 2004, the Trial Chamber granted the Prosecutor leave to file the amended Indictment,[12] which he filed accordingly on 18 February 2004. On 19 March 2004, the Trial Chamber granted the Defence certification to appeal against the Decision of 13 February 2004 and, by an oral decision of 23 February 2004, ruled that the amended Indictment was consistent with the Decision of 13 February 2004.[13] A Defence appeal against these decisions is pending.

63. The Judges note that, contrary to Defence allegations, the trial has never been conducted on the basis of an "obsolete" indictment. The Judges recall that, in its Decision of 8 April 2004,[14] the Appeals Chamber had decided that the trial should continue on the basis of the Indictment of 13 October 2003 which remains valid until a decision is taken by the Appeals Chamber on the motion to amend the Indictment.

64. The Judges note that while Karemera's Defence contends that it would be necessary to restart the trial on a "new basis", it seems to presume that a trial *de novo*

[8] "Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment", 8 October 2003.
[9] Indictment filed on 13 October 2003.
[10] Prosecutor's Appeal dated 28 October 2003.
[11] "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave To File An Amended Indictment", 19 December 2003.
[12] "Decision on The Prosecutor's Motion for Leave to Amend the Indictment", 13 February 2004.
[13] "Decision granting the Defence certification to appeal against the Decision of 13 February 2004 and the Oral Decision of 23 February ruling the amended indictment to be in compliance with the Decision of 13 February 2004", 19 March 2004.
[14] *Mathieu Ngirumpatse and Joseph Nzirorera v. The Prosecutor,* Case No. ICTR-98-44-AR73.2, "Decision on Interlocutory Appeal Regarding Motion for Declaration of Mistrial and on Motion to suspend Trial (A. Ch.)", 8 April 2004.

would be conducted on the basis of a new indictment. The Judges note that in both cases, namely a trial *de novo* and a continuation of the proceedings, the trial will proceed under the Indictment of 18 February 2004 or under the Indictment that the Appeals Chamber will decide on.

65. Since the trial has been proceeding on the basis of operative indictment, and as a trial *de novo* would change nothing in the indictment which only the Appeals Chamber may amend, the Judges hold that the arguments put forward by the parties fail to demonstrate that the interests of justice would be served by a trial *de novo.*

(b) That the Defence lacked information on the charges of joint criminal enterprise

66. Another issue before the Judges is whether, for the period from 27 November 2003 (date of commencement of the trial on the basis of the Indictment of 13 October 2003) to 18 February 2004 (date of filing of the new Indictment), the Defence had been duly informed of the fact that Nzirorera was charged with participation in a joint criminal enterprise.

67. The Judges note that the Defence was indeed informed of the particulars of the charge based on joint criminal enterprise. It could even be considered that the particulars of that charge were implicitly pleaded in the Indictment of 13 October 2003.[15] Nzirorera's Defence had itself noted, at the Status Conference of 27 November 2003, date of commencement of the trial, that the Indictment of 13 October 2003 included a joint criminal enterprise form of liability.[16]

68. In this regard, the Judges also note that it is well established in the case-law of the Appeals Chamber of the two Tribunals that which does not plead with sufficient detail the essential aspect of the Prosecution case, "can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[17] Thus, in conformity with the case law referred to above, communication of such information to the Defence can be done in a Pre-Trial Brief, in the Prosecutor's opening statement, through disclosure of evidence and during proceedings at trial.[18]

69. The Judges recall that the Prosecutor gave notice of his intention to charge the accused with participation in a joint criminal enterprise by implicitly indicating it in the Indictment, and subsequently in the Supplemental Pre-Trial Brief of 13 October,[19] in its opening statement[20] and at the Status Conference of 27 November 2003.[21]

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[15] Paragraph 6.104 of the Indictment of 13 October reads: "participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above." Each of the counts referred to paragraph 6.104.

[16] Transcript of 27 November 2003, p. 12, lines 1-3: "And simply, we wish to know, and have it made clear before the trial starts, whether our clients are charged with joint criminal enterprise or not."

[17] *The Prosecutor v. Kupreskic and others,* Case No. IT-95-16, Appeal Judgement, 23 October 2001 (A. Ch), para. 114; see also Appeal Judgement of 5 July 2004 in the *Niyitegeka* case, para. 97.

[18] *Prosecutor v. Kupreskic and others,* Appeal Judgement, paras. 117-120; *The Prosecutor v. Niyitegeka,* Appeal Judgement, para. 197.

[19] "Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B)(i) of the Rules *Supplementing the Pre-Trial Brief previously filed on 15 March 2002",* 13 October 2003, para. 6: "The objective of this supplemental filing is as follows: (i) To make explicit the Prosecutor's intention to prove his case

70. The Judges also recall the Trial Chamber's Decision of 24 November 2003 denying the motion by the Defence for Ngirumpatse for dismissal of the Prosecutor's supplementary pre-trial brief and in which the Chamber reserved "the right to rule at a latter stage on the content of the notion of joint criminal enterprise that touches on the merits of the case".[22]

c) Obsolete opening statement

71. Regarding the assertion by Counsel for Nzirorera that his opening statement obsolete, it should be emphasized that the Trial Chamber, in its oral decision of 1 April 2004, stated that might be authorized to make another opening statement at the beginning of the presentation of its case.[23]

72. In the light of the consideration underscored so far, namely that the trial has been proceeding on the basis of an operative indictment, that the Accused have not been charged on the basis of a theory unknown to the Defence and that Counsel for Nzirorera could be allowed to make another opening statement, the Judges unanimously consider that the interests of justice, as well as the requirements of judicial economy would be best served if the trial continues.

73. With respect to the admissibility of the testimonies of Witnesses GBG and GBV, the Judges refer the Defence to the Trial Chamber's Decision rendered on 30 April 2004.[24] The Judges recall that the Chamber ruled that:

> "[W]hen evaluating the probative value of all evidence presented during the trial, the Chamber will assess whether or not the Prosecutor has failed to comply with this potential obligation and whether or not it is unfair for him to have led evidence relating to these very meetings".[25]

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against all of the Accused on the indictment under a theory of co-perpetrators acting in concert with a common purpose, also referred to as *joint criminal enterprise* pleading; (ii) To further clarify that the Prosecutor intends to hold the Accused on the indictment responsible for crimes committed by co-perpetrators that may have been outside of the *common design*, but which were nonetheless the natural and foreseeable consequence of the *common purpose* or the *joint criminal enterprise* [Category 3 joint criminal enterprise]."

[20] Transcript of 27 November 2003, Opening Statement of Office of the Prosecution, pp. 3 to 22.

[21] Transcript of 27 November 2003, p. 19, lines 15-23: "[W]hat the Prosecutor has done repeatedly for the last three months, is to make a good faith attempt to place the Defence on notice of the case that we would be leading in this trial. And we've done that over and over again, and it should be clear to him now, particularly after the opening statement of this morning, that we intend to prosecute his client as a participant in a joint criminal enterprise under all three categories, including the extended form. [...] that we will be putting forth and that's the case that he has to defend, and that's the case that we have indicated to the Defence in our amended indictment, in our pre-trial brief, and in the opening statement."

[22] "Decision on Motion by the Defence for Ngirumpatse for Dismissal of Prosecutor's Pre-Trial Brief", 24 November 2003, para. 18.

[23] Transcripts of 1 April 2004, pp. 3 and 4.

[24] "Decision on the Defence Motion to Strike Testimony of Witnesses GBG and GBV" (Ch.), 30 April 2004.

[25] *Idem*, para. 19.

In the prevailing circumstances, the Judges hold the view that the Defence has failed to demonstrate that the Accused suffered prejudice due to the fact that the evidence was presented.

III. The issue of Late Disclosure

74. The Judges take note of allegations by the Defence regarding the Prosecutor's failings with respect to his disclosure obligations, which failings the Defence contends can be a trial *de novo* cured only be ordering a trial *de novo*.

75. The Judges note that the Prosecutor has not always fulfilled its disclosure obligations in a timely manner. However, most of the Defence motions for disclosure were subsequently granted by decisions of the Chamber.[26] Specific orders for disclosure of evidence were issued on several occasions.[27]

76. The Judges also recall the resolution of controversies over disclosures through informal agreements between the parties. Many agreements were confirmed by letters from Counsel for Nzirorera[28] and are evidenced by, among others, in the transcripts of the meeting of 2 November 2003.[29] It is on the basis of these agreements that the Chamber became satisfied that it could hear witnesses without causing prejudice to the Accused.

77. The Judges also note that the Prosecutor had, on several occasions, been restricted by the fact that he did not possess the materials requested by the Defence, in particular, certain witness statements made before the Rwandan Authorities, the video recording of President Habyarimana's speech in Ruhengeri and exculpatory evidence in favour of Rwamakuba.[30] In this connection, the Judges recall the Appeals Chamber's position when it held that :

> "[...] However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure"[31]

78. In the same Judgment, the Appeals Chamber stressed that the Prosecutor's failure to fulfill its disclosure obligation does not necessarily render the proceedings

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[26] See for example, the 24 November 2003 Decision on the Defence motion for an order to the Prosecution Witnesses to produce, at their appearance, their diaries or other written materials from 1992 to 1994 and their statements made before the Rwandan judicial authorities, and the 2 March 2004 Order for disclosure to Joseph Nzirorera's Defence of Trial Transcripts in closed sessions of Witnesses GAP and GKB in the case of *Casimir Bizimungu et al* (Case No. ICTR-99-50-T), and of the relevant exhibits under seal".

[27] Decision of 24 November 2003 on the Defence motion for an order to the Prosecution witnesses to produce, at their appearance, their diaries and other written materials from 1992 to 1994 and their statements made before the Rwandan judicial authorities. See also the transcripts of the Status Conference of 27 January 2004, p. 20.

[28] Letter dated 3 November 2003 to Mr. O'Donnel, p. 4 "Disclosure/Inspection of Items Agreed to by the Prosecution" and introduction of letter dated 24 November 2003 to O'Donnell.

[29] Transcripts of the informal meeting of 3 November 2003, p. 20 *et seq*. Besides, with respect to witness GBV in particular, the Defence itself stated at an informal meeting on 24 November 2003 that he had no problems cross-examining the witness. See the transcripts of 3 December 2003, p. 5, and the reference made by the Presiding Judge to the informal meeting.

[30] Transcripts of the Status Conference of 27 November 2003, p. 22.

[31] *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 35.

unfair insofar as the Accused has not demonstrated objectively that he has suffered prejudice.[32] The Judges note that, in this case, the Defence has not *in concreto* demonstrated that the Accused have suffered prejudice.

79. The Judges recall that the Appeals Chamber has never set aside a Trial Chamber Judgement on account of late disclosure by the Prosecutor. There is therefore no basis for considering that the Prosecutor's late disclosure of evidence warrants a trial *de novo*.

80. With respect to fresh evidence allegedly proffered during the questioning of certain witnesses,[33] the Judges point out that Prosecutor's allegations in question relate rather to the general historical context, and have therefore not caused prejudice to the Accused. Nonetheless, the Chamber explicitly reserved the evaluation of the evidence to a latter stage,[34] and even refused to allow the Prosecutor to examine the witness on the fresh evidence.[35]

81. The Judges that the Trial Chamber ordered an adjournment of proceedings in order to give the Defence adequate time to prepare its case in light of the fresh allegations, and even to conduct investigations.[36] The Judges consider that such remedies have made it possible to avoid prejudice being caused to the Accused.

82. In the light of the foregoing considerations, the Judges hold the view that the Defence cannot rely on late disclosure to argue that the interests of justice would be served by a trial *de novo*. On the contrary, the Judges consider that some disputed issues would recur and thus affect judicial economy. In their opinion therefore, the interests of justice would be served by continuing the trial.

IV. Recalling witnesses in the event of a trial *de novo*

83. The Judges deem it necessary to point out that in assessing the interests of justice pursuant to Rule 15*bis*(D) of the Rules of Procedure and Evidence, they also have to strike a balance between divergent interests, which include the rights of the victims and witnesses and, in particular, their safety. However, as most of the witnesses who testified were protected witnesses, concerns for their safety heightened as a result of repeated trips to the Tribunal. Besides, bringing witnesses from Rwanda or from elsewhere involves, among other things, heavy logistics. This is particularly true in the case where like in this instance, some of the witnesses who testified are detainees. With a *de novo* trial, there is the risk that a witness may refuse to return to testify for security reasons, or that a witness may be unable to come back to testify

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[32] *Idem*, para. 38: "Furthermore, the Defence has not *in concreto* demonstrated that the Appellant has suffered prejudice by the way the statements have been disclosed to him."

[33] In its submission of 6 July 2004, Counsel for Nzirorera mentioned Witnesses GBG, GBV, GFA and GBU in respect of whom the Trial Chamber had authorized the Prosecutor to produce fresh evidence.

[34] Transcripts of 3 December 2003, p. 19 "So we will allow Counsel for the Prosecution to pursue this line of questioning and we will see later what probative value to ascribe to what has been heard." The Chamber did the same with respect to witness GFA and GBU. See Transcripts of 31 March 2004, p. 27 and of 15 April 2004, p. 33.

[35] Transcripts of 10 December 2003, p. 17 (English).

[36] This decision was made in favour of Counsel for Rwamakuba who was given an extra week to cross-examine Witness GIN. Transcripts of 4 May 2004, p.6.

due to circumstances beyond his control. This would result in irretrievable loss of evidence, which would seriously affect the interests of justice.

V. Alleged errors of law

84. The Defence alleges that the Chamber erred in law. It contends that in the event of a continuation of the trial, it would not be possible to correct the errors which would subsequently be the subject of an appeal against the Judgement. In particular, the Defence refers to the Chamber's Decisions:

(i) limiting the duration of cross-examination;
(ii) authorizing the holding of closed sessions in the absence of the Accused;
(iii) excluding Defence evidence on the international nature of the 1994 conflict in Rwanda;
(iv) on the continuation of proceedings in spite of the fact that preliminary motions were pending before the Chamber; and
(v) denying requests for certification of appeal.

85. The Defence submits that the fairness of proceedings has been considerably compromised by the errors committed by the Chamber and that consequently, a trial *de novo* would serve the interests of justice. The Judges will only consider the alleged errors of law that are relevant to the present Decision.

86. With respect to Decisions relating to the limitations of the duration of cross-examination and to the holding of closed sessions in the absence of the Accused, the Judges, finds first and foremost, that the Defence has failed to demonstrate in his submissions that the Chamber took the said decisions in violation of the provisions of the Statute and of the Rules of Procedure and Evidence, rather than on the basis of the Judges' discretion under the said provisions with respect to the conduct of the trial.

87. In particular, the Judges are of the view that the purported limits to the cross-examination of witnesses, ordered by the Chamber in its Decision of 5 December 2003[37] to the effect that cross-examination time should not be twice as long as the duration of the examination-in-chief have not caused prejudice to the Accused. The Decision applies to all the parties in the same manner.[38] Moreover, the practice of the two *ad hoc* Tribunals places duration of the limits to the duration of the examination-in-chief and cross-examination, and the limits placed vary from Chamber to Chamber. This is a discretion exercised by the Judges, pursuant to Rule 90(F) of the Rules of Procedure and Evidence. Therefore, the need for such limits would still arise in the case of a trial *de novo*.

88. With regard to closed sessions held in the absence of the Accused, the Judges recall that one of the contested closed sessions is the Status Conference organized by the Chamber prior to the commencement of trial to facilitate informal discussions between the parties on certain issues in a relaxed atmosphere, in order to ensure a

[37] Transcripts of 5 December 2003, p. 5.
[38] The examination-in-chief of Witness GBU lasted one trial day, while his cross-examination by Counsel for Nzirorera lasted two days. Similarly, with respect to Witness GII, the examination-in-chief lasted one day, while the cross-examination by the Defence for Rwamakuba lasted two days.

smooth conduct of the trial. The Judges fail to see in what way the Defence has demonstrated that the Accused have suffered such prejudice as to warrant a fresh start of the trial. Another contested closed session is the hearing at which was discussed a confidential letter from Counsel for Rwamakuba to the Presiding Judge of the Trial Chamber on an issue which subsequently led to her resignation. After Judge Vaz forwarded the letter to the President of the Tribunal, the Chamber, however, decided to make public the transcripts of the hearing.

89. With respect to the exclusion of Defence evidence on the international nature of the 1994 conflict in Rwanda and, by contract, to the admission of Prosecution evidence of the 1991 Tutsi Bagogwe massacres, the Judges first of all recall that the Bureau has already noted "[t]he alleged double-standard with the Chamber's admission of evidence concerning killings of Tutsis in 1991 is misguided: the relevance of any particular category of evidence is a function of a variety of factors requiring a concrete assessment of the facts in issue".[39] Moreover, the Judges consider that with respect to war crimes, the Chamber simply relied on the Tribunal's jurisdiction given by the Security Council through the Statute, which jurisdiction the Chamber noted is limited to war crimes committed in the context of an internal armed conflict. The Judges held that in the event of a trial *de novo*, such jurisdiction cannot be extended to cover war crimes committed during an international armed conflict.

90. Regarding the Chamber's decision to proceed with the hearings in spite of the fact that preliminary motions filed by the Defence were still pending, the Judges observe that here, preliminary motions do not entail a stay of the underlying proceedings, since opening statements had already been made by the parties in conformity with Rule 84 of the Rules of Procedure and Evidence and, also, since the Defence is not entitled under the said Rules to make fresh opening statements upon every amendment of the Indictment. The Defence submission in that regard does not support its motion for a trial *de novo* because, whether it is a continuation of trial or a trial *de novo,* there is still a risk that preliminary motions will remain pending on appeal. If the Defence argument for a fresh start of the trial rather than a continuation were to be followed, it would even be more likely that the preliminary motions would remain pending in the case of a restart than if the trial were continued.

91. With respect to the allegation that the errors of law were committed by denying requests for certification of appeal (Karemera's Defence), which allegedly rendered the trial unfair (Defence for Rwamakuba), the Judges note that the Chamber had granted certification of appeal for all essential issues relating to the Indictment and for such an important issue as a declaration of mistrial. With regard to other matters, the Judges find that the Defence has not shown that the Chamber acted *ultra vires* in the exercise of its discretion under Rule 72(B)(ii) of the Rules of Procedure and Evidence and disregarded the practice in both *ad hoc* Tribunals, and in particular, that of the Appeals Chamber. Lastly, the Judges note that the number of requests for certification denied should be assessed in the light of the number of requests filed, most of which were granted (5 oral decisions and 7 written decisions denying certification out of 80 decisions made).

92. The Judges conclude that the Defence has not demonstrated the existence of

[39] "Decision on motion by Nzirorera for disqualification of Trial Judges", 17 May 2004, para. 21.

errors of law which support a finding that a trial *de novo* would serve the interests of justice.
On the contrary, they have determined unanimously, in view of the various decisions rendered, that continuing the trial would serve the interests of justice.

The alleged appearance of bias on the part of Judge Vaz and the Judges of Trial Chamber III

93. In support of their request for a trial *de novo*, the parties advance different arguments regarding an appearance of bias on the part of the Judges of the Chamber and, in particular Judge Vaz.

94. The Defence for Karemera alleges bias on the part of all the Judges that constitute the full bench of Trial Chamber III, and requests that they withdraw from the case in order to facilitate a trial *de novo*. The Defence for Nzirorera claims that if the appearance of bias cannot be removed, that could constitute grounds for appeal against the judgment, and consequently, it would be better to start the trial afresh at this stage. The Defence for Rwamakuba, for its part, submits that the circumstances of Judge Vaz's withdrawal following the Defence allegations, and the filing of motions for disqualification, are sufficient to support a ruling for a trial *de novo*. In the alternative, it asserts that an appearance of bias on the part of Judge Vaz has been established and that consequently, a trial *de novo* is necessary. The Defence also points out the special role which, in its opinion, is played by the presiding Judge in decision making.

95. As regards the submissions by the Defence for Karemera, the Judges note that the said submissions have already been found to be groundless in three Decisions by the Tribunal's Bureau denying the Defence applications for disqualification of the three judges of the Chamber.[40] Moreover, and contrary to the Defence claims, the three motions for disqualification dismissed by the Bureau are not pending on appeal before the "Tribunal's plenary session [*sic*!]", since only the Bureau has jurisdiction to deal with the matter.

96. With regard to the submission by the Defence for Rwamakuba that the Chamber's decisions would be tainted by an appearance of bias on the part of Judge Vaz, the Judges note that the Chamber's Decisions are taken by the full bench on the basis of parity. No predominant role is played by the presiding judge of the Chamber in the deliberations.

97. As regards the alleged bias or appearance of bias on the part of Judge Vaz, the Judges recall that on 17 May 2004, at an informal meeting with the parties during which Judge Vaz announced her withdrawal from the case, Defence Counsel for Ngirumpatse expressed his regret, pointing out that fairness and dignity had always prevailed in the Chamber's decisions. The other two Defence Counsel for Rwamakuba and for Karemera who were there fully supported the remarks made by

[40] "Decision on Motion by Karemera for Disqualification of Trial Judges", 17 May 2004 (Bureau); "Decision on Motion by Ngirumpatse for Disqualification of Trial Judges", 17 May 2004; "Decision on Motion by Nzirorera for Disqualification of Trial Judges", 17 May 2004.

Counsel for Ngirumpatse and, in particular, Mr. Hooper thanked Judge Vaz for her patience during the trial.

98. Following those assertions and on the basis of same Counsel for Rwamakuba announced the withdrawal of his motion for disqualification. The apprehension of bias for the future was thus dispelled as a result of the withdrawal, and this cannot be perceived as a shadow that would hang over the continuation of the trial.

99. As regards the Defence submission that an appearance of bias was manifested through Judge Vaz's withdrawal, the Judges recall, on the one hand, that Judge Vaz was motivated in her withdrawal by the consideration that the interests of justice would be served by a continued trial and, on the other hand that the Defence has always argued about apprehension of bias for the future. The Judges consider that the Defence's previous submissions cannot be ignored. Indeed, they show that Defence arguments have often been contradictory. The Judges that those submissions are better than other additions for the dismissal of the argument for a trial *de novo* so that every appearance of bias is eliminated.

100. The Judges, however, deem it necessary to point out that the Judges of the Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection in Article 12 of the Statute.[41] In the *Delalic* case, the Appeals Chamber noted that "*as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be 'firmly established'*".[42] "*Partiality must be established on the basis of adequate and reliable evidence.*"[43] The Appeals Chamber in the *Delalic* case pointed out that "*[T]he reason for this high threshold is that, just as any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias*"[44]. To sustain an allegation of appearance of bias on the part of the Chamber or of a Judge thereof, the Accused must adduce objective evidence. It is not enough for the Accused to have a mere feeling or suspicion of appearance of bias.[45]

101. As the impartiality of the three Judges of the Chamber has been definitely confirmed by the Bureau, and as the Defence has not adduced further objective evidence in support of its allegations of bias on the part of the Judges and, therefore, of the unfairness of the proceedings to date, the Judges that the Defence submissions do not sustain the argument that a trial *de novo* would serve the interests of justice.

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[41] *The Prosecutor v. Karemera*, Case No. ICTR-98-44-T, "Decision on Motion by Karemera for Disqualification of Trial Judges", 17 May 2004 (Bureau), para. 10.
[42] *Prosecutor v. Delalic*, Case No. IT-96-21, Judgment, 20 February 2001 (A.Ch.), para. 707, citing *Prosecutor v. Furundzija*, Case No. IT-95-17/1, 21 July 2000 (A.Ch.).
[43] *The Prosecutor v. Akayesu*, ICTR-94-4, Judgment, 1 June 2001 (A.Ch.), para. 91.
[44] *Prosecutor v. Delalic*, Case No. IT-96-21, Judgment, 20 February 2001 (A.Ch.), para. 707; see also *The Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgment (AC), 9 July 2004; para. 45.
[45] See also *Popescu Nasta v. Romania*, Judgment, 7 January 2003: ["The Court recalls that pursuant to Article 6(1) impartiality must be established on a subjective basis, by trying to determine the personal conviction of a judge in a particular situation, and also, an objective basis, by ensuring that sufficient guaranties are offered in order to rule out in this regard every legitimate doubt"].

VII. Evaluation of witness demeanour in court by a Chamber with a substitute Judge

102. The Judges are well aware of the fact that of the twelve witnesses heard, ten were protected. The testimonies of the latter were not video-taped due to technical constraints.[46]

103. The existence of such recordings would certainly have made it easier for the substitute Judge to evaluate the demeanour of the witnesses in court, particularly in terms of their credibility. However, in view of the specificity of the proceedings before the Tribunal, where interpretation from Kinyarwanda and the inter-mediation of two working languages affect the Chamber' assessment of a witness' demeanour, there is need to weigh the impact of such in-court evaluation against the usual practice in national courts.

104. It is true that pursuant to Rule 90(A) of the Rules, "*Witnesses shall, in principle, be heard directly by the Chambers.*" It is however well established in the Tribunal's Rules[47] and case-law[48] that the Trial Chamber may, in exceptional circumstances rule on the merits of a case without hearing all the witnesses directly. It is therefore all the more admissible for one of the three Judges to do so. Consequently, the fact that a substitute Judge acquaints herself or himself with testimonies by relying solely on transcripts and possibly on audio-recordings, which are still available even for protected witnesses, and does not hear some witnesses directly, is compatible with a fair trial and therefore with its continuation. If it were otherwise, the amendment to the Rules by introducing the new provision on continuation of trial with a substitute Judge could not have been envisaged. In the circumstances, the compatibility of such a situation with a fair trial and thus with the continuation of the trial in issue should be evaluated by the substitute Judge as part of the process of familiarizing himself or herself with the record of the proceedings.

105. Indeed, Rule 15*bis*(D) of the Rules provides for continuation either with the consent of the Accused or when so decided by the Judges only upon certification by the substitute Judge that he or she has familiarized himself or herself with the record of the proceedings, including the testimonies that are recorded in the court transcripts. The Appeals Chamber has, in fact, had the opportunity to state that:

"*failure to review video-recordings which, because they are non-existent, do not form part of the record of proceedings, does not mean that the judge has not familiarized himself with the record of proceedings as the record stands and therefore does not disqualify him from joining the bench*".[49]

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[46] See the memorandum of 13 July 2004 addressed to the Judges in which the Registrar confirmed that the Registry did not yet have sufficient electronic equipment and support staff. The Registry only had facilities to record depositions of protected witnesses in one Chamber at a time and, on the instruction of the President of the Tribunal, priority had hitherto been given to the *Bizimungu* case.

[47] See Rules 71 and 15*bis* of the Rules.

[48] See Decision by the Appeals Chamber in *The Prosecutor v. Nyiramasuhuko and Others*, paras. 22 and 25.

[49] See Decision of the Appeals Chamber in *The Prosecutor v. Nyiramasuhuko* and Others, para. 33. In that case, the Appeals Chamber also stated: "*Even after the Trial Chamber has decided in favour of*

106. In any event, the Judges consider that the new bench of the Chamber will *proprio motu*, be able to recall a few witnesses, if it deems that the interests of justice so require.[50] This could be contemplated, in particular, with regard to Witness GBU who testified in the absence of Judge Lattanzi, and whose demeanour at the hearing was therefore assessed only by Judge Arrey.[51] Even with respect to recalling certain witnesses, the Judges unanimously that continuation would serve the interests of justice.

VIII. Judicial economy

107. The Judges take note of the Defence submissions, notably that proceedings have not yet reached an advanced stage, that there have only been 24 trial days in all, that a trial *de novo* will reduce the complexity of the trial, will obviate the causes of its delay and thus facilitate its rapid progress, and that a decision to continue would be appealed, which would delay the resumption of trial. The Judges also considered the submissions by the Prosecution, notably, that a trial *de novo* would compromise the pace of the proceedings and would unreasonably commit the Tribunal's resources.

108. The Judges note that, to date, there have been 32 trial days during which the parties conducted the examination-in-chief and cross-examination of 13 Prosecution witnesses over a period of almost six months. The Judges are of the opinion that the Defence argument that there will no longer be any factors slowing down the proceedings in future is unfounded. It is probable that there will always be events that will affect the pace of proceedings, such as the non-availability of witnesses because of ill health or for other unforeseeable reasons. Coordination requirements for the appearance of witnesses in this case and in others before the Tribunal are always going to slow down the pace of the proceedings. Another factor is the need to adjourn hearings to enable Defence Counsel to travel out of Seat of the Tribunal. In the light of these considerations, the Judges hold the view that account should not be taken only of the 32 trial days, but rather of the period from 27 November 2003 to 13 May 2004, that is 5 months and 17 days. This is the period that would be lost in the event of a trial *de novo* and which, at any rate, can never be reduced in the way the Defence claims, whereas a continuation of the trial would save much more than those 32 trial days.

109. It is, moreover, the Judges' opinion that the Accused would even benefit from a minimum shortening of the duration of trial, with regard to the length of their

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continuation with a substitute judge, the latter joins the bench only upon certifying that he has familiarized himself with the record of proceedings. The object is obviously to enable him to acquaint himself with the proceedings. If he cannot, he will not give the required certificate and he will not join the bench. But he may feel that, even in the absence of video-recordings, the record of proceedings is enough to enable him to appreciate what has happened".

[50] *Ibid.*, paras. 34 and 35.

[51] The Chamber denied Nzirorera's motion requesting video-recordings because of technical constraints. Transcripts, 19 April 2004, p. 50: *"We don't have the means at any rate to be able to comply or satisfy your request. Perhaps one day, if we have the means to do that, we can record the witness and have all of the information given during the testimony, the examination-in-chief and the cross-examination when a judge is absent. But, for the time being, in this Chamber we do not have sufficient facilities in order to do that. And I think that those preparations are being made, but they are not currently ready very well".*

detention if found innocent, or of their preventive detention if found guilty. Similarly, victims who are entitled to know the truth as soon as possible would benefit from a shortened duration of the trial.

110. The Judges note that, in the event of a trial *de novo*, many motions that have already been disposed of could be filed afresh. Only a continuation of the trial would guarantee complete preservation of all the decisions that the Trial Chamber and Appeals Chamber have already rendered in this case.

111. As regards the judicial calendar, the Judges note that in the light of the current judicial recesses and also of the Defence recess requirements, and in view of the procedure for the constitution of a new bench which would be indispensable for a trial *de novo*, even in the event of an appeal against the decision to continue the trial, the trial resumption date would be nearly the same in both scenarios of a trial *de novo* and of a continuation. However, continuation offers the advantages of preserving the testimonies that have already been given and the corresponding time.

112. The Judges therefore conclude that a comparison of the time that would be lost through a trial *de novo* with the time saved through continuation of trial shows that, in the circumstances, judicial economy would serve the interests of justice if the trial continues.

FOR THE FOREGOING REASONS

THE JUDGES

DECIDE unanimously, pursuant to Rule 15*bis*(D) of the Rules, that the interests of justice would be best served by continuing the trial with a substitute Judge.

Arusha, 16 July 2004

[Signed] Flavia Lattanzi
Judge

[Signed] Florence Rita Arrey
Judge

[Seal of the Tribunal]

Translation certified by LSS, ICTR