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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 17 July 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

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DECISION ON MOTIONS TO VACATE DECISIONS

Rules 15 bis (F) and 73 of the Rules of Evidence and Procedure

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INTRODUCTION

1. The trial in this case started on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. On 19 January 2007, Judge Short withdrew from the case.

2. Under Rule 15 bis (D) of the Rules of Procedure and Evidence ("Rules"), the remaining Judges decided on the continuation of the proceedings with a substitute judge.¹ That Decision was affirmed by the Appeals Chamber in April 2007.²

3. Although Judge Vagn Joensen was appointed on 2 May 2007 as substitute judge in the present case, he first had to certify that he had familiarised himself with the record of the proceedings before joining the Bench.³

4. Meanwhile, according to the authorization given by the President of the Tribunal to the Trial Chamber composed of Judges Dennis Byron and Gberdao Gustave Kam, to conduct routine matters under Rule 15 bis (F) of the Rules,⁴ the remaining Judges delivered decisions in the absence of the substitute judge.

5. Between 14 March 2007 and 10 May 2007, 11 decisions were delivered accordingly by this Chamber composed of Judges Dennis Byron and Gberdao Gustave Kam. However, the Defence for Nzirorera lodged an appeal against one of these decisions, arguing, among other things, that the remaining Judges exceeded their authority under Rule 15 bis (F) of the Rules because the Motion on which they deliberated was not a routine matter.⁵ In its Decision of 31 May 2007, the Appeals Chamber granted this appeal and vacated the

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatswe, Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007.

² *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 bis (D) (AC), 20 April 2007.

³ See Rules of Procedure and Evidence, Rule 15bis (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."

⁴ See: Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007; Rules of Procedure and Evidence, Rule 15 bis (F): "In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members."

See: Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

⁵ See: Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining Prior Statements of Prosecution Witnesses After They Have Testified, filed on 11 April 2007; also Decision on Defence Motion for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK (TC), 4 April 2007.

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Impugned Decision.⁶ It also laid down standards and principles defining what should be considered a routine matter under Rule 15 bis (F) of the Rules.

6. On 4 June 2007, as a result of the Appeals Chamber's Decision, the Defence for Nzirorera moved that five decisions delivered by the Chamber composed of Judges Dennis Byron and Gberdao Gustave Kam be vacated.⁷ It also requested that these Judges disqualify themselves from all further deliberations on the concerned decisions, including the Impugned Decision that was vacated by the Appeals Chamber on 31 May 2007.⁸

7. The issue of the disqualification was referred to the Bureau in accordance with Rule 15 (B) of the Rules.⁹ On 14 June 2007, the Bureau composed of the Vice-President of the Tribunal and the Presiding Judges of each Trial Chamber denied Nzirorera's application for disqualification of Judges Dennis Byron and Gberdao Gustave Kam of any further deliberations on the prior decisions he seeks to be vacated.¹⁰ It held that

The possibility that, having previously decided the relevant issues on the merits, Judges Byron and Kam are pre-disposed to apply the law and assess the facts in the same manner is insufficient as a matter of law to displace the presumption of impartiality and show bias, either actual or reasonably apprehended.¹¹

8. In addition to Nzirorera's Motion for vacating some of the prior Decisions delivered under Rule 15 bis (F), it must be noted that in the Decision of 10 May 2007, the Chamber composed of Judges Dennis Byron and Gberdao Gustave Kam also noted the appeal lodged by the Defence for Nzirorera against a prior decision delivered under Rule 15 bis (F). While considering that the application at stake was a routine matter falling within the ambit of its authority, the said Chamber indicated that

⁶ *Karemera et al.*, Case No. ICTR-98-44AR73.9, Decision on "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified" (AC), 31 May 2007.

⁷ Joseph Nzirorera's Motion to Vacate Decisions and For Disqualification of Judges Byron and Kam, filed on 4 June 2007 ("Nzirorera's Motion"), see also the Reply filed on 11 June 2007. In addition to the Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Witnesses ALG, GK and UB which was vacated by the Appeals Chamber, the Defence seeks that the following Decisions be vacated: Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice (TC), 22 March 2007; Decision on Prosecutor's Motion for an Order to File Notice of Alibi (TC), 22 March 2007; Decision on Defence Motion for Certification to Appeal Decision on False Testimony (TC), 23 March 2007; Scheduling Order for the Resumption of the Trial (TC), 2 May 2007; Decision on Defence Motion for Subpoenas to Prosecution Witnesses (TC), 10 May 2007.

⁸ Nzirorera's Motion and Reply.

⁹ Interoffice Memorandum from Judge Dennis Byron, Presiding Judge in the case and President of the Tribunal to Judge Khalida Rachid Khan, Vice-President dated 11 June 2007.

¹⁰ As noted in the Bureau's Decision, Judge Byron, who is also the President of the Tribunal, had "recused himself from consideration of Joseph Nzirorera's Motion for disqualification since the decision at issue involved him" (see *Karemera et al.*, Decision on Motion to Vacate Decisions and For Disqualification of Judges Byron and Kam (Bureau), 14 June 2007, para. 1).

¹¹ *Karemera et al.*, Decision on Motion to Vacate Decisions and For Disqualification of Judges Byron and Kam (Bureau), 14 June 2007, para. 15.

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Should the Appeals Chamber lay out standards and principles in the interpretation of the phrase "to conduct routine matters", the Chamber will then determine whether reconsideration of the decisions rendered pursuant to its Rule 15 bis (F), including this Decision, is warranted in light of these standards and principles.¹²

9. In view of those circumstances, the Chamber, now fully composed, is ready to rule on Nzirorera's Motion to vacate prior decisions as well as review other decisions delivered under Rule 15 bis (F) for which the Defence for Nzirorera does not seek vacation, considering the Appeals Chamber's principles set out in the Decision of 31 May 2007.

10. It must be noted that the Defence for Ndirumpatse joins in part the application made by the Defence for Nzirorera to vacate some prior decisions.¹³ The Prosecution does not object to the Chamber vacating three of the prior Decisions as requested by the Defence for Nzirorera.¹⁴

DISCUSSION

11. In its Decision of 31 May 2007, the Appeals Chamber considered that

routine matters, within the meaning of Rule 15bis (F) of the Rules, are generally matters of a regular and standardised nature, such as the convening of a status conference to organise exchanges between the parties, pursuant to Rule 65bis of the Rules. Other matters, both of a substantive and procedural nature, are generally non-routine, for the purpose of Rule 15bis (F) of the Rules.¹⁵

The Appeals Chamber also took into account the fact that a matter was subject to extensive litigation and judicial exercise as indicative of its non-routine nature.¹⁶

¹² Decision on Defence Motion for Subpoenas to Prosecution Witnesses (TC), 10 May 2007, para. 9.

¹³ *Mémoire pour M. Ndirumpatse sur la Joseph Nzirorera's Motion to Vacate Decision*, filed on 11 June 2007. The Defence for Ndirumpatse moves the Chamber to vacate: Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice; Decision on Defence Motion for Certification to Appeal Decision on False Testimony; Scheduling Order for the Resumption of the Trial. It objects to the Chamber vacating the Decision on Prosecutor's Motion for an Order to File Notice of Abbi.

¹⁴ Prosecutor's Response to Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, para. 2. The Prosecution does not object to the Chamber vacating its orders with regard to Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice; Decision on Defence Motion for Certification to Appeal Decision on False Testimony; Decision on Defence Motion for Subpoenas to Prosecution Witnesses.

¹⁵ *Karemura et al.*, Case No. ICTR-98-44AR73.9, Decision on "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified" (AC), 31 May 2007, para. 10.

¹⁶ See *Karemura et al.*, Case No. ICTR-98-44AR73.9, Decision on "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified" (AC), 31 May 2007, at para. 11: "The Appeals Chamber is of the view that the history of this matter, including the extensive litigation related to it, is indicative of its non-routine nature."

See at paragraph 12 (footnotes omitted):

In addition, the remaining Judges took into consideration Article 28 of the Tribunal's Statute, as well as the jurisprudence of both the Tribunal and the ICTY and acknowledged that Witnesses ALG, UN and GIK were part of the thirty-seven Prosecution witnesses for whom the Trial Chamber, on 13 February 2006, requested the cooperation of the Rwandan Authorities in furnishing their statements. They reasoned that, at that stage, the Applicant had satisfied the requirements for requesting the cooperation of the Rwandan Authorities to disclose these documents, but the circumstances have since

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12. The Chamber notes that, concerning two prior decisions, the issue of whether routine matters were concerned – and whether these decisions should therefore be vacated – is now moot.¹⁷ The Appeals Chamber has already ruled on the issues in connection with the Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing and the Chamber, acting under Rule 15 bis (F).¹⁸ The Chamber is also of the view that the matter in connection with the Decision granting disclosure of closed session transcripts to the Canadian Authorities is now moot as those documents were disclosed.¹⁹ In that respect, it must be recalled that the Defence for Nzirorera did not object to such disclosure.²⁰ The Chamber further notes that the Defence for Nzirorera does not seek vacation of any of the above-mentioned two decisions.

13. In view of the Appeals Chamber's standards, the Chamber considers that the prior Orders for the transfer of Prosecution Witnesses from Rwanda as well as the prior Decisions granting an extension of time to respond to a Prosecution Motion must be considered as dealing with routine matters within the meaning of Rule 15 bis (F) of the Rules.²¹ The Chamber further notes that the Defence for Nzirorera does not seek the vacation of these decisions and that the Defence for Karemera and Ndirumpatswe had submitted that extension of time for filing submissions is a routine matter.²² There is therefore no need to vacate those decisions.

14. The Chamber also recalls its oral Decision of 12 June 2007, where it found that in view of the Appeals Chamber standards, a scheduling order is a routine matter for the purposes of Rule 15 bis (F) of the Rules.²³ In reaching this conclusion, the Chamber held that

changed, as the Motion filed before the Trial Chamber concerned Prosecution witnesses who have already testified in the Applicant's trial. The Appeals Chamber is of the view that this judicial exercise further reflects the non-routine nature of the issues ruled upon in the Impugned Decision.

¹⁷ Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007; Decision on Defence Motion for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK (TC), 4 April 2007.

¹⁸ *Karemera et al.*, Case No. ICTR-98-44AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (AC), 11 May 2007.

¹⁹ Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA (TC), 22 March 2007.

²⁰ *Ibid.*, para. 4.

²¹ Order for the Transfer of Prosecution Witnesses from Rwanda (TC), 26 April 2007; Decision Supplementing the Chamber's Prior Order For The Transfer Of Prosecution Witnesses From Rwanda (TC), 8 May 2007; *Décision accordant une prorogation de délai de réponse à une requête du Procureur* (TC), 10 May 2007.

²² See: *Décision accordant une prorogation de délai de réponse à une requête du Procureur* (TC), 10 May 2007, para. 6.

²³ T. 12 June 2007, pp. 17-18.

The commencement of a trial is based on other factors than the scheduling order itself. The goal of the scheduling order is to provide the parties, and also the Registrar, and other organs of the Tribunal concerned, by judicial organisation, an advance notice as to when the trial session will take place. In these circumstances, the trial session could have resumed today, even if a scheduling order had not been made.²⁴

The Scheduling Order of 2 May 2007 is therefore maintained.²⁵

15. Conversely, in view of the standards set out by the Appeals Chamber and in particular the fact that the issues at stake were subject to extensive litigation, the Chamber finds that the Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice and the Defence Motion for Certification to Appeal Decision on False Testimony could not be considered as routine matters upon which Judges Byron and Kam could rule in the absence of the third Judge. Consequently, the prior Decisions on these motions are to be vacated, as requested by the Defence for Nzirorera and the Defence for Ngirumpatse.²⁶

16. As already indicated for similar reasons, the Chamber also finds that the prior Decision on Defence Motion for Subpoenas to Prosecution Witnesses needs to be vacated.²⁷

17. The Defence for Ngirumpatse opposes that the Decision on Prosecutor's Motion for an Order to File Notice of Alibi be vacated.²⁸ It submits that Nzirorera has no interest in claiming that this Decision be vacated, and that if the Prosecutor was not satisfied with this Decision, he could have applied for a certification to appeal the Decision.

18. The Chamber does not agree with this submission. In view of the Appeals Chamber standards in the Decision of 31 May 2007, the issue of filing a notice of alibi cannot be considered as a routine matter. It does not have a regular and standardised nature and it certainly raises extensive litigation between the parties. Therefore, having found that the Chamber composed of Judges Byron and Kam acting under Rule 15 *bis* (F) of the Rules committed an error of law, this Chamber has the inherent power to reconsider prior decisions

²⁴ T. 12 June 2007, p. 18.

²⁵ Scheduling Order for the Resumption of the Trial (TC), 2 May 2007.

²⁶ Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice (TC), 22 March 2007; Decision on Defence Motion for Certification to Appeal Decision on False Testimony (TC), 23 March 2007. See Nzirorera's Motion, para. 1; Ngirumpatse's Motion, para. 7; the Prosecution does not oppose this request (See Prosecutor's Response, para. 1).

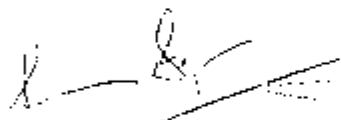
²⁷ Decision on Defence Motion for Subpoenas to Prosecution Witnesses (TC), 10 May 2007; See: T. 13 June 2007, pp. 5-6 and Decisions on Joseph Nzirorera's Motions to Vacate the Decision on Defence Motion for Subpoenas to Prosecution Witnesses, to Exclude the Testimony of Witnesses AMB, ANU, AWJ, AWE, FH, and KGV, and to postpone the testimony of Witness ANU (TC), 14 June 2007.

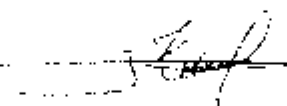

²⁸ Decision on Prosecutor's Motion for an Order to File Notice of Alibi (TC), 22 March 2007; Ngirumpatse's Motion, paras. 3-5.

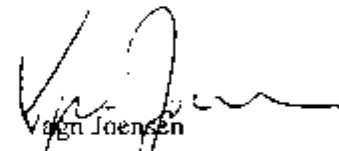
in light of the Appeals Chamber's principles.²⁹ The Chamber further notes that since then, the Prosecution filed another motion for enforcement of a notice of alibi by the Defence with a broader scope than the initial motion which was decided on 22 March 2007 by the two remaining Judges.³⁰ In view of these circumstances, the Chamber finds that the Decision on Prosecutor's Motion for an Order to File Notice of Alibi must also be vacated.

FOR THOSE REASONS, THE CHAMBER

- I. GRANTS** in part the Motions of Joseph Nzirorera and Mathieu Ndirumpatse;
- II. AND DECIDES** to vacate the following:
1. Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice, 22 March 2007;
 2. Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Witnesses ALG, GK and UB, 22 March 2007;
 3. Decision on Prosecutor's Motion for an Order to File Notice of Alibi, 22 March 2007;
 4. Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 22 March 2007; and
 5. Decision on Defence Motion for Subpoenas to Prosecution Witnesses, 10 May 2007.
- III. DENIES** the remainder of Joseph Nzirorera's and Mathieu Ndirumpatse's Motions.
- Arusha, 17 July 2007, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
[Seal of the Tribunal]



Vagn Joensen
Judge

²⁹ According to the established jurisprudence, a Chamber has the inherent power to reconsider its decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision, (ii) there has been a material change in circumstances since it made its original Decision, or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in injustice thereby warranting the exceptional remedy of reconsideration. See: *Karemura et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemura et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemura et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph)

³⁰ Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67, filed on 18 June 2007.



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Date: **17 July 2007**

Case Name / Affaire: **The Prosecutor vs.**

**- Joseph NZIRORERA
- Mathieu NGIRUMPATSE
- Edward KAREMERA**

Case No / Affaire No.: **ICTR-98-44-T**

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<input type="checkbox"/>	Judge S. B. Bossa (Nyramasuhuku et al.)	<input type="checkbox"/>	S. Unnikrishnan	
<input type="checkbox"/>	Judge L. G. Muthoga (Bizimungu et al.)	<input type="checkbox"/>	C. Duffy	
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<input type="checkbox"/>	Judge T. Hakmet (Ndindiyimana et al.)	<input type="checkbox"/>	P. Narayanan	
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<input type="checkbox"/>	A. Marong, Judgement Co-ordinator			
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<input checked="" type="checkbox"/>	Judge K. R. Khan, Vice President	<input type="checkbox"/>	C. Rassi	
<input checked="" type="checkbox"/>	Judge I. M. Weinberg de Roca	<input type="checkbox"/>	S. Unnikrishnan	
<input type="checkbox"/>	Judge L. G. Muthoga (Zigronyiraza)	<input type="checkbox"/>	K. Ardault	
<input type="checkbox"/>	Judge F. R. Arrey (Banda)	<input type="checkbox"/>	M. I. Mbadinga	
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<input type="checkbox"/>	Judge R. Fremt (Banda & Nchamihigo)	<input type="checkbox"/>	P. Mathiam	
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<input type="checkbox"/>	Co-Counsel / Conseil Adjoint: P. N. M. Ngimbi, F. Weyl & F. Sow				
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