

1838/H

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Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

ICTR-98-44-AR11bis,  
(03<sup>rd</sup> July 2007)  
1838/H - 1834/H

CA

**IN THE APPEALS CHAMBER**

Before:

Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Wolfgang Schomburg

Registrar:

Mr. Adama Dieng

Decision of:

3 July 2007

ICTR Appeals Chamber

Date: 3 July 2007

Action: P.T.

Copied To: Conferred Judges  
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PROSECUTOR

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

Case No. ICTR-98-44-AR11bis

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**Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation  
of a Trial Chamber to Consider Referral to a National Jurisdiction**

**Office of the Prosecutor:**

Mr. James Stewart  
Mr. Don Webster  
Mr. George W. Mugwanya  
Ms. Inneke Onsea

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM: Patricia Tchidiemba

SIGNATURE: [Signature] DATE: 03/07/07

**Counsel for the Defence:**

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Édouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse  
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal filed by Joseph Nzirorera<sup>1</sup> on 29 May 2007 against a decision of the President of the Tribunal denying his request to designate a Trial Chamber to consider the referral of his case to a national jurisdiction.<sup>2</sup> The Prosecution responded on 6 June 2007,<sup>3</sup> and Mr. Nzirorera replied on 11 June 2007.<sup>4</sup>

#### A. Background

2. The trial of Mr. Nzirorera, who is being tried jointly with Édouard Karemera and Mathieu Ndirumpatse, commenced on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, Emile Francis Short and Gberdao Gustave Kam. Following Judge Short's withdrawal from the case due to ill-health on 19 January 2007, Mr. Nzirorera and Mr. Ndirumpatse withheld their consent to continue the trial with a substitute judge.<sup>5</sup> On 6 February 2007, the remaining Judges decided that continuation of the proceedings with a substitute judge in accordance with Rule 15bis (D) of the Rules of Procedure and Evidence of the Tribunal ("Rules") would serve the interests of justice.<sup>6</sup> On 20 April 2007, the Appeals Chamber rejected an appeal against that decision.<sup>7</sup>

3. Simultaneously with said proceedings, on 29 January 2007, Mr. Nzirorera requested the President of the Tribunal to designate a Trial Chamber to consider a referral of his case to a national jurisdiction other than Rwanda.<sup>8</sup> Mr. Nzirorera argued that the referral of his case was warranted due to the alleged inability of the Tribunal to complete his case within the time-frame set forth in United Nations Security Council resolutions 1503 (2003) and 1534 (2004) for the conclusion of all trials of first instance.<sup>9</sup> On 28 May 2007, the President issued the Impugned Decision in which, in

<sup>1</sup> Joseph Nzirorera's Appeal from Denial of Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction, filed 29 May 2007 ("Nzirorera Appeal").

<sup>2</sup> *The Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction, filed 28 May 2007 ("Impugned Decision").

<sup>3</sup> Prosecutor's Response to Joseph Nzirorera's Appeal from Decision on Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction, filed 6 June 2007 ("Prosecution Response").

<sup>4</sup> Reply Brief: Joseph Nzirorera's Appeal from Denial of Request for Designation of Trial Chamber to Consider Referral to National Jurisdiction, filed 11 June 2007 ("Nzirorera Reply").

<sup>5</sup> Impugned Decision, para. 1.

<sup>6</sup> Impugned Decision, para. 1.

<sup>7</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15bis.3, Decision on Appeals Pursuant to Rule 15bis (D), filed 20 April 2007 ("Rule 15bis (D) Appeals Decision").

<sup>8</sup> Impugned Decision, para. 2.

<sup>9</sup> Impugned Decision, para. 2.

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light of Judge Vagn Joensen's appointment as a substitute Judge in this case and the decision of the reconstituted Trial Chamber to resume the trial on 11 June 2007, he found Mr. Nzirorera's request to be moot.<sup>10</sup>

### B. Submissions of the Parties

4. Mr. Nzirorera submits that his appeal is an appeal of right pursuant to Rule 11*bis* (H) of the Rules.<sup>11</sup> He argues that since the Impugned Decision is final under Rule 11*bis*, it constitutes "the functional equivalent of a decision by a Trial Chamber not to transfer his case".<sup>12</sup> In the alternative, he contends that the Appeals Chamber may hear his appeal as part of its inherent jurisdiction to consider issues of general significance to the Tribunal's jurisprudence or in order to ensure that this matter will not evade review on appeal from final judgement.<sup>13</sup>

5. Mr. Nzirorera raises two principal contentions in support of his request to the Appeals Chamber to reverse the Impugned Decision.<sup>14</sup> First, he argues that Rule 11*bis* (B) violates the right of an accused to equality of arms in that only the Prosecutor and not the accused is authorized to request a transfer of a case to a national jurisdiction.<sup>15</sup> Second, Mr. Nzirorera contends that the President erred by finding that the resumption of his trial rendered the request for transfer moot.<sup>16</sup>

6. The Prosecution responds that Mr. Nzirorera lacks standing to appeal the Impugned Decision.<sup>17</sup> The Prosecution argues that Rule 11*bis* (H) provides for an appeal from a decision of a Trial Chamber whether to refer a case pursuant to Rule 11*bis* and not for an appeal from a decision of the President whether to designate a Trial Chamber.<sup>18</sup> It further avers that the appeal is neither "closely related to issues involving the fairness of the proceedings on appeal" nor does it concern an issue of general significance for the Tribunal's jurisprudence to provide a basis for the Appeals Chamber to exercise its inherent jurisdiction.<sup>19</sup>

7. In reply, Mr. Nzirorera submits that the rationale of Rule 11*bis* (H) is to provide the possibility to appeal a final decision whether a case is to be transferred to a national jurisdiction.<sup>20</sup>

<sup>10</sup> The Scheduling Order for the Resumption of the Trial was issued by the two remaining Judges on 2 May 2007.

<sup>11</sup> Nzirorera Appeal, paras. 2, 7.

<sup>12</sup> Nzirorera Appeal, para. 9.

<sup>13</sup> Nzirorera Appeal, para. 10.

<sup>14</sup> Nzirorera Appeal, para. 35.

<sup>15</sup> Nzirorera Appeal, paras. 12, 15-25.

<sup>16</sup> Nzirorera Appeal, paras. 30-33.

<sup>17</sup> Prosecution Response, paras. 8-13.

<sup>18</sup> Prosecution Response, paras. 9, 10.

<sup>19</sup> Prosecution Response, paras. 11, 12.

<sup>20</sup> Nzirorera Reply, para. 5.

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Thus, the Impugned Decision being final, he should be entitled to appeal from it.<sup>21</sup> Moreover, Mr. Nzirorera submits that by declining to designate a Trial Chamber to consider a referral *proprio motu*, the President confers the exclusive power to initiate referral of his case on the Prosecution, a result which runs against the rationale of Rule 11bis.<sup>22</sup> He further contends that since an accused can move for dismissal of his case pursuant to Rules 72 and 73 of the Rules, he must also be entitled to request transfer to a national jurisdiction.<sup>23</sup>

8. Finally, Mr. Nzirorera opposes the Prosecution's argument that the President would have erred in designating a Trial Chamber to consider the Rule 11bis request when a Trial Chamber was already seized of his case.<sup>24</sup> According to Mr. Nzirorera, there was no Trial Chamber presiding over his case at the time of his request.<sup>25</sup> Even at the time of the President's decision, there was no Trial Chamber constituted to hear his case, since the substitute Judge had not yet certified familiarity with the case.<sup>26</sup> Moreover, Mr. Nzirorera reiterates that contrary to Rule 11bis of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 11bis of the Tribunal's Rules does not limit referrals to the period before the commencement of the trial.<sup>27</sup>

### C. Analysis

9. The Appeals Chamber finds no legal basis for Mr. Nzirorera to appeal against the Impugned Decision. Rule 11bis (H) of the Rules expressly provides for the possibility to appeal a *Trial Chamber's decision* determining whether to refer a case to a national jurisdiction. The Tribunal's Statute and Rules do not provide for appellate review of a decision taken by the President pursuant to Rule 11bis (A) to designate a Trial Chamber for determining whether referral of a case would be appropriate. Furthermore, the Appeals Chamber has already held, in a different context, that a decision taken by the Tribunal's President within his exclusive discretion is not subject to appeal.<sup>28</sup>

10. The Appeals Chamber is also unable to accept Mr. Nzirorera's proposition that the Appeals Chamber may hear his appeal as part of its inherent jurisdiction.<sup>29</sup> While it is correct that the Appeals Chamber has the statutory duty to ensure the fairness of proceedings on appeal and, to this

<sup>21</sup> Nzirorera Reply, para. 5.

<sup>22</sup> Nzirorera Reply, paras. 16-19.

<sup>23</sup> Nzirorera Reply, para. 21.

<sup>24</sup> Nzirorera Reply, para. 24.

<sup>25</sup> Nzirorera Reply, para. 25.

<sup>26</sup> Nzirorera Reply, para. 26.

<sup>27</sup> Nzirorera Reply, para. 28.

<sup>28</sup> Cf. *The Prosecutor v. Vincent Rutaganira*, Case No. ICTR-95-IC-AR, Decision on Appeal of a Decision of the President on Early Release, 24 August 2006, para. 3; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006 (for the proposition that decisions taken by the Bureau may not be appealed) ("*Seromba Appeal Decision*").

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effect, has jurisdiction to review decisions taken by the Tribunal's President,<sup>30</sup> Mr. Nzirorera's case is presently not on appeal. Moreover, the Appeals Chamber's consideration of the underlying issues of the fairness of Mr. Nzirorera's proceedings is limited to an appeal against a conviction or where the issue properly arises in an interlocutory appeal as of right under the Tribunal's Rules or as certified by a Trial Chamber.<sup>31</sup>

11. Mr. Nzirorera's argument that the Appeals Chamber should decide his appeal on the basis that it concerns an issue "of general significance to the Tribunal's jurisprudence" is likewise not persuasive.<sup>32</sup> The Appeals Chamber has already decided the issue which is the subject of the present appeal. It explicitly noted that "Rule 11bis of the Rules makes no provision for an accused to request the transfer of his case to a national jurisdiction for trial" and concluded that "[c]onsequently, the remaining Judges were not obliged to take into consideration Mr. Nzirorera's request to the President pursuant to Rule 11bis of the Rules".<sup>33</sup> In light of the above, the Appeals Chamber finds that Mr. Nzirorera has no standing to appeal against the Impugned Decision.

12. Finally, since the Appeals Chamber has already discussed and decided the issue which is the subject of the present appeal, the Appeals Chamber finds that Mr. Nzirorera's appeal is frivolous and constitutes an abuse of process under Rule 73(F) of the Rules applicable on appeal through Rule 107.

#### D. Disposition

13. For the foregoing reasons, the Appeals Chamber:

**DISMISSES** Mr. Nzirorera's Appeal of the Impugned Decision; and

**DIRECTS** the Registry to withhold the payment of fees in relation to this Appeal.

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

Done this 3<sup>rd</sup> day of July 2007,  
At The Hague,  
The Netherlands.



Judge Fausto Pocar  
Presiding  
[Seal of the Tribunal]

<sup>29</sup> Nzirorera Appeal, para. 10.

<sup>30</sup> Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion to Set Aside President's Møsc's Decision and Request to Consummate His Marriage, 6 December 2005.

<sup>31</sup> See *Seromba* Appeal Decision, para. 4 (citing cases).

<sup>32</sup> Nzirorera Appeal, para. 11.

<sup>33</sup> Rule 15bis (D) Appeals Decision, para. 38.



**International Criminal Tribunal for Rwanda  
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		Case No / no. de l'affaire: <b>ICTR-98-44-AR73.9</b>	
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