ICTR-98-44-AR15 bis.2
22 OCTOBER 2004
(940/H - 918/H)

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

2004 OCT 25 A 9:43
ICTR
JUDICIAL RECORDS/ARCHIVES
RECEIVED

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 22 October 2004

ICTR Appeals Chamber
Date: 22 October 200
Action: PG
Copied To: Concerned Ji
Parties, Judicial Arch
LOs, LSS

Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Andre RWAMAKUBA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR15bis.2

REASONS FOR DECISION ON INTERLOCUTORY APPEALS REGARDING THE CONTINUATION OF PROCEEDINGS WITH A SUBSTITUTE JUDGE AND ON NZIRORERA'S MOTION FOR LEAVE TO CONSIDER NEW MATERIAL

Counsel for the Prosecution

Mr. Hassan Bubacar Jallow
Ms. Melanie Werrett
Mr. James Stewart
Mr. Don Webster
Ms. Holo Makwaia
Ms. Dior Fall
Mr. Gregory Lombardi
Mr. Bongani Dyani
Ms. Sunkarie Ballah-Conteh
Ms. Tamara Cummings-John

Counsel for the Defence

Ms. Dior Diagne Mbaye
Mr. Félix Sow
Mr. Charles Roach
Mr. Frédéric Weyl
Mr. Peter Robinson
Mr. David Hooper
Mr. Andreas O'Shea

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: ROSETTE MUZIGO-MORRISON 22 October 2004

1. On 28 September 2004 the Appeals Chamber of the International Criminal Tribunal for Rwanda ("Appeals Chamber", "Tribunal", respectively) rendered the Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, with written reasons to follow. This decision granted the appeals filed by Edouard Karemera,[1] Mathieu Ngirumpatse,[2] Joseph Nzirorera,[3] and Andre Rwamakuba[4] ("Appeals", "Appellants", respectively) against the Decision on Continuation of Trial, rendered on 16 July 2004[5] ("Impugned Decision"), quashing the Impugned Decision to continue the proceedings with a substitute Judge, and declined to consider the Motion for Leave to Consider New Material filed by Joseph Nzirorera on 13 September 2004 ("Nzirorera's Motion"). The Appeals Chamber now provides the reasons for its decision.

Procedural History

2. The trial in the present case commenced on 27 November 2003 before a section of Trial Chamber III composed of Judge Vaz, presiding, and *ad litem* Judges Lattanzi and Arrey. On 27 April 2004 Nzirorera requested disqualification of Judge Vaz on the basis of her alleged association with a Prosecution counsel taking part in the case.[6] The Trial Chamber dismissed this request.[7] Thereafter, Nzirorera and Rwamakuba moved for Judge Vaz's disqualification from the case before the Bureau of the Tribunal.[8] Prior to the Bureau's ruling on these motions, Judge Vaz withdrew from the case on 14 May 2004.[9] On 17 May 2004 the Bureau declared moot the motions for disqualification of Judge Vaz.[10]

3. The accused withheld their consent to continue the proceedings with a substitute Judge. Thereafter, on 24 May 2004, the two remaining Judges in the case rendered a decision to continue the proceedings with a substitute Judge, pursuant to Rule 15*bis*(D) of the Rules of Procedure and

[1] "Brief on the Continuation of Trial", filed on 26 July 2004 by Edouard Karemera's Defence ("Karemera's Appeal").
[2] "Appeal of Ngirumpatse from the Decision of Trial Chamber III 'Decision Relative a la Continuation du Proces' dated July 16, 2004", filed on 2 September 2004 by Mathieu Ngirumpatse's Defence ("Ngirumpatse's Appeal").
[3] "Appeal from Second Decision Relative a la Continuation du Proces", filed on 23 July 2004 by Joseph Nzirorera's Defence ("Nzirorera's Appeal").
[4] "Appeal Brought under Rule 15(E) on Behalf of Dr. Andre Rwamakuba Concerning the Continuation of the Trial", filed on 23 July 2004 by Andre Rwamakuba's Defence ("Rwamakuba's Appeal").
[5] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of Trial, 16 July 2004.
[6] T. 27 April 2004 p. 28.
[7] T. 27 April 2004 pp. 29-30.
[8] *See* Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz, The Bureau, 17 May 2004, p. 2. Further, on 29 March 2004, Karemera lodged an application to disqualify all three Judges on the basis of their lack of impartiality as evidenced by decisions rendered in the case. The Bureau noted that the accused did not allege that it was interest or association of the trial Judges which gave rise to the apprehension of bias and denied the application. Decision on Motion by Karemera for Disqualification of Trial Judges, The Bureau, 17 May 2004. Similarly, on 30 March 2004, Ngirumpatse moved the Bureau for recusal of all three trial Judges on the basis of their partiality as evidenced by decisions rendered in the case. The Bureau denied this application. Decision on Motion by Ngirumpatse for Disqualification of Trial Judges, The Bureau, 17 May 2004.
[9] *See* Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz, para. 6.
[10] Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz, p. 3.

Evidence of the Tribunal ("Rules"). The accused appealed, their principal contention being that, before reaching the decision to continue the trial, the remaining Judges did not give them the opportunity to be heard.[11] On 21 June 2004 the Appeals Chamber directed the remaining Judges to reconsider their decision after giving the parties an opportunity to be heard and taking account of the submissions as to whether it would be in the interests of justice to continue the trial.[12]

4. After receiving submissions from the parties, in the Impugned Decision the remaining Judges unanimously decided that it would be in the interests of justice to continue the trial with a substitute Judge, pursuant to Rule 15*bis*(D) of the Rules. The Appellants brought the present Appeals.

5. In response to the Appeals, on 5 August 2004 the Prosecution filed the "Consolidated Response to Appeals from Décision Relative à la Continuation du Procès of 16 July 2004" ("Prosecutor's Response") which it supplemented on 13 September 2004.[13] The Appellants replied to the Prosecution's Response.[14]

6. On 20 September 2004 the Prosecution responded to Nzirorera's Motion[15] and Nzirorera replied on 22 September 2004.[16]

Submissions of the Parties

Karemera

7. Karemera argues that the two remaining Judges were not competent to decide to continue the trial under Rule 15*bis*(D) of the Rules.[17] Karemera submits that Articles 11(2), 12*quater*, and

[11] Decision in the Matter of Proceedings under Rule 15*bis*(D), 21 June 2004, para. 8.
[12] Decision in the Matter of Proceedings under Rule 15*bis*(D), 21 June 2004.
[13] Supplement to Prosecutor's Consolidated Response to Appeals from Décision Relative à la Continuation du Procès of 16 July 2004 in respect of Ngirumpatse's Re-Filed Appeal, 13 September 2004.
[14] "Réplique à << Prosecutor's Consolidated Response to Appeals from Décision Relative a la continuation du Procès of 16 July 2004 >>", filed by Edouard Karemera on 6 September 2004 ("Karemera's Reply"); "Response of Ngirumpatse to Prosecutor's Consolidated Response to Appeals from Decision a la Continuation du Proces", filed by Mathieu Ngirumpatse on 16 August 2004 ("Ngirumpatse's Reply"); "Reply to Prosecutor's Consolidated Response", filed by Mathieu Ngirumapatse on 16 September 2004 ("Ngirumpatse's Supplemental Reply"); "Joseph Nzirorera's Reply Brief: Appeal from Second Decision Relative a la Continuation du Proces", filed by Joseph Nzirorera on 12 August 2004 ("Nzirorera's Reply"); "Reply on Behalf of Rwamakuba to Prosecutor's Consolidated Response to Appeals from Decision Relative a la Continuation du Proces of 16 July 2004", filed by Andre Rwamakuba on 11 August 2004 ("Rwamakuba's Reply").
[15] "Prosecutor's Response to Nzirorera's Motion for Leave to Consider New Material", filed on 20 September 2004 ("Prosecutor's Response to Nzirorera's Motion").
[16] "Motion for Leave to Reply to Prosecutor's Response to Motion for Leave to Consider New Material", filed by Joseph Nzirorera on 22 September 2004. Although Nzirorera's reply is entitled "Motion", it is in substance a reply to the Prosecutor's Response to Nzirorera's Motion and the Appeals Chamber treats it as such. In response, on 23 September 2004, the Prosecution filed the "Prosecutor's Response to Nzirorera's Motion for Leave to Reply to Prosecutor's Response to Motion for Leave to Consider New Material".

13(7) of the Statute of the Tribunal ("Statute"), and Rule 15 of the Rules make plain that a Trial Chamber cannot function in the absence of a Presiding Judge who is a permanent Judge of the Tribunal and that, consequently, the two remaining *ad litem* Judges erred when they considered themselves competent to render the Impugned Decision.[18]

8. Karemera further argues that the reasons motivating the decision to continue the trial with a substitute Judge were inadequate to sustain such a decision.[19] First, Karemera submits that a continuation of the trial cannot be ordered on the basis of an indictment which is being challenged.[20] In his view, should the Appeals Chamber agree with the challenge to the indictment, the proceedings would have to be annulled.[21] Karemera notes that the Impugned Decision admitted the possibility that the Appeals Chamber would order the amendment of the indictment, but failed to address the consequences of such a decision.[22]

9. Second, Karemera observes that in deciding against a trial *de novo*, the remaining Judges took into account the risk to which the protected witnesses would be exposed by repeated trips to the seat of the Tribunal and the possibility that the witnesses may refuse to return due to safety concerns.[23] At the same time, however, the remaining Judges maintained in the Impugned Decision that were the trial to continue, the Chamber could recall certain witnesses. In Karemera's view, this shows that the remaining Judges did not know that the witnesses who had already testified would refuse to return to testify were the trial to start anew.[24]

10. Third, Karemera submits that in reaching the Impugned Decision, the remaining Judges disregarded the fact that the testimonies of the witnesses who had testified in the case had not been video-recorded and that, consequently, the new Presiding Judge assigned to the case would not be able to assess the testimonies adequately.[25]

11. Finally, Karemera argues that the proceedings to date failed to meet the requirements of a fair trial and submits that in the interests of justice the trial should begin afresh with a new bench of Judges.[26] In this respect, Karemera alleges violations of his right to be informed of the charges against him in a language he understands; that he did not receive the French versions of most

---

[17] Karemera's Appeal, pp. 3-5.
[18] Karemera's Appeal, pp. 3-5.
[19] Karemera's Appeal, pp. 5-8.
[20] Karemera's Appeal, p. 6. Karemera submits that he has filed five preliminary motions challenging the indictment, which are still pending before the Appeals Chamber. *Ibid.*
[21] Karemera's Appeal, p. 6.
[22] Karemera's Appeal, p. 6.
[23] Karemera's Appeal, p. 7.
[24] Karemera's Appeal, p. 7.
[25] Karemera's Appeal, p. 7.
[26] Karemera's Appeal, p. 10.

decisions which has hindered his counsel in preparing his defence; that the Trial Chamber systematically denied his requests for certification to appeal; that the Prosecution has repeatedly varied the list of its witnesses; and that the Defence was often denied the opportunity to adequately examine the witnesses against him.[27]

Ngirumpatse

12. Ngirumpatse requests the Appeals Chamber to vacate the Impugned Decision and order a new trial.[28] Ngirumpatse submits that it is not in the interests of justice to continue with the trial since the proceedings have been contaminated by an apprehension of bias.[29] Ngirumpatse submits that Judge Vaz withdrew from the case because of an apprehension of bias and that this apprehension attaches to the entire period of the proceedings and contaminates over eighty rulings made in favour of the Prosecution during the trial.[30] Moreover, Ngirumpatse argues that the apprehension of bias also attaches to the two remaining Judges.[31]

> [O]n May 17, 2004 counsel for Dr. Mathieu Ngirumpatse made an oral motion in court that Judge Vaz be recused if it were true that she had cohabited with one of the prosecutors. The Chamber adjourned to consider that motion and later ruled that Judge Vaz should continue on the panel. The remaining judges were involved in that decision and were privy to the facts on which the allegations of apprehension of bias [were] based being Judge Vaz's long standing friendship, professional working relationships within the Government of Senegal, and her cohabitation with Prosecutor Dior Fall. ... The remaining judges concurred in continuing the trial failing to regard the circumstances as constituting grounds for apprehension of bias. ... Herein lies a violation of the principle of *nemo judex in causa sua potest* because the remaining judges are ruling on an issue after they had already countenanced Judge Vaz['s] continuation with the case after knowing of the circumstances of cohabitation. The judges fettered their discretion under Rule 15*bis*D;....[32]

13. Ngirumpatse further submits that because Judge Vaz was forced to withdraw from the case, there is an apprehension that the remaining Judges "may unwittingly be adversely disposed to the accused for forcing their sister judge to retire from the case."[33]

14. Finally, in respect of apprehension of bias, Ngirumpatse submits that in reaching their decision to continue the trial with a substitute Judge the remaining Judges improperly considered out of court remarks made by Defence counsel "supposedly" in praise of Judge Vaz.[34]

---

[27] Karemera's Appeal, pp. 6, 8-9.
[28] Ngirumpatse's Appeal, para. 55.
[29] Ngirumpatse's Appeal, para. 23.
[30] Ngirumpatse's Appeal, para. 23.
[31] Ngirumpatse's Appeal, para. 24.
[32] Ngirumpatse's Appeal, paras. 25-26. *See also* Response of Ngirumpatse to Prosecutor's Consolidated Response to Appeals from "Decision Relative a la Continuation du Proces", filed on 16 August 2004, para. 3.3.
[33] Ngirumpatse's Appeal, para. 29.
[34] Ngirumpatse's Appeal, para. 30.

15. Ngirumpatse argues that the remaining Judges erred in law by placing on the Defence the burden of showing that a new trial would better serve the interests of justice.[35] He recalls several paragraphs of the Impugned Decision in which the remaining Judges held that the Defence failed to prove that the interests of justice would be better served by a new trial.[36] Ngirumpatse submits that the burden should rather have been on the Prosecution to show why continuing the trial with a substitute Judge would best serve the interests of justice.[37]

16. Ngirumpatse submits that the Impugned Decision did not give sufficient weight to the fact that the first session of the trial proceeded under an indictment that was later deemed invalid and was replaced by an amended indictment under which the trial then continued.[38]

17. Ngirumpatse further submits that the Impugned Decision gave too much weight to the possibility that some witnesses would not return to testify in the new trial, although there was no proof to that effect.[39] Irreconcilably with this position, the remaining Judges indicated the possibility of recalling some witnesses were the trial to continue with a substitute Judge.[40]

18. Ngirumpatse submits that the remaining Judges misconstrued the position of the Defence when they wrote that the Defence "unanimously concluded that, in the light of the various decisions rendered ... the interests of justice would be served if the trial continues."[41] Ngirumpatse stresses that the position of the Defence was the opposite.[42]

19. Ngirumpatse further raises a number of arguments alleging unfairness in the trial proceedings. He submits that Prosecution failed to make disclosures in a timely manner;[43] that the Judges limited cross-examination without regard to relevance;[44] and that the Judges failed to ensure that documents were presented to the Tribunal in French, hindering the preparation of defence.[45]

20. Finally, Ngirumpatse submits that he was denied the equal benefit of the law since the Judges in his trial failed to ensure that the proceedings be audio-visually recorded whereas proceedings in other cases were so recorded.[46] Ngirumpatse also argues that this violated his right to

[35] Ngirumpatse's Appeal, para. 31.
[36] Ngirumpatse's Appeal, para. 32.
[37] Ngirumpatse's Appeal, para. 32.
[38] Ngirumpatse's Appeal, para. 34.
[39] Ngirumpatse's Appeal, para. 36.
[40] Ngirumpatse's Appeal, para. 36.
[41] Ngirumpatse's Appeal, para. 39 quoting Impugned Decision, para. 92.
[42] Ngirumpatse's Appeal, para. 39.
[43] Ngirumpatse's Appeal, para. 41.
[44] Ngirumpatse's Appeal, para. 40.
[45] Ngirumpatse's Appeal, para. 45.
[46] Ngirumpatse's Appeal, para. 50.

a fair trial,[47] and stresses that the substitute Judge will be unable to properly appreciate credibility of the witnesses who had already testified due to the lack of the audio-visual record which would have enabled the Judge to assess the witnesses' demeanour.[48] Moreover, Ngirumpatse recalls that Judge Arrey was absent during some of the testimony given in the first trial session and that Judge Lattanzi was absent during some of the testimony in the second session.[49] According to Ngirumpatse, Judge Vaz was the only Judge to have been present during the entire trial.[50] Ngirumpatse submits that in reaching the Impugned Decision, the remaining Judges failed to take the foregoing important circumstances into account.[51]

Nzirorera

21. Nzirorera moves the Appeals Chamber to quash the Impugned Decision and order a new trial.[52] He submits that the remaining Judges erred in law by placing on the accused the burden of showing that it was in the interests of justice to re-start the trial.[53] In Nzirorera's view, continuing the trial under Rule 15*bis*(D) of the Rules is an extraordinary measure that can only be resorted to if doing so would demonstrably serve the interests of justice.[54] It should not be for the accused to show that he would be prejudiced by the continuation of the trial, rather, it is for the proponent of the continuation to demonstrate that it would serve the interests of justice.[55]

22. Nzirorera next submits that the remaining Judges erred in law by minimizing the importance of demeanour.[56] He recalls the following statement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Kupreškić* Judgement: "The Appeals Chamber expects a Trial Chamber to be influenced by the demeanour of the witness in assessing the credibility of his or her evidence."[57] Nzirorera points out that in the Impugned Decision "[t]he Judges found a reduced value of demeanour evidence where the witnesses testified in a language different than the trier of fact" and asks, "If there is little value to observing the demeanour of witnesses who speak a foreign language, why should an Appeals Chamber give any deference to a

[47] Ngirumpatse's Appeal, para. 52.
[48] Ngirumpatse's Appeal, paras. 46, 49, 52.
[49] Ngirumpatse's Appeal, para. 47.
[50] Ngirumpatse's Appeal, para. 47.
[51] Ngirumpatse's Appeal, para. 53.
[52] Nzirorera's Appeal, para. 53.
[53] Nzirorera's Appeal, para. 16. *See also* "Joseph Nzirorera's Reply Brief: Appeal from Second Decision Relative a la Continuation du Proces", filed on 12 August 2004 ("Nzirorera's Reply"), paras. 3, 9-14.
[54] Nzirorera's Appeal, para. 11. Nzirorera submits that "apart from the perceived absence of prejudice to the accused, there were no positive circumstances particular to this case that favour continuation of the trial." Nzirorera's Reply, para. 15.
[55] Nzirorera's Appeal, para. 11.
[56] Nzirorera's Appeal, para. 31. *See also* Nzirorera's Reply, paras. 4, 21-27.
[57] Nzirorera's Appeal, para. 32 quoting *Prosecutor v. Z. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 138.

Trial Chamber's factual findings?"[58] Furthermore, Nzirorera submits that the remaining Judges erred in the Impugned Decision in giving insufficient weight to the absence of video recordings of the proceedings.[59]

23. Finally, according to Nzirorera, the remaining Judges erred in law in the Impugned Decision by finding that he was on notice of being charged with joint criminal enterprise liability.[60] Nzirorera argues that although he had sought clarification on this point before the trial commenced, he was not informed of this until the indictment was amended during trial.[61] By that point eight witnesses had already testified,[62] of whom five had testified to crimes committed by co-accused Rwamakuba.[63] Nzirorera submits that he had made no effort to investigate or contest these allegations because, absent the application of joint criminal enterprise liability to him, these allegations did not concern him;[64] and adds that a trial *de novo* would afford him the opportunity "to cross-examine witnesses to acts of his co-accused for which he is now liable."[65]

24. Additionally, in his Motion for Leave to Consider New Material, Nzirorera requests the Appeals Chamber to take into account in considering his appeal against the Impugned Decision the following developments: (i) that on 10 September 2004 the Prosecution moved for leave to amend the indictment; (ii) that the Prosecution moved to add six new witnesses; and (iii) that the Prosecution has now disclosed a statement of Witness GFA which increases the likelihood that the witness will need to be recalled if the trial continues.[66]

Rwamakuba

25. Rwamakuba submits that under Article 20 of the Statute the accused is entitled to the attendance of witnesses under the same conditions as witnesses against him and argues that this would not be the case where a Judge hears some witnesses live and assesses the testimony of others from transcripts only, without being able to observe demeanour.[67]

26. In Rwamakuba's view, there is considerable potential prejudice to the accused from the substitute Judge's inability to see the witnesses testify and assess their demeanour.[68] Rwamakuba

[58] Nzirorera's Appeal, paras. 31, 33.
[59] Nzirorera's Appeal, para. 39.
[60] Nzirorera's Appeal, paras. 40-42, 44. *See also* Nzirorera's Reply, para. 5.
[61] Nzirorera's Appeal, paras. 43-44.
[62] Nzirorera's Appeal, para. 40.
[63] Nzirorera's Appeal, para. 48.
[64] Nzirorera's Appeal, para. 48.
[65] Nzirorera's Reply, para. 29.
[66] Nzirorera's Motion, paras. 2-6.
[67] Rwamakuba's Appeal, para. 13.
[68] Rwamakuba's Appeal, paras. 16, 17.

argues that the credibility of the witnesses who had testified thus far is at issue and that the new presiding Judge in the case will not be able to assess it properly since he or she will not have had the opportunity to observe their demeanour.[69]

27. Moreover, Rwamakuba points out that the prejudice arising from the substitute Judge's inability to observe the demeanour of the witnesses would affect him in particular since seven of the thirteen witnesses who had testified thus far gave evidence substantially against him alone.[70] Rwamakuba notes that Rule 82 of the Rules prescribes that each accused shall be accorded the same rights as if he were being tried separately.[71]

28. Rwamakuba argues that little time would be lost in the present case were the trial started afresh since evidence was taken in little more than one month of sitting.[72] Rwamakuba observes that although the trial commenced on 27 November 2003, there have been extensive adjournments, largely due to the Prosecution's decision to amend the indictment.[73] According to Rwamakuba, the Trial Chamber sat two days in November, eight days in December, none in January and February, two days in March, sixteen (half) days in April, and four days in May.[74] Rwamakuba posits that this factual background distinguishes the present case from the *Butare* case as well as from *Milošević*, both cases where a substantial part of the Prosecution case had already been completed.[75] Rwamakuba cautions that the time needed for the retrial should not be exaggerated, that it would not take longer than a month, and that the observations made in the Impugned Decision concerning the time lost if the trial were to re-start cannot be justified.[76]

29. Rwamakuba submits that the protection of witnesses, mentioned in paragraph 83 of the Impugned Decision, is insufficient justification for continuing the proceedings with a substitute Judge.[77] Rwamakuba notes that the Prosecution did not express any difficulty to recall witnesses to testify in the continued trial and argues that there is no reasonable basis for concluding that the identity of witnesses cannot be adequately protected in a retrial any more than if they were to be recalled in a continuing trial.[78]

---

[69] Rwamakuba's Appeal, para. 17.
[70] Rwamakuba's Appeal, para. 17.
[71] Rwamakuba's Appeal, para. 17.
[72] Rwamakuba's Appeal, para. 15.
[73] Rwamakuba's Appeal, para. 15.
[74] Rwamakuba's Appeal, para. 15.
[75] Rwamakuba's Appeal, paras. 13, 14.
[76] Rwamakuba's Appeal, para. 15.
[77] Rwamakuba's Appeal, para. 19.
[78] Rwamakuba's Appeal, para. 19.

30. Rwamakuba cautions that there is no guarantee that the Trial Chamber would recall witnesses in a continued trial and submits that even if it would do so, dividing evidence in that way is unsatisfactory.[79]

31. Rwamakuba submits that the proceedings in the case are tainted with a reasonable apprehension of bias.[80] "This must be viewed in the context of the learned judge's withdrawal in the face of this asserted apprehension. In our submission the remaining judges have wrongly based their decision on impartiality of the judges during the proceedings when this very issue led to the withdrawal of the learned judge and no finding was made on the application for the judge's alleged appearance of bias ...."[81] He submits:

> Where impartiality of the tribunal is put into question and where this forms the background to the withdrawal of a judge, this sets the situation apart from other situations where a judge leaves a case with no question over impartiality. Where there is a reasonable apprehension of bias and a judge withdraws in the face of a consequent application for recusal or disqualification, it is submitted that there is no other reasonable choice but a retrial in order to preserve the fairness of the whole trial, as well as the accused and public's confidence in the process.[82]

32. Rwamakuba argues that the appearance of bias in this case arises from the close association, including cohabitation shortly before the trial and while the case was in active preparation, between Judge Vaz and one of the Prosecution counsel involved in the case.[83] This appearance is further emphasized, according to Rwamakuba, by Judge Vaz's conduct during trial, particularly during the examination of Witness TM.[84] Furthermore, the appearance of bias was compounded by the Judge's subsequent behaviour.[85] "It is submitted that the judge had shown that she was disturbed, annoyed, intransigent and ultimately moved into concession and withdrawal by the defence application in a manner which may suggest to the reasonable observer that she was not in fact at ease with disclosing the truth to the defence, while recognising the difficulty of the issue concealed for so long."[86]

33. In view of the foregoing, and balancing the modest loss of court time from a retrial against the need to preserve the right to a fair trial, Rwamakuba seeks a reversal of the Impugned Decision and an order for a retrial.[87]

---

[79] Rwamakuba's Appeal, para. 18.
[80] Rwamakuba's Appeal, para. 21.
[81] Rwamakuba's Appeal, para. 21.
[82] Rwamakuba's Appeal, para. 24. *See also* "Reply on Behalf of Rwamakuba to Prosecutor's Consolidated Response to Appeals from Decision Relative a la Continuation du Proces of 16 July 2004", filed on 11 August 2004, para. 12.
[83] Rwamakuba's Appeal, paras. 35, 36.
[84] Rwamakuba's Appeal, para. 40.
[85] Rwamakuba's Appeal, para. 41.
[86] Rwamakuba's Appeal, para. 41.
[87] Rwamakuba's Appeal, paras. 20, 42.

Prosecution

34. The Prosecution opposes the Appeals and responds that the remaining Judges were empowered to issue the Impugned Decision and that they did not abuse their discretion when they held that continuation with a substitute Judge would serve the interests of justice.[88]

35. In response to Karemera's argument concerning the incompetence of the remaining Judges to render the Impugned Decision, the Prosecution submits that Rule 15*bis*(D) of the Rules expressly empowers the two remaining Judges to decide whether to continue the trial with a substitute Judge and that their *ad litem* status has no impact on their authority in this regard.[89]

36. The Prosecution responds that the remaining Judges did not misdirect themselves on the law to be applied in reaching the Impugned Decision.[90] Pointing to paragraph 61 of the Impugned Decision, the Prosecution argues that the remaining Judges correctly stated that they had "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."[91] The Prosecution further submits that the remaining Judges did not reverse the burden in holding that the Defence did not show that continuing the trial would be prejudicial to the accused.[92] The Prosecution argues that the remaining Judges were merely responding to the arguments made by some of the accused that continuing the trial would be prejudicial to them.[93]

37. The Prosecution further responds that the remaining Judges did not fail to take into account material considerations.[94] The Prosecution argues that the remaining Judges did not abuse their discretion when they concluded that the allegations of bias "do not sustain the argument that a trial *de novo* would serve the interests of justice"[95] because there has been no determination that bias existed.[96] In the Prosecution's view, the remaining Judges were not competent to make a determination on the allegations of bias lodged against them.[97] Moreover, the Prosecution observes, in response to Ngirumpatse's submission, that it is not aware of any decision by the Trial Chamber dismissing a motion for Judge Vaz's recusal.[98]

---

[88] Prosecutor's Response, paras. 1, 13-16.
[89] Prosecutor's Response, paras. 9-12.
[90] Prosecutor's Response, paras. 17-20.
[91] Prosecutor's Response, para. 17 quoting Impugned Decision, para. 61.
[92] Prosecutor's Response, para. 20.
[93] Prosecutor's Response, paras. 18-20.
[94] Prosecutor's Response, paras. 21-37.
[95] Prosecutor's Response, para. 26 quoting Impugned Decision, para. 101.
[96] Prosecutor's Response, paras. 21, 22.
[97] Prosecutor's Response, paras. 23, 24.
[98] Prosecutor's Response, para. 24.

38. The Prosecution also submits that the remaining Judges properly rejected arguments that errors during the trial were material facts weighing in favour of starting the trial anew.[99] The Prosecution argues that Rule 15*bis*(D) of the Rules is not an avenue for an appellate review of every Trial Chamber decision in the case and that the Appellants' arguments in this regard are an inappropriate attempt to get the Appeals Chamber to review the case as if from final judgement.[100]

39. Moreover, the Prosecution submits that a *de novo* trial would not undo the decisions made in the case by the trial Judges and that, therefore, even if a decision made during trial were erroneous, it could not be a material consideration in a Rule 15*bis*(D) decision.[101]

40. The Prosecution also submits that the Appeals Chamber has already resolved Defence objections to the amended indictment and that the Appellants have the right to seek a recall of witnesses who testified prior to the amended indictment entering into force.[102]

41. Furthermore, the Prosecution points out that the Trial Chamber has the inherent right to control the proceedings and that there has been no violation of the Appellants' rights, *inter alia*, in limiting cross-examination, holding status conferences in closed session without them, and ruling on questions of disclosure.[103]

42. The Prosecution further responds that the remaining Judges did not give a diminished role to demeanour.[104] Contrary to Nzirorera's submission, the Prosecution states that the remaining Judges did not conclude that observing demeanour of witnesses who speak a foreign language has little value,[105] rather, the Prosecution recalled the statement from the Impugned Decision that "there is need to weigh the impact of such in-court evaluation against the usual practice in national courts."[106] The Prosecution posits that it is certainly true that the "observer loses the inflection, tone, and nuance of the witness' [*sic*] words as they are filtered through the interpreter" and suggests: "To the extent that their demeanour can be captured verbally, all witness' [*sic*] testimony has been audiotaped and is available for the substitute Judge to review."[107]

43. Finally, the Prosecution submits that in reaching the Impugned Decision the remaining Judges did not err by giving weight to immaterial considerations, such as judicial economy or the

[99] Prosecutor's Response, para. 27.
[100] Prosecutor's Response, para. 28.
[101] Prosecutor's Response, paras. 29, 30.
[102] Prosecutor's Response, para. 32.
[103] Prosecutor's Response, para. 33.
[104] Prosecutor's Response, para. 35.
[105] Prosecutor's Response, para. 35.
[106] Impugned Decision, para. 103.
[107] Prosecutor's Response, para. 35.

"courteous remarks" of Defence counsel made during an informal session on 17 May 2004.[108] For the foregoing reasons the Prosecution requests the Appeals Chamber to deny the Appeals.[109]

44. The Prosecution opposes Nzirorera's Motion for Leave to Consider New Material on the principal ground that the developments which he seeks to bring to the attention of the Appeals Chamber are irrelevant to disposing of the issue presented in the Appeals—whether the remaining Judges abused their discretion under Rule 15*bis* of the Rules.[110] The Prosecution argues that on appeal from a decision under Rule 15*bis*, the Appeals Chamber must evaluate the same record as was before the remaining Judges when they exercised their discretion and not take into account subsequent developments.[111] The Prosecution submits that the mere fact that he filed motions seeking to amend the indictment and to vary the witness list has no evidentiary value and should not be taken into consideration in deciding the Appeals.[112] Finally, the Prosecution notes that it disclosed the statement of Witness GFA on 4 June 2004, long before Nzirorera filed his Appeal, and that, therefore, he should have raised this matter in the first instance.[113]

Discussion

45. The Appellants raise numerous issues which overlap to a certain extent. Where this is the case, they are considered together. The Appeals challenge the competence of the two remaining Judges to make a decision under Rule 15*bis*(D) of the Rules and raise issues relating to the interests of justice, including assessment of credibility in the absence of an opportunity to observe the demeanour of witnesses, apprehension of bias, and various ancillary considerations, as well as the allocation of the burden of persuasion under Rule 15*bis*(D).

46. It is noted that under Rule 15*bis*(D), the remaining Judges have "the right to establish the precise point within a margin of appreciation at which a continuation should be ordered. In that decision-making process, the Appeals Chamber can intervene only in limited circumstances, as, for example, where it is of the view that there was a failure to exercise the discretion, or that the Trial Chamber failed to take into account a material consideration or took into account an immaterial one and that the substance of its decision has in consequence been affected."[114]

[108] Prosecutor's Response, paras. 38, 39.
[109] Prosecutor's Response, p. 15.
[110] Prosecutor's Response to Nzirorera's Motion, para. 1.
[111] Prosecutor's Response to Nzirorera's Motion, para. 3.
[112] Prosecutor's Response to Nzirorera's Motion, para. 4.
[113] Prosecutor's Response to Nzirorera's Motion, para. 5.

Applicable Law

47. Rule 15*bis*(D) of the Rules provides in part:

> 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.[115]

Competence of the Remaining Judges to Render the Impugned Decision

48. Karemera raises the threshold issue of the legal competence of the two remaining Judges to render the Impugned Decision. His argument appears to be two-fold: that a Trial Chamber cannot function in the absence of three Judges and that it cannot function in the absence of a Presiding Judge who is a permanent Judge of the Tribunal.[116]

49. Rule 15*bis*(D) of the Rules explicitly prescribes that the "remaining Judges" may decide to continue the proceedings. The Appeals Chamber noted this in the *Butare* case: "The new Rule 15*bis*(D) gives judicial power to *the two remaining judges*, namely, the power to decide whether or not it is in the interests of justice to continue a part-heard case with a substitute judge."[117] The fact that the remaining Judges have *ad litem* rather than permanent status does not change anything under Rule 15*bis*(D). Article 12*quater* of the Statute unequivocally provides that *ad litem* Judges enjoy the same powers as the permanent Judges of the Tribunal, except in expressly delimited circumstances which do not include the power to decide to continue the proceedings under Rule 15*bis*(D).[118] Accordingly, on 21 June 2004, the Appeals Chamber directed the remaining Judges in

---

[114] *See Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings under Rule 15*bis*(D), 24 September 2003 ("*Butare* Appeal Decision"), para. 23.

[115] This Rule has been applied in ICTR jurisprudence only once, in the *Butare* Appeal Decision. The lone ICTY precedent for a substitution of a Judge under the ICTY Rule 15*bis*(D) is the *Milošević* case, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Order Pursuant to Rule 15*bis*(D), 29 March 2004.

[116] *See* Karemera's Appeal, p. 4.

[117] *Butare* Appeal Decision, para. 11 (emphasis added).

[118] Article 12*quater* of the Statute provides in relevant parts:

> 1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:
>
> ...
>
> (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
>
> ...
>
> 2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:
>
> ...
>
> (b) Have power:
> (i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;
> (ii) To review an indictment pursuant to article 18 of the present Statute;
> (iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute;
> (iv) To adjudicate in pre-trial proceedings.

the case to re-consider their decision to continue the proceedings with a substitute Judge after giving the parties an opportunity to be heard and taking account of their submissions.[119]

50. The Appeals Chamber finds that the remaining Judges were competent to render the Impugned Decision and that Karemera's challenge on this point cannot be sustained.

Burden of Showing Which Outcome Would Best Serve the Interests of Justice

51. Ngirumpatse and Nzirorera argue that the remaining Judges erred in law by placing upon the accused the burden of showing that a new trial would be in the interests of justice. Ngirumpatse submits that in criminal law "the burden of proof initially rests with the Prosecution...."[120] Nzirorera submits that as with other Rules in which the consideration of the interests of justice is a criterion, the moving party bears the burden of showing that proceeding as requested would serve the interests of justice.[121] By way of an example, Nzirorera points to circumstances in which a party seeks a deposition, closed session, or protective measures for witnesses.[122] Nzirorera thus submits that it is the proponent of continuing the trial under Rule 15*bis*(D) who bears the burden of showing that doing so would serve the interests of justice.[123]

52. Ngirumpatse's submission is a mere recitation of the principle that the Prosecution bears the burden of proof in the case, that is, the burden of proving the charges against the accused. This is not at issue here. Nzirorera's submission likewise does not assist the Appeals Chamber in determining the present issue because it refers to circumstances in which a party moves the court for a particular action. This, also, is not relevant to the instant determination. In the circumstances to which Rule 15*bis*(D) is addressed, it is not for a party to move the court, rather, the Rule allows the remaining Judges to take the initiative and act in their discretion, namely, decide to continue the proceedings with a substitute Judge if, taking all the circumstances into account, they unanimously determine that doing so would serve the interests of justice. The parties have a right to be heard before the decision is made,[124] but they bear no burden of proving that continuing or not continuing the proceedings would better serve the interests of justice. Accordingly, it would constitute an error

---

See also Karemera and Nzirorera v. Prosecutor, Case No. ICTR-98-44-AR73.4, Decision on Interlocutory Appeals regarding Participation of *Ad Litem* Judges, 11 June 2004, p. 3 ("[P]ursuant to Article 12 *quater* of the Statute of the International Tribunal, *ad litem* judges enjoy the same powers as the permanent judges of the International Tribunal, with the exception of the right to review an indictment, the right to adjudicate in pre-trial proceedings and other administrative matters specifically enumerated in paragraph 2 of Article 12 *quater* of the Statute of the International Tribunal.").

[119] Decision in the Matter of Proceedings under Rule 15*bis*(D), para. 13.

[120] Ngirumpatse's Appeal, para. 31.

[121] *See* Nzirorera's Appeal, paras. 11-13.

[122] Nzirorera's Appeal, para. 13.

[123] Nzirorera's Appeal, para. 11.

[124] Decision in the Matter of Proceedings under Rule 15*bis*(D), para. 9.

on the part of the remaining Judges to take into account that Defence submissions have not demonstrated that re-starting the trial would serve the interests of justice.

53. Nzirorera and Ngirumpatse correctly note that in the Impugned Decision the remaining Judges found in respect of several issues that the Defence had failed to demonstrate that starting a new trial would best serve the interests of justice.[125] For example, in response to a Defence submission that the Trial Chamber erred in law when it held closed sessions in the absence of the accused, the remaining Judges stated: "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."[126] Further, summing up in the section on alleged errors of law committed during the trial, the Judges concluded "that the Defence has not demonstrated the existence of errors of law which support a finding that a trial *de novo* would serve the interests of justice."[127] Similarly, when considering the complaint that the trial proceeded under an obsolete indictment, the remaining Judges concluded as follows:

> 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. ... 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*.[128]

54. The issue under Rule 15*bis*(D) is whether taking all the circumstances into account, the Judges find that continuing the trial would serve the interests of justice. In answering this question, the Judges are to assess the totality of the circumstances rather than whether a party has demonstrated that continuing or re-starting the trial would better serve the interests of justice. In the view of the Appeals Chamber, although the remaining Judges noted that the Defence had not demonstrated certain facts, they did not base their findings on this observation, which would be an immaterial consideration, but, rather, they based them on the assessment of the underlying circumstances, which was material for their decision. Consequently, the Appeals Chamber finds that the remaining Judges did not abuse their discretion by taking into account an immaterial consideration, namely whether the Defence met a certain burden, and dismisses the Appeals on this point.

Assessment of Credibility in the Absence of an Opportunity to Observe the Demeanour of Witnesses

55. The Appellants submit that the remaining Judges erred by giving insufficient weight to the

[125] *See* Impugned Decision, paras. 65, 73, 78, 88, 92, 101.
[126] Impugned Decision, para. 88.
[127] Impugned Decision, para. 92.
[128] Impugned Decision, paras. 64, 65.

fact that testimonies of most of the witnesses who had testified in the case had not been video-recorded and that, consequently, the substitute Judge would be unable to adequately assess the credibility of these witnesses.

56. The remaining Judges recalled in the Impugned Decision that Rule 90(A) of the Rules prescribes that, in principle, witnesses shall be heard directly by the Chambers.[129] The Judges explained, however, that Rules 15*bis* and 71 of the Rules as well as the *Butare* Appeal Decision establish that in exceptional circumstances the Trial Chamber may rule on the merits of the case without hearing all the witnesses directly.[130] "It is therefore all the more admissible for one of the three Judges to do so."[131] Consequently, in the view of the remaining Judges, "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 fair trial and therefore with its continuation."[132] "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."[133] The remaining Judges noted that the recomposed bench *proprio motu* will be able to "recall a few witnesses, if it deems that the interests of justice so require" and observed that this could be particularly contemplated in respect of Witness GBU who testified in the absence of Judge Lattanzi.[134]

57. It appears that thirteen witnesses testified in the case thus far and that eleven were protected witnesses who testified for the Prosecution (the other two witnesses were Prosecution investigators).[135] The testimonies of the protected witnesses were heard live in court, audio-recorded, and transcribed. However, the giving of these testimonies was not video-recorded.[136] The record further reflects that Judge Vaz was present during the entire trial, while Judge Lattanzi was absent for four days during most of the testimony of Witness GBU[137] and a part of the testimony of Witness GII,[138] and Judge Arrey was absent during a part of the testimony of Witness HF.[139]

58. In the view of the Appeals Chamber, the remaining Judges erred in considering that the

---

[129] Impugned Decision, para. 104.
[130] Impugned Decision, para. 104.
[131] Impugned Decision, para. 104.
[132] Impugned Decision, para. 104.
[133] Impugned Decision, para. 104.
[134] Impugned Decision, para. 106.
[135] Witnesses GBG, GBV, CEA, TM, GIO, HF, GFA, GBU, GII, GIN, GIT. The Impugned Decision indicates that twelve witnesses were heard of whom ten were protected. Impugned Decision, para. 102.
[136] *See* Impugned Decision, para. 102.
[137] 19-22 April 2004.
[138] 22 April 2004.
[139] 11 December 2004.

substitute Judge should evaluate the "compatibility" of fair trial requirements with the fact that he or she is to acquaint himself or herself with the testimonies from the transcript and audio-recordings.[140] This observation is incorrect because, under the Rules, the substitute Judge is not called upon to evaluate whether, in the circumstances, the lack of video-recordings is incompatible with the requirements of a fair trial. Rather, the substitute Judge is to "familiarise" himself or herself with "the record" of the proceedings, whatever that record may contain.[141] In any event, this is done *after* the remaining Judges decide to continue the trial with a substitute Judge. Therefore, any evaluation of the record by the substitute Judge could have no effect on the decision to continue the trial. Moreover, even if the substitute Judge would decide that fair trial demands that he or she observe the protected witnesses during their testimony, the substitute Judge alone could not ensure their recall.[142]

59. The Appeals Chamber also finds that in reaching the Impugned Decision the remaining Judges took into account an immaterial consideration, namely, the fact that the testimonies were given in a language not understood by the Bench. The remaining Judges stated:

> The existence of such [video] 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' [*sic*] assessment of a witness' [*sic*] demeanour, there is need to weigh the impact of such in-court evaluation against the usual practice in national courts.[143]

60. The Tribunal has repeatedly emphasized the importance of observing the demeanour of witnesses and, indeed, it is this first-hand observation which is the basis for the Appeals Chamber's deference to the factual findings of Trial Chambers.[144] The Appeals Chamber considers that the importance of evaluation of the demeanour of witnesses by the triers of fact cannot be discounted on the ground that the witnesses may speak through an interpreter. Even when this is the case, the Judges observing the witness testify have an opportunity to see his or her demeanour, assess it, and weigh the evidence accordingly.

---

[140] Impugned Decision, para. 104.
[141] *See* Rule 15*bis*(D). As Judge Hunt pointed out in his *Butare* dissent, Rule 15*bis*(D) "does not give to the substituted Judge either the power or the obligation to determine the adequacy of the record of proceedings." *Butare* Appeal Decision, Dissenting Opinion of Judge David Hunt, para. 36.
[142] *See Butare* Appeal Decision, Dissenting Opinion of Judge David Hunt, para. 36.
[143] Impugned Decision, para. 103.
[144] For example in *Rutaganda,* the Appeals Chamber stated the following: "It is an established principle that a high degree of deference must be shown to the factual findings of a Trial Chamber, and the Appeals Chamber has regularly recalled that it will not lightly disturb findings of fact by a Trial Chamber. *Such deference is based essentially on the fact that the Trial Chamber has the advantage of observing witnesses in person and hearing them when they are testifying, and so are better placed to choose between divergent accounts of one and the same event. Trial Judges are better placed than the Appeals Chamber to assess witness reliability and credibility, and to determine the probative value to ascribe to the evidence presented at trial.*" *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26

61. Having regard to the two errors mentioned in paragraphs 58-60, the Appeals Chamber holds that the remaining Judges took into account immaterial considerations and that the substance of their decision has, as a result been affected.

Apprehension of Bias

62. Ngirumpatse and Rwamakuba submit that it cannot be in the interests of justice to continue the trial since the proceedings have been tainted by an apprehension of bias arising from Judge Vaz's close association and cohabitation with a Prosecution counsel and her subsequent withdrawal from the case in the face of the asserted apprehension of bias.

63. The remaining Judges have considered in the Impugned Decision submissions concerning the alleged appearance of bias.[145] The remaining Judges have recalled that Judges of the Tribunal enjoy a presumption of impartiality and that, to sustain an allegation of appearance of bias, objective evidence must be presented.[146] "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 [*sic*] that the Defence submissions do not sustain the argument that a trial *de novo* would serve the interests of justice."[147]

64. The Appeals Chamber recalls that the Bureau dismissed applications lodged by Nzirorera, Rwamakuba, and Ngirumpatse for the disqualification of all three Judges on the basis of their lack of impartiality evidenced by their decisions in the case.[148] Additionally, the Appeals Chamber notes that following Judge Vaz's withdrawal from the case, the Bureau dismissed as moot Nzirorera's and Rwamakuba's applications for Judge Vaz's disqualification on the basis of her close association with a Prosecution counsel.[149]

65. The Appeals Chamber finds that the remaining Judges erred in the exercise of their discretion when they took into account that the Bureau has confirmed the impartiality of all three Judges.[150] While the Bureau has denied two motions for disqualification of the three trial Judges which were based on their decisions, the Bureau has *not* passed on the question of apprehension of

---

May 2003, para. 21 (citations omitted, emphasis added). The Appeals Chamber also observed that in reviewing the factual findings of Trial Chambers it only has at its disposal transcripts of the testimonies. *Id.* n. 36.

[145] *See* Impugned Decision, paras. 93-101.

[146] Impugned Decision, para. 100.

[147] Impugned Decision, para. 101.

[148] *See* Decision on Motion by Karemera for Disqualification of Trial Judges, The Bureau, 17 May 2004; Decision on Motion by Ngirumpatse for Disqualification of Trial Judges, The Bureau, 17 May 2004.

[149] *See* Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz, The Bureau, 17 May 2004.

bias allegedly arising from Judge Vaz's admitted association and cohabitation with a Prosecution counsel involved in the case.[151]

66. The Appeals Chamber notes that the allegations of appearance of bias are supported by Judge Vaz's admission of association and cohabitation with a Prosecution counsel who was one of the trial attorneys appearing in the present case.[152] The question remains whether these circumstances gave rise to an appearance of bias. In a finding repeated in the jurisprudence of both this Tribunal and the International Criminal Tribunal for the Former Yugoslavia, the ICTY Appeals Chamber stated in the *Furundžija* Judgement:

> ...the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> ...
>
> B. There is an unacceptable appearance of bias if:
>
> ...
>
> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[153]

67. This finding informs the interpretation of Rule 15(A) of the Rules.[154] Rule 15(A) provides, in part, that "[a] Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or had any association which might affect his impartiality." The particular circumstances involved here include, in addition to the admitted association and cohabitation, the fact that Judge Vaz did not disclose these facts until Defence counsel expressly raised this matter in court and that she withdrew from the case after Defence lodged applications for her disqualification on this basis and before the Bureau decided the disqualification motions. The Appeals Chamber finds that these circumstances could well lead a reasonable, informed observer to objectively apprehend bias. The Appeals Chamber emphasizes that this is not a finding of actual bias on the part of Judge Vaz, but rather a finding, made in the interests of justice, that the circumstances of the case gave rise to an appearance of bias.

68. The Appeals Chamber notes Ngirumpatse's argument that the appearance of bias also attaches to the remaining Judges by virtue of their decision to continue the trial with Judge Vaz on the Bench after learning of her association and cohabitation with the Prosecution counsel. In presenting this argument, Ngirumpatse did not provide specific references to the record. In both his

---

[150] *See* Impugned Decision, para. 101.
[151] *See* Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz, The Bureau, 17 May 2004.
[152] *See* T. 27 April 2004 pp. 24-25.
[153] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 189. *See also, e.g., Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 39.
[154] *See Furundžija* Appeal Judgement, para. 191.

Appeal and Reply he refers to a decision made on 17 May 2004.[155] It is clear from the context th Ngirumpatse had the 27th of April 2004 in mind when he referred to 17 May. On that da Ngirumpatse's counsel confronted Judge Vaz in court with the "rumour" that she had a clos association with a Prosecution counsel and that they had cohabited during the preparation of th case. Ngirumpatse's counsel characterized this as a motion.[156] Judge Vaz answered by explainin the nature of her relationship with the counsel. There appears to have been no decision o Ngirumpatse's counsel's submission. Subsequently, on the same day, Nzirorera's counsel Pete Robinson made a motion in court for Judge Vaz's recusal on the basis of her association with th Prosecution counsel (he also lodged another motion at the same time).[157] Judge Vaz ruled a follows: "Please, we therefore like to respond to the two motions made by Counsel Robinson. We dismiss both of them. I shall not step down or disqualify myself, and you may file the motion pursuant to Rule 15*bis*."[158]

69. Having found that the appearance of bias attached to Judge Vaz, the Appeals Chamber now finds that this appearance also extended to Judges Lattanzi and Arrey because, although aware of the circumstances of Judge Vaz's association with the Prosecution counsel, they acquiesced in rejecting Nzirorera's motion and, therefore, in continuing the trial with Judge Vaz on the Bench.

Other Issues

70. The Appellants raise a number of other issues, none of which appears to sufficiently support the claim that the remaining Judges abused their discretion in reaching the Impugned Decision. These issues relate, for example, to the Judges' consideration that protected witnesses would be exposed to risk by repeated trips to the Tribunal, that some witnesses may refuse to return in the event of a re-trial, and the length of time needed for a re-trial.

71. The Appellants also raise issues related to the indictment. Karemera argues that it would not be proper to continue the trial when the Appeals Chamber is considering the challenge to the indictment. The Appeals Chamber has already rendered its decision on Rwamakuba's interlocutory appeal concerning joint criminal enterprise, the only interlocutory appeal pending in this case, and this issue is therefore moot.[159] Ngirumpatse and Nzirorera submit that the trial proceeded under an indictment that was amended during the trial and allege unfairness arising from that. The Appeals Chamber has already addressed Ngirumpatse's and Nzirorera's concerns about the indictment in the

[155] Ngirumpatse's Appeal, para. 25; Ngirumpatse's Reply, para. 3.3.
[156] T. 27 April 2004 p. 23.
[157] T. 27 April 2004 pp. 28-29.
[158] T. 27 April 2004 pp. 29-30.

8 April 2004 Decision on Interlocutory Appeal Regarding Motion for Declaration of Mistrial and on Motion to Suspend Trial and in the 27 August 2004 Decision on Interlocutory Appeal Against Decision of 13 February 2004 Partially Granting the Prosecutor's Motion for Leave to Amend the Indictment. To the extent that Ngirumpatse and Nzirorera have other concerns about the indictment, they should raise them in the Trial Chamber, rather than on appeal arising under Rule 15*bis*(D).

Disposition

72. For the foregoing reasons, on 28 September 2004 the Appeals Chamber found, Judge Schomburg dissenting, that the remaining Judges erred in the exercise of their discretion in reaching the Impugned Decision to continue the proceedings with a substitute Judge. The Appeals Chamber granted the Appeals on the points of assessment of credibility in the absence of an opportunity to observe the demeanour of witnesses and apprehension of bias. The Appeals Chamber declined to consider Nzirorera's Motion as it has been rendered moot by the decision to quash the Impugned Decision. Judge Shahabuddeen appends his Declaration concerning the issue of bias.

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

Theodor Meron
Presiding Judge

Done this 22nd day of October 2004,
At The Hague,
The Netherlands.

Seal of the International Tribunal

[159] *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004.

DECLARATION OF JUDGE SHAHABUDDEEN

I support today's decision only on two grounds. These are, first, the evaluation problem, referred to in paragraph 58 of the decision, and, second, the language problem referred to in paragraphs 59 and 60 of the decision. I do not consider it necessary to make a finding as to whether an appearance of bias attached to Judge Vaz, and I do not find that there was any such appearance in the case of the two remaining Judges.

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

Dated 22 of October 2004

At The Hague

The Netherlands

Mohamed Shahabuddeen

[Seal of the Tribunal]