ICTR-98-42-A15bis
24 September 2003
(138/h - 99/h)

Reg-0445

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED
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IN THE APPEALS CHAMBER

ICTR Appeals Chamber
Date: 24 September 0
Action: PG
Copied To: concerned Judges, Parties, Judicial Archives, LSS, LO, PIOTC II

Before : **Judge Theodor MERON, Presiding**
Judge Mohamed SHAHABUDDEEN
Judge David HUNT
Judge Fausto POCAR
Judge Inès Monica WEINBERG DE ROCA

Registrar: **Mr. Adama DIENG**

Decision of: **24 September 2003**

THE PROSECUTOR

v/

2003 SEP 24 P 1:05

Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T
Sylvain NSABIMANA & Alphonse NTEZIRYAYO
Case No. ICTR-97-29A&B-T
Joseph KANYABASHI
Case No. ICTR-96-15-T
Elie NDAYAMBAJE
Case No. ICTR-96-8-T

Joint Case n° ICTR-98-42-A15bis

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

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Mr. Richard PERRAS
For Kanyabashi: Mr. Michel MARCHAND
Mr. Michel BOYER
For Ndayambaje: Mr. Pierre BOULE
Mr. Claude DESROCHERS

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1. These appeals concern a part-heard trial in which one of the three judges of the Trial Chamber was not re-elected; they present an issue as to whether the case should continue or be heard afresh, with a substitute judge being assigned in lieu of the ourgoing judge. That being the issue common to all of the appeals, a single decision is being given. The matter arises this way:

I. The background to the appeals

2. The joint trial of Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambje (the "*Butare* trial") started on 12 June 2001 in Trial Chamber II before Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson. At the elections of the Tribunal's judges by the General Assembly of the United Nations on 31 January 2003 for the new mandate beginning on 25 May 2003, Judge Maqutu was not re-elected; the last day of his term of office was 24 May 2003. There are no alternate judges. On 26 March 2003, Judge Navanethem Pillay, then President of the Tribunal, wrote to the Security Council of the United Nations to request the Security Council, among other things, to extend Judge Maqutu's term at the Tribunal in order to enable him to finish the trial of the *Butare*, the *Kamuhanda* and the *Kajelijeli* cases. In the meantime, President Pillay asked the various Defence Counsel in the *Butare* trial whether they would give their consent to the possible substitution of a new judge to replace Judge Maqutu for the purposes of continuing that trial. In their responses to Judge Pillay, none of the accused gave their consent. On 19 May 2003, the Security Council adopted Resolution 1482, *inter alia*, extending Judge Maqutu's term of office for purposes of finishing the *Kamuhanda* and *Kajelijeli* cases but not the *Butare* trial. On 21 May 2003, the Presiding Judge of the *Butare* trial reported to President Pillay that, as of 24 May 2003, Judge Maqutu would be unable to sit in the *Butare* trial. Twenty-three prosecution witnesses had already testified.

3. On 27 May 2003, Rule 15*bis* was amended. A new paragraph (D) empowered the remaining judges of a Trial Chamber, after the third judge was *inter alia* not re-elected, to decide to continue the proceedings with a substitute judge, if, taking all the circumstances into account, they determined unanimously that doing so would serve the interests of justice; that provision would apply where the accused did not consent to a continuation of

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the hearing with a substitute judge, such consent being required after the opening statements provided for in Rule 84 or the beginning of the presentation of evidence pursuant to Rule 85, both of which events had happened in this case. On 6 June 2003, Judge Møse, who had been elected President of the Tribunal on 26 May 2003, accordingly wrote to the parties enquiring whether they would be willing to reconsider their position and consent to a continuation of the trial with a substitute judge. In response, the Defence Counsel for the Accused Sylvain Nsabimana and the Prosecution indicated their consent to continue the trial with a substitute judge. The remaining Defence Counsel reiterated their clients' withholding of consent for the continuation of the trial with a substitute judge.

4. Taking into account the various submissions of the parties as to whether it would be in the interests of justice to continue the trial with a substitute judge under the new Rule 15*bis* (D), the Trial Chamber, constituted of Judge Sekule and Judge Ramaroson, decided the following in its "Decision in the matter of proceedings under Rule 15*bis* (D)" on 15 July 2003 (the "Impugned Decision"):

- The Trial Chamber, as constituted by the two judges, had jurisdiction to determine the applicability of the new Rule 15*bis* to the *Butare* trial.[1]
- The ability of an accused under the old Rule 15*bis* to withhold consent and thus to force the recommencement of a part-heard case did not amount to a substantive right. An "Accused had no vested right in the purely procedural ability, now superseded, to withhold consent and force recommencement of the trial".[2] In consequence, the rights of an accused in the pending trial would not be prejudiced by the retroactive application of the new Rule 15*bis*.
- Even if the right to withhold consent were a substantive right, the retroactive operation of the new provision to the trial did not prejudice the rights of an accused in the trial. This was so because the right to withhold consent had to be considered in the context of the other interests of justice. The interests of justice

[1] Impugned Decision, paras. 1-10.
[2] Impugned Decision, para. 26. See also paras. 11-25.

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showed that it was correct to continue the case with a substitute judge within the terms of the new provision.

- In reaching this conclusion, account was taken of the need for a speedy trial, the willingness of the Defence to proceed in other cases, the absence of consent in this case, the interests of the victims and witnesses, the financial costs and other matters.[3]

5. In furtherance of Rule 15*bis* (D) and (E), five of the six accused filed appeal against the Impugned Decision on 21 and 22 July 2003 (the "Accused" or the "Appellants").[4] The Appellants submit, as more fully set out below, that the Trial Chamber committed an error of law by deciding unanimously that it serves the interests of justice to continue the trial with a substitute judge in terms of the new Rule 15*bis*(D) on the basis of the existing trial record and decisions in the case. They request the Appeals Chamber *inter alia* to order a trial *de novo*.

6. The Prosecution filed the "Prosecutor's Response to the appeals by Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi and Ndayambaje of the Decision by the Trial Chamber in the matter of proceedings under Rule 15*bis* (D)" on 31 July 2003 ("Prosecutor's Response"). The Prosecution submits *inter alia* that the old Rule 15*bis* did not cover the non-reelection of a judge and was therefore not applicable to the present case. It further argues that no prejudice results to the rights of the accused from the application of the new Rule 15*bis* to the present case and that the Trial Chamber was correct in finding that it was in the interests of justice to continue the proceedings in the case.

[3] Impugned Decision, paras. 33-34.

[4] "*Avis d'appel de Pauline Nyiramasuhuko de la 'Decision in the matter of proceedings under Rule 15bis(D)'*" filed on 21 July 2003 ("Nyiramasuhuko's notice of appeal"); "*Acte d'appel de la 'Decision in the matter of proceedings under Rule 15bis(D)' datée du 15 juillet 2003*", filed on 21 July 2003 by the Accused Ntahobali ("Ntahobali's notice of appeal"); "*Acte d'appel de la décision intitulée 'Decision in the matter of proceedings under Rule 15bis(D)'*" filed by the Accused Ndayambaje on 22 July 2003 ("Ndayambaje's notice of appeal"); "*Appel selon l'article 15 bis par.D) E) du Reglement de procédure et de preuve*" filed by the Accused Kanyabashi on 22 July 2003 ("Kanyabashi notice of appeal"); "*Appel par Alphonse Ntzeriyayo de la décision 'Decision in the matter of proceedings under Rule 15bis(D)' rendue par les honorables juges Sekule, président, et Ramaroson le 15 juillet 2003*" filed on 22 July 2003 ("Ntzeriyayo's notice of appeal").

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7. Four of the Appellants filed their replies on 4 August 2003.[5] The Accused Ntahobali filed his "*Réplique à la réponse du procureur à l'acte d'appel de la 'Decision in the matter of proceedings under Rule 15bis(D)' datée du 15 juillet 2003*" on 8 August 2003, which was four days out of time.[6] However, by his decision dated 22 August 2003, the pre-appeal Judge in this case decided to authorize the reply as validly filed.

II. The Appellants' main grounds of appeal

8. The five Appellants made various complaints in their notices of appeal and replies; the main submissions may be authorized as follows:

- The two remaining judges, namely, Judge Sekule and Judge Ramaroson, erred in law in holding that they had jurisdiction to decide whether the new Rule 15*bis* was applicable to the present case.[7]
- They erred in law in finding that the old Rule 15*bis* did not create any substantive right for the accused, that the application of the new Rule 15*bis* did not prejudice the rights of the accused, and that therefore the new Rule applied retroactively to the present case.[8]

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[5] "*Réplique de Pauline Nyiramasuhuko à 'Prosecutor's Response to the appeals by Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi and Ndayambaje of the Decision by the Trial Chamber in the matter of proceedings under Rule 15bis(D)*"; "*Réplique à la réponse du Procureur 'Prosecutor's Response to the appeals by Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi and Ndayambaje of the Decision by the Trial Chamber in the matter of proceedings under Rule 15bis(D)*" filed by the Accused Ndayambaje; "*Réplique à la 'Prosecutor's Response to the appeals by Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi and Ndayambaje of the Decision by the Trial Chamber in the matter of proceedings under Rule 15bis(D)*" filed by the Accused Ntezirayo and "*Réplique à la réponse du Procureur relativement à l'appel selon l'article 15bis Par.D) E) du Reglement de procédure et de preuve*" filed by the Accused Kanyabashi.

[6] The "Practice Direction on procedure for the filing of written submissions in appeal proceedings before the Tribunal" dated 16 September 2002, provides in its paragraph 3 that the Appellant "may file a reply within four days of the filing of the response."

[7] See Nyaramasuhuko's notice of appeal, paras. 3-16; Ntahobali's notice of appeal, paras. 14-26; Ndayambaje's notice of appeal, paras.9-10; Kanyabashi's notice of appeal, paras. 15-28.

[8] See Nyiramasuhuko's notice of appeal, paras. 15-23; Ntahobali's notice of appeal, paras.17-39; Ndayambaje's notice of appeal, paras., 11-15; Kanyabashi's notice of appeal, paras. 29-40; Nteziryayo's notice of appeal, paras. 13-31.

- They erred in law in deciding that it served the interests of justice to continue the *Butare* trial with a substitute judge on the basis of the existing trial record and decisions in the case.[9]

These submissions will be subsumed in what follows. But first it will be convenient to set out the applicable provisions.

III. The relevant Rules of Procedure and Evidence

Rule 6: Amendment of the Rules (as it reads prior to and post 27 May 2003)

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted, if agreed to by not less than ten Judges at a Plenary Meeting of the Tribunal convened with notice of the proposal addressed to all Judges.

(B) An amendment of the Rules may be adopted otherwise than as stipulated in Sub-Rule (A) above, provided it is approved unanimously by any appropriate means either done in writing or confirmed in writing.

(C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

Rule 14 *bis* (as it read prior to 27 May 2003)

The members of the Tribunal shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

Rule 14 *bis* (as it reads since 27 May 2003)

The members of the Tribunal shall continue to discharge their duties until their places have been filled.

Rule 15 *bis* : Absence of a Judge (as it read prior to 27 May 2003)

(A) If

[9] See Nyiramasuhuko's notice of appeal, paras 24-50; Ntahobali's notice of appeal, paras.40-58; Ndayambaje's notice of appeal, paras. 16-35; Kanyabashi's notice of appeal, paras.41-51; Ntaziryayo's notice of appeal, paras.32-38.

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(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,

those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.

(B) If

(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied should be disposed of in the interests of justice, notwithstanding the absence of that Judge, and

(b) the Presiding Judge may adjourn the proceedings.

(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

(D) 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, authorize a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

Rule 15 *bis* : Absence of a Judge (as it reads since 27 May 2003)

(A) If

(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,

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those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.

(B) If

(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied should be disposed of in the interests of justice, notwithstanding the absence of that Judge, and

(b) the Presiding Judge may adjourn the proceedings.

(C) If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).

(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.

(E) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

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(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

(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.

IV. Preliminary considerations

9. The Appeals Chamber will address two preliminary arguments. First, the Appellants contend that the two remaining judges in the *Butare* trial sat in the plenary which amended Rule 15*bis* on 27 May 2003 and that this impaired their impartiality.[10] The argument overlooks the fact that judges can in a legislative capacity make rules without prejudice to their right to pronounce in a judicial capacity on the *vires* or operation of the rules so made.[11] In this case, article 14 of the Statute, which gives a rule-making competence to the judges of the Tribunal, does not prevent them from later deciding in their judicial capacity on the *vires* or operation of the rules adopted.

10. The second preliminary argument is that the two remaining judges in the *Butare* trial had no jurisdiction to decide whether the new Rule 15*bis* was applicable to the present case.[12] The contention is that each Trial Chamber must be composed of three members and that a Trial Chamber is only authorised, in furtherance of Rule 15*bis* (F), to conduct routine matters in the absence of one or more of its members;[13] the question whether the powers conferred by the amended Rule 15*bis* apply to the present case cannot fall within the definition of "routine matters".

11. The Appeals Chamber considers that anyone exercising a judicial power has the responsibility and the competence to ensure that he has the power which he is proposing to exercise. The new Rule 15*bis* (D) gives a judicial power to the two remaining judges,

[10] The Appellants also argue that the amendment was designed to prevent them from benefiting from their previous refusal to consent. See, for example, the submissions of Nyiramasuhuko in her notice of appeal, paras.12-14, and Nteziryayo's notice of appeal, paras. 15-17.
[11] *Smokovitis v. Greece*, ECHR, 11 April 2002, concerned a legislative judgment relating to specific claims, and not the laying down of a legislative norm; it is distinguishable.
[12] See *supra* footnote 7.
[13] See Ndayambaje's notice of appeal, paras. 9-10, and Nyiramasuhuko's notice of appeal, paras. 3-10.

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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. This power comprehends the incidental power to decide whether or not this provision is applicable to the particular case of the *Butare* trial. This incidental power has to be exercised by the two remaining judges to whom the main power is entrusted. The Appeals Chamber cannot see any error committed by them in this respect; it upholds their reasoning as expressed in paragraph 8 of the Impugned Decision.

V. The nature of the Appellants' main challenge

12. The thrust of the Appellants' main challenge is that the amended Rule 15*bis* is not applicable to the *Butare* trial, the argument being that, were it to apply to that trial, it would be applying retrospectively and that it cannot do that since it concerns substantive rights and does not clearly evidence a retrospective intention. The argument does relate to a pending trial, but since it concerns the continuance of the trial in the future it may be questioned whether any issue of retrospectivity is involved even if a substantive right is implicated.[14] The Appeals Chamber will, however, proceed on the footing that the amendment concerns a substantive right, in the sense of there being a legitimate expectation to be tried in a certain way in order to achieve the fundamental objective of a fair trial, and that retrospectivity is consequently involved in applying the amendment to a pending trial. Nevertheless, the Appeals Chamber does not consider that this ends the matter.

13. Statutes which make alterations in procedure regulate secondary rather than primary conduct; they apply to existing proceedings even though these were commenced before the statutes were made and in that sense may be regarded as retrospective.[15] By contrast, there is a presumption that enactments affecting substantive rights are intended to be prospective.[16] This presumption is however a rebuttable one; if it is rebutted, an

[14] On different grounds, such questions were raised in *Attorney-General v. Vernazza* [1960] A.C. 965, H.L., at pp. 976 *per* Lord Denning and at p. 980 *per* Lord Morris of Borth-y-Gest, and in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at pp. 292-293 *per* Justice Scalia.

[15] See for example, *Rex v. Chandra* [1905], 2 K.B.335 ; and *Paul v. Paul*, 214 Va. 651, 203 S.E.2d 123 (1974).

[16] See *Turnbull v. Forman* (1885) 15 Q.B.D 234, per Bowen L.J at p.238: "Where the legislature means to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so, or, to put the same thing in a somewhat different form, if the words are not unequivocally clear to the contrary, a provision must be construed as

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amendment, though affecting substantive rights, applies retrospectively (barring any impediment of a constitutional nature) and so can affect existing proceedings.[17]

14. Evidence capable of rebutting the presumption is furnished through Rule 6(C), which states that "an amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case". It is true that a provision stipulating that a statute is to commence at a certain time does not necessarily mean that the statute is to govern previous conduct into which an inquiry is pending at that time. But it depends on the language of the commencement provision. Here there is one commencement provision; it applies to amendments of all kinds. Therefore, every amendment enters into force "immediately", *i.e.*, whether substantive or procedural, it applies to all cases of which the Tribunal is then or may in future be seised, the sole qualification being that the amendment, of whatever kind, must not "operate to prejudice the rights of the accused in any pending case". So, the real and only question under the Rules, as they have been crafted, is whether the new amendment to Rule 15*bis* will operate to prejudice the rights of the Appellants.

15. That being the only question, the Appellants submit that the new Rule 15*bis* would operate to prejudice their rights in the pending case for two main reasons. First, they claim that, under the old Rule 15*bis*, they had an absolute right to withhold consent to the continuation of the case; since 27 May 2003, this right has been materially modified.[18] Second, they submit that they had in fact exercised that right before 27 May 2003 by refusing to give it and had thus earned a consequential right to a rehearing, and that the new Rule 15*bis* would take away their right to a rehearing.[19] Each argument will be addressed in turn.

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not intended to take away or lessen existing rights. A converse rule is that, where the legislature is dealing with matters of procedure as distinguished from substantive rights, the same presumption does not apply".

[17] The presumption was not rebutted in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which contains a number of helpful statements on the subject.

[18] Ndayambaje's notice of appeal, para.13; Nyiramasuhuko's notice of appeal, paras.18-23; Ntahobali's notice of appeal, paras.17 and 21 and Nteziryayo's notice of appeal, paras 19-20.

[19] Nteziryayo's notice of appeal, paras. 13-14 and 19-21; Ntahobali's notice of appeal, paras 14-16; Nyiramasuhuko's notice of appeal, paras 13 and 21-23; Ndayambaje's notice of appeal, paras. 11-12.

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VI. The first of the Appellants' arguments on prejudice

16. As to the first of the Appellants' arguments on prejudice, the Appellants assume that they had a right to withhold consent under the old Rule 15*bis* in the case of a judge who has not been re-elected. Even if this assumption were correct, the Appeals Chamber considers that this would not put an end to the inquiry, because it is necessary to answer the question, not whether the right to consent was taken away *simpliciter*, but whether the rights of the Appellants in the *Butare* trial were prejudiced by the operation of amended Rule 15*bis*.

17. The Appellants do not take their arguments as far as to suggest that consent is the source of the Tribunal's competence to provide for continuation of a hearing with a substitute judge, and accordingly there is no need to consider the basis of that competence. The Tribunal will limit itself to observing that, as a matter of pleading, consent may preclude a party from questioning a decision to continue a hearing but that consent cannot give the Tribunal competence to continue if the Tribunal does not otherwise have it; the power of the Tribunal to continue the hearing with a substitute judge exists *dehors* consent. The Appeals Chamber takes the view that, though apparently absolute, the right to consent to continuation of the trial was not proprietorial but functional. The right to consent gave protection against possible arbitrariness in the exercise of the power of the Tribunal to continue the hearing with a substitute judge; consent was only a safeguard.

18. The question therefore is whether the safeguard provided through the mechanism of consent under the old Rule 15*bis* was replaced by the modifications made on 27 May 2003 by a safeguard of equivalent value. The new Rule 15*bis* contains various safeguards: the decision by the two remaining judges is a judicial one; it is taken after hearing both sides; the two remaining judges know the case as it has so far developed; their decision must be unanimous; an appointment can only be made once. Further, there is an unqualified right of appeal by either party from the decision taken by the two remaining judges direct to a full bench of the Appeals Chamber. Finally, in cases where the Appeals Chamber affirms the Trial Chamber's decision or if no appeal is lodged, the newly assigned judge must certify that he has familiarised himself with the record of the

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proceedings; if he cannot give the required certificate of familiarisation, he cannot eventually be substituted.

19. In effect, under the new Rule 15*bis*, the purpose of the old safeguard is met by the various procedures mentioned in paragraph 18 above. In the opinion of the Appeals Chamber, the value of the old safeguard is equivalent to the value of the new one, with the consequence that no material prejudice results to the accused from providing for the application of the new safeguard where the accused withholds his consent: in both cases there is an equivalent protection against arbitrariness. It follows that, even if, in the case of a judge who has not been re-elected, there was a right to consent to continuation of the trial under the old provision, the operation of the newly amended Rule 15*bis* does not prejudice the rights of the Appellants in the pending trial.

VII The second of the appellants' arguments on prejudice

20. The second argument of the Appellants concerning prejudice also assumes, as the Appeals Chamber understands it, that, in the case of a judge who has not been re-elected, the Appellants had a right to consent to a continuation of the trial under the old Rule 15*bis*. On this basis, they submit that, before 27 May 2003, they had already exercised their right to consent to the continuation of the *Butare* trial under the old Rule 15*bis* by refusing that consent. Under paragraph (C) of that Rule, in the circumstances of the case, the President of the Tribunal could only order a continuation of the proceedings with the consent of the accused; in the absence of such consent, he was obliged to order a rehearing. He could have done so before 27 May 2003. Had he done so, he would have been giving effect to a right which had already accrued to the Appellants when they refused to consent. Accordingly, the new Rule 15*bis* operates to prejudice their rights in the pending trial within the meaning of Rule 6(C).[20]

21. Because of its interest, the second argument of the Appellants has been set out. However, in the view of the Appeals Chamber, the foundation on which it rests is deficient. Even if, in the case of a judge who has not been re-elected, the Appellants had a right to withhold consent under the old Rule 15*bis*, the Appeals Chamber finds that the right was capable of being qualified by the substitution of a safeguard equivalent in value

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to that provided by the right to consent and that it was so qualified by the new provision. The second argument of the Appellants on prejudice is therefore rejected.

VIII The interests of justice

22. The Appellants do not challenge the existence of a discretion to determine whether the interests of justice require a continuation of the trial. As the Appeals Chamber understands it, their submission is that, in exercising that discretion, the Trial Chamber committed an error of law.[21] However, subject to what is later said in paragraph 35, the Appeals Chamber considers that they have not shown how the Trial Chamber (as composed by the two remaining judges) erred in balancing the interests of justice. The Appeals Chamber does not propose to repeat what the Trial Chamber has said and will only emphasise the following.

23. The discretion of the Trial Chamber meant that the Trial Chamber had 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. It is not enough that the Appeals Chamber would have exercised the discretion differently. However, even if a trial court has not otherwise erred, the appellate "court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the judge's ruling may have resulted in injustice to the appellants."[22]

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[20] See *supra* footnote 19.

[21] Nyiramasuhuko's notice of appeal, paras.24-50; Ntezirayo's notice of appeal, para.12; Kanyabashi's notice of appeal, paras. 41-51; Ntahobali's notice of appeal, paras.40-58.

[22] See *R. v. McCann*, (1991), 92 Cr. App. R. 239 at 251, *per* Beldam, L.J., reading the judgment of the Court of Appeal and citing *Evans v. Bartlam*, [1937] A.C.473. A civil case can likewise be interpreted to mean that, even if there is no other vitiating error, an appellate court could interfere with the exercise by the lower court of its discretion where the latter "has exceeded the generous ambit within which a reasonable disagreement is possible". See Lord Fraser of Tullybelton in *G. v. G. (Minors: Custody Appeal)*, [1985] 2 All ER 210, H.L., at 228.

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24. The Appeals Chamber accepts that as between a speedy trial and an equitable trial preference should be given to the latter. But there is no necessary opposition between the two: a trial is inequitable if it is too long drawn out. Speed, in the sense of expeditiousness, is an element of an equitable trial. The Appeals Chamber does not consider that the Trial Chamber meant otherwise or that, in particular, it was deferring to expediency. The Appeals Chamber will credit the Trial Chamber with knowing of the distinction between "expeditiousness" and "expedience". It notes that the Trial Chamber referred to the command in article 19.1 of the Statute that "Trial Chambers shall ensure that a trial is fair and expeditious ..." and that it is in that sense – the sense of "expeditiousness" - that the expression "speedy trial" is understood in major jurisdictions.[23] The Appeals Chambers considers that the decision of the Trial Chamber was not based on expedience.

25. There is a preference for live testimony to be heard by each and every judge. But that does not represent an unbending requirement. The Rules and the cases show that exceptions can be made. The exceptions may relate even to evidence involving an assessment of demeanour, various ways being available to assist a new judge to overcome any disadvantages. The Appellants have not attacked the procedure prescribed by Rule 15(A) or Rule 15(B). Under these provisions, a witness could be heard by two judges; that the procedure is, in effect, available only over a short period of time is not relevant to the principle involved. Nor have the Appellants attacked the procedure prescribed by the old Rule 15(C) by virtue of which, in a part-heard case, a substitute judge could come in for the remainder of the trial; that this was possible only with the consent of the accused (where opening statements had been made or evidence had begun to be presented) was, again, not relevant to the principle involved. And then there is the case of deposition evidence admitted under Rule 71. In all these cases, the temporarily absent judge or the substitute judge, as the case may be, is faced with the task of evaluating evidence not given before him.

[23] See, for example, *Black's Law Dictionary*, 7th ed., p. 1408.

26. In paragraph 33(k) of its Decision, the Trial Chamber took "due note of the financial costs to the public", stating, "While monetary costs may not be the overriding consideration in the administration of justice, they may not, on the other hand, be ignored altogether". It does not appear that the Trial Chamber was saying that financial costs can justify less than a fair trial. Rather than attributing so improbable a view to the Trial Chamber, the Appeals Chamber prefers to understand the Trial Chamber to be saying that unnecessary costs should not be incurred; that was proper. The Trial Chamber was also entitled to consider that, for one reason or another, some of the witnesses from Rwanda who had already testified might not return for a new trial;[24] that again was proper.

27. The Appeals Chamber does not consider it useful to lay down a hard and fast relationship between the proportion of witnesses who have already testified and the exercise of the power to order a continuation of the trial with a substitute judge. The discretion to continue the trial with a substitute judge is a discretion; the Appeals Chamber can only interfere with the way in which the discretion has been exercised if it has been incorrectly exercised in the circumstances mentioned above. The stage reached in each case need not always be the same. The Appeals Chamber sees no error in the balance made by the Trial Chamber of the various interests of justice in the trial as it relates to each of the Appellants.

28. So far, the Appeals Chamber does not find that the Trial Chamber failed to exercise its discretion or that it made any error in exercising its discretion or that its decision resulted in injustice to the Appellants. This is, however, subject to what is noted below.

29. The appeal brief of Kanyabashi, paragraph 32, says that 22 of 23 witnesses were protected and that their testimony has not been video-recorded;[25] the credibility of the majority, if not all, of these witnesses was questioned in cross-examination. See also paragraphs 31ff of the appeal brief of Ndayambaje and paragraphs 30ff of the appeal brief of Nyiramasuhuko. In the case of the last-mentioned Appellant, 14 of 24

[24] Impugned Decision, paragraph 33(h).

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Prosecution witness relevant to her case have already testified. These statements were not controverted by the Prosecution.

30. The position being taken by the Appellants is that the ability to evaluate credibility on a point of demeanour is essential to there being a fair trial as mandated by the supreme instrument, namely, the Statute, and that, in the absence of video-recordings, it will not be possible for the substitute judge to make such an evaluation. Subject to the following, that submission is correct.

31. The Impugned Decision said nothing about any submission having been made to the two judges about the absence of video-recordings and strongly suggests that none was made to them. As the Appeals Chamber understands the briefs before it, neither the Appellants nor the Prosecution asserted before the Appeals Chamber that such a submission had been made to the two judges. In the circumstances of the case, the Appeals Chamber does not consider it correct to consider the point, more particularly in light of the fact that it does not have the benefit of any views of the two judges on it.

32. However, and in any event, it appears to the Appeals Chamber that the two judges were entitled to regard the question of substitution as a process which would be divided up between them and the substitute judge, the question of adequacy of the records (including the availability of video-recordings) being a matter for the substitute judge: he was also a serving judge. The division would be made in the following way:

33. The Tribunal should endeavour to make available to Trial Chambers the video-recordings of witnesses, in particular of protected witnesses. However, it seems to the Appeals Chamber that the adequacy of the record of proceedings is a matter for the substitute judge to pass on; that being so, any inadequacy in the record does not invalidate the decision of the Trial Chamber to continue the trial with a substitute judge. Even after the Trial Chamber has decided in favour of continuation with a substitute judge, the latter joins the bench only upon certifying that he has familiarized himself with

[25] See also para. 24 of his Reply.

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the record of the proceedings. The object is obviously to enable him to acquaint himself with the proceedings. If he cannot, he will not give the required certificate and he will not join the bench. But he may feel that, even in the absence of video-recordings, the record of proceedings is enough to enable him to appreciate what has happened. Failure to review video-recordings which, because they are non-existent, do not form part of the record of the proceedings, does not mean that the judge has not familiarized himself with the record of the proceedings as the record stands and therefore does not disqualify him from joining the bench. He may decide to join the bench with any questions of demeanour being left to be resolved in the manner following:

34. The recomposed Trial Chamber may recall witnesses so as to enable the substitute judge to assess their demeanour on particular points. The recall decision would be made by the recomposed Trial Chamber after the proposed judge has joined it. Where video-recordings are available, an absent judge who reviews such recordings does so as a member of the bench, as in all the cases mentioned in paragraph 25 above. In like manner, in this case the substitute judge would be hearing recalled testimony as a member of the recomposed Trial Chamber. The recall power lies within the normal competence of the recomposed Trial Chamber. It was not for the two judges to authorize it to exercise that competence, although they could note that competence.

35. On this basis, the solution is as follows: If the judge assigned by the President certifies "that he or she has familiarized himself or herself with the record of the proceedings" (which, as mentioned above, does not in this case include video-recordings) and thereafter accordingly joins the bench of the Trial Chamber, the recomposed Trial Chamber may, on a motion by a party or *proprio motu*, recall a witness on a particular issue which in the view of the Trial Chamber involves a matter of credibility which the substitute judge may need to assess in the light of the witness's demeanour.

36. The Appeals Chamber has considered whether a rehearing (as opposed to a continuation) could be facilitated by recourse to Rule 92*bis* (D), which provides for the admission of transcripts of evidence. It notes, however, that the procedure does not apply

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in relation to "the acts and conduct of the accused" and may not therefore be adequate. The concern of the Appellants with matters of demeanour strongly suggests that some, or all, of the 23 witnesses who have testified have done so in relation to "the acts and conduct of the accused". For this reason, the Appeals Chamber is not satisfied that the Trial Chamber erred in giving no consideration to the possibility of making recourse to Rule 92*bis*.

IX Disposition

37. The Appeals Chamber finds that the Trial Chamber composed of Judge Sekule and Judge Ramaroson had jurisdiction to decide whether the new Rule 15*bis* is applicable to the present proceedings, that the Trial Chamber did not err in finding that the application of the new Rule 15*bis* to the proceedings does not prejudice the rights of the accused in the proceedings, and that it did not err in concluding that it was in the interests of justice that the proceedings should continue with a substitute judge.

38. Subject to paragraph 35 above, the Appeals Chamber dismisses the appeals.

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

Theodor Meron
Presiding Judge of the Appeals Chamber

Judge Mohamed Shahabuddeen appends a declaration to this decision.
Judge David Hunt appends a dissenting opinion to this decision.

Dated this 24th day of September 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

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DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree with the decision of the Appeals Chamber and would like to support it with the following additional argument about whether, under the old Rules, the appellants had a right to consent to a continuation of the trial with a substitute judge.

2. It appears to me that it is useful to start with a few remarks on Rule 14*bis*, as it stood before 27 May 2003. The second sentence of this rule, then deleted, read: "Though replaced, they [judges of the Tribunal] shall finish any cases which they may have begun". This provision affected the structure of the Tribunal in the sense that a person without the mandate of a judge was being empowered by Rules made by the judges themselves to function as a judge, i.e., although he had been "replaced" by another elected judge.[1] The Security Council is the ultimate arbiter of the structure of the Tribunal. So its attitude to the provision is relevant. On the basis of the provision, the Security Council should have found it unnecessary on 19 May 2003 to extend Judge Maqutu's term of office to enable him to complete two part-heard cases, that is to say, if he was available, as he obviously was. Likewise, he would have been, without the intervention of the Security Council, able to complete the *Butare* trial; clearly, the Security Council thought that he could not do so without its approval. So, on both counts, the Security Council took the view that a judge who had not been re-elected could not continue to sit without its authority.[2]

3. Rule 14*bis*, in its original form, is relevant, however, to an understanding of the scope of the old Rule 15*bis*(C), the latter having been adopted while the former was in force. A case in which one of the three judges was not re-elected was dealt with by the old Rule 14*bis*; it was therefore not necessary to deal with such a case in the old Rule 15*bis*(C). This view restricts the operation of the seemingly open-ended words "for any reason" in the old Rule 15*bis*(C), preventing them from embracing the case of a judge who has not been re-elected; otherwise there could be two judges each authorised to stand in for one and the same vacancy – the "replaced" but continuing judge under the old Rule 14*bis* and "another Judge" assigned by the President under the old Rule

[1] In the case of the International Court of Justice, a similar formulation exists but it exists as part of the principal law of that institution, namely, as article 13(3) of the Statute of the Court, stating that the "Members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun". Here, the power was sought to be conferred by a rule of court.

[2] Paragraph 17 of the Prosecutor's Response, dated 31 July 2003, refers to the Secretary General's letter of 16 April 2003 to the Presidents of the Security Council and the General Assembly. After noting that the ICTR Statute "does not contain a provision similar to Article 13, paragraph 3, of the Statute of the International Court of Justice", the Secretary General observed: "Nevertheless, in the absence of any explicit provision in the Statute of the International Tribunal for Rwanda providing for the extension of the term of office of permanent judges of the Tribunal in order to allow them to complete ongoing cases, an approval of the Security Council, as the parent organ of the Tribunal, and of the General Assembly, as the organ which elects its judges, would be highly desirable in order to preclude any question being raised regarding the legality of such an extension".

15*bis*(C). This construction is in conformity with the additional words in the new Rule 15*bis*(C), "If, by reason of death, ... , resignation from the Tribunal, non-reelection, non-extension of term of office". These words are followed by the words "or for any other reason", the word "other" being also new and emphasising that the case of judges whose term of office had come to an end for "non-reelection" or other cause had not been covered by the previous language. The new formulation is also consistent with the interpretation that the concern of the old Rule 15*bis* was with capacity to sit in the particular "part-heard case" and not in cases generally. The judge, to whose case that provision was directed, remained a judge: he could sit in other cases, he continued to have a mandate. In other words, the continuation provisions of the old Rule 15*bis*(C) were not intended to apply to the case of a judge who was not re-elected and who therefore could not sit in any case. On the basis of the old Rule 14*bis*, in such a case, that is to say, the case of a judge who was not re-elected, no question of continuing the trial with a substitute judge would arise: the judge who was not re-elected would carry on as usual.

4. By contrast, under the new Rule 15*bis*, the machinery for ordering either a rehearing or a continuation of the hearing with a substitute judge applies where a judge has not been re-elected. It is the first time that Rule 15*bis* provides for the case of a judge whose mandate has expired. And it does this, not by providing that the judge who has not been re-elected shall continue to sit although not re-elected, but by providing that his place would be taken by a judge with a continuing mandate to function as a judge.[3]

5. It may be asked what would happen if, before the recent change, a sitting judge was not re-elected and the Security Council did not authorise him to continue to serve in a part-heard matter. Would not the accused have had a right, under the old regime, to consent to the continuation of the trial with a substitute judge in such a case? The answer is that this overlooks the fundamental question as to what the old Rule 15*bis* meant when it was adopted. It was adopted in the light of the old Rule 14*bis*. Read in the light of the latter, it assumed that the Security Council did not come into the picture at all: the judge who was not re-elected would simply carry on and the need for continuing the trial with a substitute judge would not arise. Therefore also the question of consenting to a continuation of the trial with a substitute judge would not arise.

[3] "Ordonnance du President Portant Affectation d'un Juge *Ad Litem* à un Procès", IT-95-9-T of 11 April 2002 (ICTY), concerned the replacement of an ill *ad litem* judge by another *ad litem* judge. The replacement order related to a particular part-heard case. It stated that it was impossible for the ill *ad litem* judge to continue but did not say that he had actually left the service of the Tribunal. It mentioned the consent of the accused to the continuation of the trial; it pleaded the fact that the replacement *ad litem* judge was designated by the Secretary General. The case is distinguishable. So is "Ordonnance du President Portant Affectation d'un Juge *Ad Litem* à un Procès", IT-97-24-T of 31 October 2002.

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6. The question may also be asked what would happen, under the old regime, if the Tribunal realised that reliance could not be placed on the old Rule 14*bis* to entitle a judge who had not been re-elected to carry on with a part-heard case. Could the Tribunal continue the trial with a substitute judge without the consent of the accused? Yes. This is so because of two things. First, the limited meaning of the old Rule 15*bis* would still remain. Second, as the Appeals Chamber said in paragraph 17 of its decision, "consent cannot give the Tribunal competence to continue if the Tribunal does not otherwise have it; the power of the Tribunal to continue the hearing with a substitute judge exists *dehors* consent". The Tribunal would therefore have had a right to make its own arrangements for the continuation of the trial by appointing a substitute judge; there was no requirement under the old regime for the consent of the accused to such a decision. True, consent would be required in one case but not in another; but the apparent discrepancy is the result of the way that the law was laid down. And it is upon that law that the appellants rely.

7. This conclusion is not inconsistent with the reference in the old Rule 15*bis*(D) (retained in the new Rule 15*bis*(F)) to "an unfilled vacancy or ... any other similar circumstances". In such a situation, the provision provided a specific remedy in that the President could "authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members". The provision provided for the case where one or *more* than one member was absent; also the remedy which it provided was not a continuation of the trial with a substitute judge.

8. In sum, I do not agree with the fundamental assumption of the appellants that the old Rule 15*bis* applied to the case of a judge who had not been re-elected. In such a case, when that Rule was read with the old Rule 14*bis*, no question could arise of the trial continuing with a substitute judge. Therefore, there could not be a question of the appellants having a right under the old regime to consent to such a continuation and of that asserted right being impaired by subsequently made Rules.

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

Mohamed Shahabuddeen

Dated 24 September 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

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DISSENTING OPINION OF JUDGE DAVID HUNT

Background to the appeal

1. The five appellants (Arsène Shalom Ntahobali, Pauline Nyiramasuhuko, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje), together with a sixth accused (Sylvain Nsabimana), have been standing trial before Trial Chamber II in the Rwanda Tribunal since 12 June 2001. The judges assigned to Trial Chamber for that purpose were Judges Sekule, Maqutu and Ramaroson.

2. Trial Chamber II was hearing this case contemporaneously with two other cases, for reasons which are not immediately apparent. The mandate (or term of office) of all three judges was due to conclude on 24 May of this year. At the election of judges for a new mandate, conducted by the UN General Assembly on 31 January of this year, Judge Maqutu was not re-elected. In March, Judge Pillay (then the President of the Rwanda Tribunal) requested the UN Secretary-General to seek from the UN Security Council an extension of Judge Muqutu's mandate to enable him to conclude all three cases he was hearing. On 19 May, the Security Council passed a resolution extending Judge Maqutu's mandate in relation to the other two cases but not in relation to this case. His mandate in relation to this case accordingly expired on 24 May.

3. As at 24 May, the only provisions in the Rules of Procedure and Evidence ("Rules") dealing with the inability of a judge to take part in a hearing were to be found in Rule 15*bis* ("Absence of a Judge"):

> (A) If
>
> (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
>
> (ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,
>
> those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.
>
> (B) If
>
> (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
>
> (ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

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(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied should be disposed of in the interests of justice, notwithstanding the absence of that Judge, and

(b) the Presiding Judge may adjourn the proceedings.

(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

(D) 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.

4. On 27 May, the judges of the Rwanda Tribunal amended the Rule, so that the existing par (C) was replaced by new paragraphs (C), (D) and (E), in the following terms:

(C) If, by reason of death, illness, resignation from the Tribunal, non-re-election, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).

(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.

(E) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

The existing par (D) was redesignated as par (F).

5. On 28 May, Judge Møse (who had become the President of the Tribunal) authorised the two remaining members of the Trial Chamber to conduct routine matters in accordance with the

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Rule. That power was given to the President both by the Rule as it stood on 24 May (in par (D)) and thereafter (in par F)). The President then wrote to the parties asking whether, in the light of the events which had occurred, they would consent to the continuation of the trial with another judge being substituted for Judge Maqutu. Such consent would have been sufficient to enable the President to assign another judge pursuant to the new par (C), and the absence of consent would have been relevant to the determination to be made pursuant to the new par (D) as to whether the continuation of the trial with a substituted judge would serve the interests of justice. Both Sylvain Nsabimana and the prosecution consented, but all five appellants opposed the continuation of the trial. Two of the appellants filed motions by which they sought, *inter alia*, a ruling as to whether the two remaining judges had "jurisdiction" to determine whether the amended Rule 15*bis* rather than the Rule as it existed on 24 May was applicable in the circumstances of this case.

6. The two remaining judges of the Trial Chamber invited submissions from the parties both as to whether the amended Rule applied and, if so, as to whether the interests of justice would be served by continuing the trial with a substituted judge. They subsequently concluded that the amended Rule applied, and that the interests of justice would be so served.[1] The appellants then appealed.[2] They argue that the two remaining judges of the Trial Chamber erred:

(i) in ruling that they had "jurisdiction" to determine whether the amended Rule was applicable;[3]

(ii) in determining that it was so applicable; and

(iii) in concluding that the interests of justice would be served by continuing the trial with a substituted judge.

There are various subsidiary issues raised by the appellants, and these can be dealt with when considering these three principal issues.

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1 *Prosecutor v Nyiramasuhuko et al*, ICTR-98-42-T, Decision in the Matter of Proceedings Under Rule 15*bis*(D), 15 July 2003 ("Trial Chamber Decision").

2 Notice of Appeal of "Decision in the Matter of Proceedings Under Rule 15*bis*(D)" Dated 15 July 2003, 20 July 2003 ("Ntahobali Appeal"); Notice of Appeal by Pauline Nyiramasuhuko Against the Decision in the Matter of Proceedings Under Rule 15*bis*(D), 19 July 2003 ("Nyiramasuhuko Appeal"); Alphonse Nteziryayo's Appeal Against the Decision "Decision in the Matter of Proceedings Under Rule 15*bis*(D)" Rendered by Judges Sekule, Presiding, and Ramaroson on 15 July 2003, 18 July 2003 ("Nteziryayo Appeal"); Appeal Pursuant to Rule 15(D) and (E) of the Rules of Procedure and Evidence, 22 July 2003 ("Kanyabashi Appeal"); Notice of Appeal Against the Decision Entitled [*sic*]: "Decision in the Matter of Proceedings Under Rule 15*bis*(D)" (Rules 15*bis*(D) and 107*bis* of the Rules of Procedure and Evidence), 22 July 2003 ("Ndayambaje Appeal").

3 Ntahobali Appeal, par 3; Nyiramasuhuko Appeal, pars 2-3, 14; Kanyabashi Appeal, pars 22-34; Ndayambaje Appeal, par 15.

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The power of the two remaining judges to rule that they had power to determine whether the amended Rule was applicable

7. The appellants argue that Rule 15*bis* in the form in which it stood as at 24 May 2003 (when Judge Maqutu's mandate in relation to this case expired) is the only relevant source of power for the two remaining judges of the Trial Chamber to determine any issue in the case, and that the extent of those powers depend upon other determinations made by the President of the Tribunal. They submit that Rule 15*bis* does not permit the two remaining judges to determine whether the amended Rule was applicable to this case, which is not a "routine matter" covered by the Rule, and which could only have been determined by a Trial Chamber "legally constituted to that effect".[4]

8. The Trial Chamber rejected the argument that the issue as to whether the amended Rule was applicable to the present case was separate from the issue as to whether the interests of justice would be served by continuing this trial with a new judge as a result of the expiration of Judge Maqutu's mandate.[5] This was correct. The interpretation of, for example, a rule relating to the admissibility of evidence is not separate from the application of that rule to the determination of the admissibility of the evidence in question. In the present case, the two remaining judges were obliged to determine which version of Rule 15*bis* was applicable to the situation in which they found themselves after 27 May before they could act under either version. The issue as to whether the amended Rule was applicable was necessarily incidental to their task under Rule 15*bis*. The arguments of the appellants to the contrary are rejected.

9. It has also been submitted that Rule 15*bis* was amended by the judges (including the two remaining judges of this Trial Chamber) in order to resolve the issue which had arisen in the present case, and that an objective observer could therefore infer that the two remaining judges were not impartial.[6] There is no substance in this submission. The judges of the Rwanda Tribunal were merely following their usual practice of adopting relevant amendments which had previously been made by the judges of Yugoslav Tribunal to that Tribunal's Rules. Those amendments were made by the judges of the Yugoslav Tribunal on 12 December 2002 (before the election for the Rwanda judges had taken place), and they were adopted by the judges of the Rwanda Tribunal on the first occasion upon which that Tribunal's Rules were being considered by those judges since December. The Rules can only be amended by the judges of the Tribunal. There can be no valid (or responsible) submission that judges who necessarily must take part in

[4] Ntabobali Appeal, par 23; Ndayambaje Appeal, par 9; Nyiramasuhuko Appeal, pars 9-10.
[5] Trial Chamber Decision, pars 8, 10.
[6] Ntezinyayo Appeal, par 15; Kanyabashi Appeal, par 19.

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the Rule-making process fail to act impartially when they are called upon to determine either the proper interpretation of a rule which they have amended or its application in a particular case. It would be equally without substance to infer that a judge's impartiality in determining either the interpretation or application of a Rule could be challenged according to how he or she voted in the Rule-making process.

10. Another submission which has been made is that the Security Council acted unlawfully in refusing to "renew" Judge Maqutu's mandate to hear the present case (i) by violating the "right to equality" of all accused as guaranteed by Article 20(1) of the Tribunal's Statute, and (ii) by contravening "the principle of irremovability" and thereby the independence of the Tribunal, as a judge whose mandate had not been renewed [in the General Assembly election] may continue to form part of the Trial Chamber only "if he or she begs authorisation from the Security Council".[7] The second part of this submission is in part based upon the deletion of the second sentence of Rule 14*bis* at the meeting of the judges on 27 May. As at 24 May, that Rule was in these terms:

> The members of the Tribunal shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

This submission is also without substance. The second sentence would have had no validity in the situation where the judge's mandate had expired; it could have been valid only in relation to the internal arrangements made by the President in assigning judges. The Tribunal's Statute provides for the election of its judges by the General Assembly for a term of four years. The Security Council cannot be required to overcome the problems created by an unsuccessful nomination for re-election by automatically extending every unsuccessful judge's mandate merely because he or she may be part-heard in a trial. Whether it is appropriate in the particular case to extend the mandate of such a judge in order to finish a trial is a matter for the Security Council and not for the Tribunal to determine. The fact that Judge Maqutu was hearing three cases contemporaneously at the time his mandate expired was no doubt a substantial reason for the Security Council's decision. The submission is rejected.

The decision that the amended Rule was applicable in this case

11. The appellants had argued in the Trial Chamber that the application of the amended Rule to a case which was part-heard at the time when the amendment was adopted offended the

[7] Kanyabashi Appeal, para 15-19.

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presumption against the retrospective application of legislation.[8] The issue here concerns Rule 6(C), which at all relevant times has been in the following terms:

> An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

The appellants had argued (and continue to argue) that, prior to the amendment, they had a substantive right to refuse their consent to the continuation of the trial with a substituted judge, and that the removal of that right by the amendment to Rule 15*bis* prejudiced them.[9] The Trial Chamber held that the right to refuse such consent was not a fundamental right to which Rule 6(C) applied.[10] Alternatively, the Trial Chamber held that, even if the right to refuse consent were to be regarded as a fundamental right, Rule 6(C) required it to take into account other interests of justice which put the rights of the appellants in their "proper legal context".[11] There are three issues which must be considered here.

12. First, the appellants' claim that such a right to refuse their consent to a continuation of the trial existed prior to the amendment depends upon whether Rule 15*bis*(C) in its original form applied to the situation where a judge was unable to continue sitting because he or she had not been re-elected. That Rule 15*bis* permitted the President of the Tribunal to order a continuation of the hearing with another judge where one of the judges of the Trial Chamber was "for any reason" unable to continue sitting in the part-heard case "for a period which is likely to be longer than of a short duration". The non-re-election of such a judge hardly creates an inability to continue sitting for a period of short duration, and such a situation was not contemplated by the Rule. The Tribunal has undoubtedly always had an inherent jurisdiction to make such an order where a judge has not been re-elected, and that jurisdiction does not depend upon the consent of the accused, but it was not provided for in the Rules. The amended Rule 15*bis*(D) makes such a provision for the first time, so that the position at present when a judge has not been re-elected is that (1) the President may order the trial to continue pursuant to par (C), but in certain circumstances only with the consent of the accused, and (2) where the consent of the accused has been withheld, the two remaining judges of the Trial Chamber may order the trial to continue pursuant to par (D), but only if they are satisfied that such continuation would serve the interests of justice.

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8 Ntahobali Appeal, par 15; Ndayambaje Appeal, par 11.
9 Nyiramasuhko Appeal, par 7, 19 -20; Ntaziryayo Appeal, pars 24-25; Kanyabashi Appeal, par 40; Ndayambaje Appeal, pars 13-14.
10 Trial Chamber Decision, par 24.
11 *Ibid*, par 25.

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13. Secondly, the obligation of the Trial Chamber at all times is to ensure that the trial is fair, with full respects for the rights of the accused.[12] The right of the accused to a fair trial is a fundamental right to which Rule 6(C) applies. The issue under Rule 6(C) as to whether Rule 15*bis* operates immediately in the present case therefore depends upon whether its operation will prejudice *that* fundamental right. This means that, in order to determine the application of the amended Rule, it is necessary in the present case to consider the merits of the determination of the ruling that the interests of justice would be served by continuing the trial with a substituted judge.

14. Thirdly, the Trial Chamber was in error in interpreting Rule 6(C) as requiring it to take into account other interests of justice which put those rights of the accused in their "proper context". The interests of justice generally are relevant to the operation of the amended Rule 15*bis* once it is determined that the amended Rule applies, but they are wholly irrelevant to the issue as to whether Rule 6(C) denies the immediate operation of that amended Rule. If there is a fundamental right of the accused which is prejudiced by the immediate operation of an amended rule, then the amendment does not operate in relation to the case against that accused.[13]

The decision that the interests of justice would be served by continuing the trial

15. The phrase "interests of justice" is a protean one. It is used throughout the Rules in various situations, with obviously different connotations. The interests of justice must be taken into account in determining whether a Chamber or a judge may exercise their functions away from the seat of the Tribunal,[14] whether the Registrar should be instructed to assign counsel to represent the interests of the accused,[15] whether the conduct of counsel for either party warrants the imposition of sanctions by a Chamber,[16] whether a judge or a Trial Chamber may, in exceptional circumstances, order non-disclosure of any document or information to the public until further order,[17] whether an indictment or document or information should not be disclosed,[18] whether depositions may be taken for a trial,[19] whether the prosecutor's list of

[12] Statute, Article 19.1
[13] The Appeals Chamber of the Yugoslav Tribunal has recognised a distinction between a "right" and a "procedural entitlement": *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, Decision on Prosecution Motion to Set Aside the Decision of the Appeals Chamber of 29 July 1997, 12 Aug 1997, par 12.
[14] Rule 4.
[15] Rule 45*quarter*.
[16] Rule 46(A).
[17] Rule 53(A).
[18] Rule 53(C).
[19] Rule 71(A).

witnesses may be reinstated or varied after the commencement of the trial,[20] whether the public should be excluded from the proceedings,[21] whether persons who have been charged jointly should be tried separately,[22] whether the usual order of calling witnesses should be varied,[23] whether evidence of a consistent pattern of conduct may be admitted,[24] and whether additional evidence should be admitted on appeal.[25]

16. The Trial Chamber correctly observed that prejudice to an accused is always a matter of "interest" to the administration of justice,[26] but it also observed that even the violation of a substantive right of the accused cannot be considered in isolation, and it does not prevent the interests of justice being served.[27] It may be that, in the context of considering only the claimed loss of the right to refuse consent to the continuation of the trial, and after setting out what may be described as the procedural entitlements of the accused enumerated in Article 20 of the Statute, this observation was not intended to suggest that the interests of justice may be served by denying the accused a fair trial. But the observation was unfortunate in its generality. There may be many difficulties placed in the way of the accused in the course of applying an "interests of justice" test in various situations, so that the trial is not a perfect one (such as the need to protect victims and witnesses), but the absence of perfection does not mean that the trial will not be a fair one.[28] However, the interests of justice cannot be served where the accused is denied a fair trial.

17. Although no-one has expressly referred to this matter in the present case, it is necessary to emphasise that the very proper endorsement by the Security Council "in the strongest terms" of the Completion Strategy of the Yugoslav Tribunal, and its urging of the Rwanda Tribunal to formalise a similar strategy to complete its work within a particular time,[29] should not be interpreted as an encouragement by the Security Council to either Tribunal to conduct its trials so that they would be other than fair trials. The adoption by both Tribunals just at this time of the express power to order the continuation of a trial against the wishes of the accused where one

[20] Rule 73*bis*(E).
[21] Rule 79(A)(iii).
[22] Rule 82(B).
[23] Rule 85(A).
[24] Rule 93(A).
[25] Rule 115(B).
[26] Trial Chamber Decision, par 31.
[27] *Ibid*, par 30.
[28] *Prosecutor v Tadić*, Decision on the Prosecutor's Motion Requesting Measures for Victims and Witnesses, (1995) I JR ICTY 123 at 179 [ICTY-94-1-PT, at par 72]; *Prosecutor v Brdanin & Talić*, ICTY-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, par 31.
[29] UN Security Council Resolution 1503, 28 Aug 2003.

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judge is unable to continue in a trial should not therefore be seen as a warrant to conduct a trial which is no longer a fair trial for the accused.

18. In considering the interests of justice, the Trial Chamber took into account a number of matters – the right of the accused to be tried without undue delay, the need for judicial economy, the fact that other proceedings have been continued with a substituted judge by consent, the fact that one of the accused in the present case (Sylvain Nsabimana) had consented to the trial continuing, the rights of victims and witnesses, the possibility that some of the witnesses may not return to give evidence in a new trial, the length of the case, its size and complexity, the rights of other accused awaiting trial who will have to wait longer for a trial date, the financial cost, and the fact that "proceedings must not be allowed to drag on endlessly – they must come to an end at some point". The Trial Chamber appears to have had some difficulty in stating what would be involved in starting the trial anew,[30] but all of the appellants have accepted that they would remain bound by the rulings made during the trial to date, although they maintain their existing right to challenge those decisions on appeal against conviction.[31]

19. The "chief argument" of the appellants which the Trial Chamber considered was that their right to a fair trial required each judge in the case to be given the opportunity to observe for himself or herself the demeanour of every witness called in the case. The Trial Chamber accepted that this was "indeed [...] an important consideration", but said that it was, however, one which needed to be "reconciled with other considerations, including, for example, the right to a speedy trial". It disposed of the argument in this way:[32]

> In this regard, we note, first, that the records of the proceedings do exist. Hence, in our view, it will be possible for a substitute judge to review these records as part of his or her duty and to draw inferences from them, even in the matter of witness demeanour. It is particularly presumed that this will be possible – and will be done – when the Parties make submissions on the matter of demeanour of particular witnesses at the end of the trial.

The second point made by the Trial Chamber is that, as only 23 witnesses had not been seen by the substituted judge of an anticipated 83 witnesses to be called by the prosecution, that judge will have observed the "bulk" of the witnesses for the Prosecution and all the witnesses for the Defence. Thirdly, although the Trial Chamber stressed that "it is important for any judge in a

30 Trial Chamber Decision, par 33(j).
31 Ntahobali Appeal, par 53; Nyiramasuhuko Appeal, par 47; Ntezityayo Appeal, pars 35-37; Kanyabashi Appeal, par 49; Ndayambaje Appeal, pars 26-27.
32 Trial Chamber Decision, par 33(e).

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case to observe every witness as they testify", only one judge may be substituted and the other two judges will have seen all the witnesses. The fourth point was expressed in this way:[33]

> Fourthly, while consideration of the need for every judge to assess demeanour is certainly a very important one, we note that it must be considered with care, for any precedent that sets it up as the overriding consideration of what it means to have a fair trial will make it extremely difficult – if not impossible – ever to order continuation of a trial pursuant to Rule 15*bis*(D).

The Trial Chamber expressed its conclusion in relation to this issue in the following terms:[34]

> Where there is a conflict, as appears to exist in the circumstances, between the right to speedy trial and the inability of a substitute judge to observe the demeanour of any witness who has testified, it is easier to take steps (in the *Butare* Case as it now stands)[35] to redress the problem of one judge not sitting in the case during the testimony of some witnesses – a minority of them for that matter – than it is to redress the problem of delay in the trial. As indicated above, the records will be reviewed and counsel could make submissions to assist the Substitute Judge and the other Judges to determine this issue. But it is more difficult to recoup wasted time, in view of the right to speedy trial, if time is lost as a result of recommencement of the trial.

20. The decision by the Trial Chamber was, of course, a discretionary one. It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber. It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion. In relation to the Trial Chamber's findings of fact upon which it based its exercise of discretion, the party challenging any such finding must demonstrate that the particular finding was one which no reasonable tribunal of fact could have reached, or that it was invalidated by an error of law. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the impugned decision, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly. Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has

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[33] *Ibid*, par 33(e).
[34] *Ibid*, par 33(f).
[35] This is a reference to the case of *Prosecutor v Nyiramasuhuko* from which the present appeal is brought (see footnote 1).

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prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.[36]

21. It is not possible to lay down any hard and fast rules as to what is and what is not relevant to the interests of justice in every case where a judge has not been re-elected and where the issue is whether the continuation of the trial serves those interests, beyond repeating that, whatever detriment may be caused to the accused in such a case by taking other interests into account, the trial must remain a fair one, even though perhaps not a perfect one.

22. The weight afforded by the Trial Chamber to some of the considerations it took into account gives rise to considerable concern. In this particular case, where the appellants have conceded – albeit reluctantly – that acceptance of their argument (that only a new trial will be a fair trial) will prejudice their right to the expedition which the continuation of the trial would have afforded them, it is surprising that the first interest which the Trial Chamber has taken into account in holding that the interests of justice would be served by such a continuation was the right of the appellants to be tried without undue delay. It is even more surprising that the right to a speedy trial should in these circumstances be identified as the main factor to outweigh the need for a trial in which each of the three judges who determine the result will have had the opportunity of observing all of the witnesses. The right to a speedy trial remained relevant, but the prominence given to it in this case suggests that the Trial Chamber may have placed more importance upon that right than it warranted in those circumstances. Moreover, the inadequacy of the resources available to the Tribunal to try other accused persons who have been in custody for a long period and the financial cost of the Tribunal were also issues of minimal weight in a case such as this, yet they too have been taken into account in outweighing the right of these appellants to a trial in which each judge will have had the opportunity of observing all the witnesses. However, these blemishes, even taken cumulatively, are insufficient in themselves to demonstrate an error in the exercise by the Trial Chamber of the wide discretion which Rule 15*bis*(D) gives to it.

23. The fact that other proceedings have been continued with a substituted judge by consent is completely irrelevant to whether particular proceedings should be continued against the wishes of an accused. A party can always consent to an order against his interests if he wishes to do so

[36] *Prosecutor v Milošević*, ICTY-99-37-AR73, ICTY-01-50-AR73 & ICTY-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 Apr 2002, pars 5-6.

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(even where contrary to a specific provision in the Rules), provided that the order is otherwise within the jurisdiction of the Tribunal. But the context in which those other proceedings were discussed at various places in the Trial Chamber's Decision does not suggest that it placed any weight upon that fact in the present case. What the context does suggest is that the Trial Chamber referred to that fact only in order to acknowledge the importance given to the consent of the accused in those cases. The Trial Chamber was not in error in doing so. The fact that one of the accused in the present case had consented to the continuation of the trial *was* relevant to the interests of justice, in that it would mean a bifurcated trial and thus additional expenditure of judicial resources, but it would have been preferable had the Trial Chamber also expressly recognised that, in the current joint trial, each of the appellants is to be accorded the same rights as if he were being tried separately.[37] However, this does not demonstrate an error in the exercise of the Trial Chamber's discretion either.

24. The Trial Chamber Decision does nevertheless demonstrate error in relation to three matters.

25. The first concerns the clear indication that the Trial Chamber did not accept that it *is* necessary to the fairness of a trial for all three judges to have the opportunity to observe, independently, the demeanour of all witnesses. The Trial Chamber said that such a recognition would make it "extremely difficult – if not impossible – ever to order continuation of a trial pursuant to Rule 15*bis*(D)",[38] and it proceeded to make such an order despite the fact that one of the judges had not seen 23 of the witnesses. The Trial Chamber made no reference to any prospect that the substituted judge would have an opportunity to observe such demeanour for himself or herself. It cannot be disputed that, as the Trial Chamber conceded, it is important for all three trial judges to be able to observe, independently, the demeanour of all witnesses. The absence of that opportunity on appeal has been identified as the basis for the rule that the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber.[39] If the substituted judge has not had the same advantage as the other two judges of observing witnesses, that judge must necessarily have to give deference to what the other judges had observed, and therefore has no independent basis for judging that demeanour. Reading the transcript, or listening to the submissions of counsel, places the substituted judge in no better

[37] Rule 82(A).
[38] The relevant passage in the Trial Chamber Decision is quoted in par 19, *supra*.
[39] *Prosecutor v Tadić*, ICTY-94-1-A, Judgment, 15 July 199, par 64; *Prosecutor v Aleksovski*, ICTY-95-14/1-A, Judgment, 24 Feb 2000, par 63; *Prosecutor v Delalić et al*, ICTY-96-21, Judgment, 20 Feb 2000, par 330; *Prosecutor v Bagilishema*, ICTR-95-1A-A, Reasons for Judgment, 13 Dec 2002, pars 11-12.

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position than the Appeals Chamber in hearing an appeal in determining the facts of the case. The opportunity to see the demeanour of the witnesses has always been regarded as essential.

26. When Rule 15*bis* was first introduced in the Yugoslav Tribunal allowing a trial to continue for three days in the absence of a judge, the period selected was a relatively short one because it was recognised that the absent judge would not only be expected to read the transcript of the evidence given in his or her absence but must also be given the opportunity to view the video-recording of that evidence in order to judge for himself or herself the demeanour of the witnesses when giving that evidence. In the context of a continuing trial, the period over which this would be practicable was necessarily short. The opportunity to view the video-recording has, however, been regarded as essential.[40] That opportunity to view the video-recording places an absent judge in the same position as the Trial Chamber itself in relation to evidence which had been taken by way of deposition (when the proceedings are also video-taped).[41] The more extensive task involved in the amended Rule 15*bis* has been justified (and it could only be justified) upon the basis that an opportunity to view the video-recording of the evidence is essential, and the amended Rule itself contemplates that this may take some time. The Rwanda Tribunal merely copied the original Rule and the amended Rule without alteration.

27. The second error made by the Trial Chamber is that it has not referred to the fact that, of the 23 witnesses who have already given evidence in the trial, 22 of them were protected witnesses. In accordance with the usual practice in the Rwanda Tribunal, a protected witness is not included in the video-recording of the trial. There is simply nothing to which the substituted judge can refer in order to make an independent assessment of the demeanour of those witnesses.[42] There is some doubt as to whether the witnesses' own voices can be heard on the

[40] It is not suggested that a judge who has not seen the evidence of a number of witnesses would be required to view the video-recording of the evidence of every such witness, or even the whole of the evidence of any such witness. It would usually be necessary for the judge to view the video-recording of only the relevant parts of those particular witnesses whose evidence is important to the case of either party which is genuinely in dispute (as shown, for example, by the transcript of the cross-examination).

[41] The purist would no doubt say that a judge who is not present when the evidence is given is denied the opportunity to ask his or her own questions of the witness. Questions are ordinarily asked by trial judges for one of two reasons. The first is to achieve clarity in the evidence. It is, however, the obligation of counsel who calls the witness or who cross-examines him or her to ensure that the evidence of that witness is given clearly; it is not the obligation of the judges to do so. The second reason for a judge to ask questions – when sitting as the tribunal of fact – is ordinarily to test the accuracy or the honesty of the witness. The use of that opportunity by judges is rarely to the advantage of the party calling the witness, and its loss is not usually to the disadvantage of the accused. This is but an imperfection; it is does not render the trial unfair.

[42] The position in the Yugoslav Tribunal is different. When a protected witness gives evidence in public session, the face of the witness as shown to the public is distorted. One camera focussed on the witness nevertheless records on a separate video-tape the undistorted picture of the witness, and this undistorted version is always available to enable a judge to see the witness giving evidence again (or for the first time).

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audio-tape, but (even if the witnesses' own voices can be heard) the substituted judge will receive no more than minimal assistance from hearing the witnesses' voices unless he or she speaks the same language as the witnesses. As it was the usual practice of the Rwanda Tribunal not to include any protected witnesses on the video-recording, the Trial Chamber was necessarily aware of the absence of any such video-recording in this case. Yet all that the Trial Chamber did was to make the suggestion (which has already been refuted) that the substituted judge could determine the absent witnesses' demeanour from reading the transcript and from the submissions of counsel.[43] The evidence given by these witnesses is said by the appellants to be vital to the case against them, and the prosecution appears to accept that this is so. Although Rule 15*bis*(D) provides that the newly assigned judge must certify a familiarity "with the record of the proceedings" before he or she can join the bench, the absence of any video-recording means that such a certification provides no protection at all to the appellants that such judge is in a position to assess the demeanour of the witnesses. The absence of any reference to this important matter which was directly relevant to the exercise of the Trial Chamber's discretion indicates clearly that it gave gravely insufficient weight to this issue.

28. The third error made by the Trial Chamber concerns its assessment that it was "easier" to continue with a substituted judge than to redress the "problem" of delay in starting again, in that it appears to have assumed that all 23 witnesses would have to give their evidence in full again at a new trial. The Trial Chamber gave no consideration to the prospect that an extensive use of Rule 92*bis*(D) where applicable,[44] together with a limited right to cross-examine the witnesses in order to assist the substituted judge to assess their demeanour, could well have reduced the "problem" of delay by a substantial amount.

29. These three errors of omission demonstrated so far establish failures by the Trial Chamber either to take into account or to give sufficient weight to relevant and important matters in the exercise of its discretion. The exercise of that discretion has accordingly miscarried. But there has also been an error of commission made by the Trial Chamber.

30. Judicial expedience should play no part in decisions relating to the fairness of a trial. There are, however, two clear indications in the Trial Chamber Decision that expedience did in fact play a substantial part in the conclusion reached. There is the observation to which

[43] Paragraph 25, *supra*.

[44] "A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused."

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reference has already made that, if it is necessary for all three judges to have an opportunity to assess the demeanour of all the witnesses, it will be extremely difficult – if not impossible – for an order to be made pursuant to Rule 15*bis*(D) for the continuation of the trial. The Trial Chamber then proceeded to determine whether the continuation of the trial served the interests of justice in the present case by reference to which was the "easier" course to follow. Picking the "easier" course could be justified only if the interests which opposed the new trial which the appellants sought were very weighty indeed. As already pointed out, the main interest upon which the Trial Chamber relied was the right to a speedy trial, in circumstances where the appellants have accepted a loss of expedition in order to obtain a fair trial. None of the other interests identified by the Trial Chamber, even taken cumulatively, warranted this determination being made for the sake of expedience. The Trial Chamber therefore erred by giving weight to an extraneous consideration.

31. There is yet another basis upon which the exercise of the Trial Chamber's discretion miscarried. The decision reached that the interests of justice were served by a continuation, despite the absence of any opportunity for the substituted judge to assess the demeanour of 22 of the 23 witnesses who have given evidence in the trial to date, was (on the basis of the factors to which the Trial Chamber *did* give weight, which excluded any prospect that that judge would have such an opportunity by having witnesses recalled) so unreasonable or plainly unjust that the Trial Chamber failed to exercise its discretion properly. The consequences of these three independent findings that the exercise of discretion miscarried would normally be for the Appeals Chamber to quash the decision and then to consider for itself what the proper exercise of discretion should be.

32. The Appeals Chamber's Decision in the present case has interpreted the failure of the Trial Chamber to refer to the fact that there is no video-recording of 22 protected witnesses as strongly suggesting that no submission had been made by the appellants concerning this point.[45] It has accordingly declined to consider the point, "more particularly in the light of the fact that it does not have the benefit of any views of the two judges on it".[46] An appellate court cannot validly abdicate its responsibility to determine an appeal against the exercise of discretion, where that appeal is based upon the failure of the first instance court to give sufficient weight to a

[45] Appeals Chamber Decision, par 31. The Appeals Chamber has not been favoured with the submissions made before the Trial Chamber. The interpretation placed upon the absence from the appeal briefs of any reference to such submissions having been made to the Trial Chamber is, in my view, highly speculative.

[46] Appeals Chamber Decision, par 31.

relevant consideration, simply because it has not had the benefit of any views from that court upon that issue. It is the very absence of such views which demonstrates that the first instance court failed to give sufficient weight to that relevant consideration and that the exercise of its discretion thereby miscarried.

33. As already stated, the Trial Chamber was necessarily aware of the absence of any such video-recording. They did not need to be told of that fact by the appellants.[47] The Appeals Chamber has accepted that it is essential for a fair trial that all the judges have the ability to evaluate the demeanour of the witnesses and that, in the absence of a video-recording, the substituted judge will not be able to make that evaluation.[48] The failure of a Trial Chamber to give sufficient weight to such a relevant and important matter in the exercise of its discretion cannot be overlooked merely because a party may not have told the Trial Chamber something which the judges already knew. The Trial Chamber described the appellants' argument that their right to a fair trial required each judge in the case to be given the opportunity to observe for himself or herself the demeanour of every witness called in their case as their "chief" argument. Instead of squarely facing up to the problem caused by the absence of any video-recordings of 22 of 23 of the witnesses already called, the Trial Chamber said that such a right needed to be reconciled with other considerations such as a right to a speedy trial. The Trial Chamber therefore was in error by failing to give sufficient weight to the need for all three judges to have the ability to evaluate the demeanour of the witnesses and to the fact that, in the absence of a video-recording, the substituted judge would not be able to make that evaluation without the witnesses being called to give evidence again.

34. The solution proposed by the Appeals Chamber's Decision is that, although it is correct to say that the ability of the judges to evaluate demeanour (or credibility, as the Appeals Chamber has put it) is essential to the fairness of the trial –

(a) it is for the substituted judge to determine the adequacy of the record of proceedings, and that if he is unable thereby to familiarise himself with the earlier proceedings he will not join the bench; and

[47] That the judges went on to make the extraordinary suggestion that the substituted judge could determine the absent witness's demeanour from reading the transcript and from the submissions of counsel shows beyond any doubt that they were aware of the absence of any video-recording.

[48] *Ibid*, par 30.

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(b) (i) the substituted judge may feel that, even in the absence of video-recordings of these witnesses, the record which is available is sufficient to enable him "to appreciate what has happened"; or

(ii) if not, the substituted judge may decide to join the bench with any questions of demeanour being left to be resolved by the recomposed Trial Chamber deciding to recall witnesses for the substituted judge to assess their demeanour on particular points if, in the view of that Trial Chamber, the point involves a matter of credibility which that judge may need to resolve in that manner.[49]

35. Before dealing with the merits of this proposed solution, it must be pointed out that, as such a relevant solution had not been considered by the Trial Chamber, and particularly as the Trial Chamber clearly declined to accept the premise accepted by the Appeals Chamber that the opportunity for all three judges to observe, independently, the demeanour of all witnesses is essential to the fairness of the trial, it necessarily follows that the exercise of the Trial Chamber's discretion miscarried. In those circumstances, the only order which the Appeals Chamber can appropriately make is to uphold the appeal, quash the Trial Chamber's Decision and exercise its own discretion as to whether the interests of justice would be served by the continuation of the trial. If the Appeals Chamber feels itself to be in the position to do so, it could then make orders directing the recomposed Trial Chamber to consider the recall of witnesses as already outlined. If the appeal is simply dismissed without any such orders being made, the position remains as it now is, without any obligation upon the Trial Chamber to carry out the solution proposed.

36. But there is a flaw in the Appeals Chamber's reasoning. Rule 15*bis*(D) provides only that the substituted judge may not join the bench until he or she "has certified that he or she has familiarised himself or herself with the record of the proceedings". It does not give to the substituted judge either the power or the obligation to determine the adequacy of the record of proceedings. The substituted judge may join the bench even if he or she is not satisfied that it will be possible to observe the demeanour of the witnesses either from the record without any video-recordings or from that record plus the recalling of some of the witnesses. As it has already been pointed out, the certification required by Rule 15*bis*(D) provides no protection to the appellants that the substituted judge is in a position to assess the demeanour of the witnesses. This flaw leads to a number of problems. Without any order from the Appeals Chamber to the recomposed Trial Chamber to consider such a procedure, the substituted judge cannot insist upon

[49] *Ibid*, pars 33-35.

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witnesses being recalled. What is to happen should the substituted judge remain dissatisfied with his or her ability to assess the demeanour of the witnesses because, for example, some of the witnesses nominated for recall have died or are too sick or too frightened to re-appear?[50] Is he or she obliged to disclose this dissatisfaction to the parties? Does the recomposed Trial Chamber continue, or does it have power to reconsider its decision to continue the trial notwithstanding the dismissal of this appeal? The Appeals Chamber's proposed solution, without the appeal being upheld, provides no safeguards at all.

37. In exercising my own discretion were the appeal to be upheld, I would not accept the solution which the Appeals Chamber Decision has proposed. Whilst I accept that recalling witnesses will enable the substituted judge to observe their demeanour if they do reappear, I do not believe that the Appeals Chamber is in any position to assess for itself upon the material before it an issue which the Trial Chamber failed to consider – whether recalling witnesses to give evidence in the existing trial (as the Appeals Chamber Decision suggests) would cause greater delay than starting a new trial with the probable advantages of the procedures afforded by Rule 92*bis*. Only the two remaining members of the Trial Chamber can make that assessment.

Disposition

38. Accordingly, I would uphold the appeal, quash the Trial Chamber's Decision and remit the matter to the two remaining judges of the Trial Chamber to reconsider the matter in the light of what has been said in this Dissenting Opinion.

Done in English and French, the English text being authoritative.
Dated this 24th day of September 2003,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt

[Seal of the Tribunal]

[50] It is understood that many of the witnesses were infected with AIDS.