THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-AR73.10

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Date Filed: 28 August 2007

THE PROSECUTOR

v.

EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE, and
JOSEPH NZIRORERA

REPLY BRIEF:
JOSEPH NZIRORERA'S APPEAL FROM DECISION TO PROCEED IN THE ABSENCE OF THE ACCUSED

The Office of the Prosecutor:
Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:
Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:
Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera has appealed, pursuant to certification granted under Rule 73(B), from the decision of the Trial Chamber to proceed with the trial in his absence. His co-accused, Edouard Karemera and Mathieu Ngirumpatse, have joined in his appeal.[1] On 27 August 2007, the prosecution filed its *Prosecutor's Response to Nzirorera, Ngirumpatse and Karemera's Appeal from Decision to Proceed in the Absence of the Accused*. Mr. Nzirorera now files this brief in reply.

2. The parties are in agreement with certain fundamental principles. First, an accused has a well-established right, enshrined in the ICTR Statute, to be present at his trial. Second, that right is not absolute. Where the parties disagree is under what circumstances that right may be dispensed with.

3. The Appeals Chamber has given some guidance on this issue. In the *Zigiranyirazo* decision, it held that:

> "The explicit exception provided by Rule 80(B) and the ICTY Appeals Chamber's reference to 'substantial trial disruptions' provide a useful measure by which to assess other restrictions on the right to be present at trial."[2]

4. The prosecution argues that this formulation was "not…an exhaustive description of the bases upon which a trial can continue in the absence of an accused. Rather it is a yardstick by which other justifications for continuing a trial in the absence of an accused can be assessed."[3] Mr. Nzirorera agrees.

5. Using substantial trial disruptions as a yardstick, it is impossible to conclude that the Trial Chamber was justified to continue the trial in the absence of an accused who was legitimately ill, had scrupulously attended his two trials since 2003 without disruption, and wanted to be present for the testimony. The prosecutor has failed to demonstrate that the conduct of Mr. Nzirorera in any way measures up to the type of circumstance illustrated by the Appeals Chamber in *Zigiranyirazo*.

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[1] *Memoire d'Appel relatif à la décision rendue le 11 juillet 2007 par la Chambre III. Sur la suspension de la procédure lorsque l'accusé n'est pas en mesure d'assister au process* (Karemera); *Mémoire d'Appel pour M Ngirumpatse contre la Décision « ON JOSEPH NZIRORERA'S MOTION FOR STAY OF PROCEEDINGS WHILE HE IS UNFIT TO ATTEND TRIAL OR CERTIFICATION TO APPEAL*

[2] *Zigiranyirazo v Prosecutor*, No. ICTR-2001-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006) at para. 14

[3] Prosecution brief at para. 8

6. To adopt the prosecution's position in this appeal, the Appeals Chamber would have to overrule and vitiate the above-quoted language from its opinion in *Zigiranyirazo*. The prosecution has provided no cogent reasons for abandoning a decades-long tradition and practice of respecting the right of the accused to be present at his own trial, absent refusal or disruption.

7. The prosecution also contends that the Appeals Chamber in *Zigiranyirazo* implicitly approved proceeding in the absence of the accused had there been a sufficient showing of need due to witness security.[4] This argument is speculative, since the Appeals Chamber was not confronted with a situation where witness security required taking testimony in the absence of the accused. However, the alternatives discussed in *Zigiranyirazo* involved ways of taking testimony by video-link at which the accused could hear the testimony simultaneously, could instruct and advise his counsel in time for interventions or objections, and could provide timely input into cross examination.

8. In contrast, taking testimony when an accused is incapacitated due to illness, such as Mr. Nzirorera was, deprives him of participating, even in the restricted way rejected in the *Zigiranyirazo* decision. Therefore, nothing in the *Zigiranyirazo* decision can be read as authorizing the taking of testimony in the absence of an accused who is incapacitated due to illness.

9. The prosecution relies upon the Appeals Chamber's decision in the *Milosevic* case for the proposition that a trial may continue when the accused is absent due to ill health.[5] However, a close reading of that decision demonstrates that it supports Mr. Nzirorera's position that the right of the accused to be present at his own trial can only be taken away by conduct amounting to a waiver of his presence.

10. In the *Milosevic* decision, the Appeals Chamber held that:

> "If a defendant's right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self -representation any differently."[6]

[4] Prosecution brief at para. 9
[5] Prosecution brief at para. 10
[6] *Milosevic v. Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at para. 13

11. The Appeals Chamber then went on to consider the following:

> "Defense counsel objects that "the appointment of counsel to an accused who is engaging in deliberate misconduct... is quite distinct from the situation where an accused would be allowed to continue [representing himself] but for a finding of medical unfitness." But it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial work – the late nights, the stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month? Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt? In the Appeals Chamber's view, to ask that question is to answer it."[7]

12. Therefore, when considering the possibility that the assignment of counsel might allow the trial to continue in the absence of the accused for health reasons, the Appeals Chamber was basing its opinion on the fact that by insisting on representing himself despite documented health problems, the accused was voluntarily creating the situation that might cause his absence. The same cannot be said for Mr. Nzirorera, who was absent due to circumstances that were not his fault.

13. The issue of whether the *Milosevic* trial could proceed in his absence when he was in ill-health was never resolved by the Appeals Chamber.[8]

14. The Appeals Chamber's decision in *Zigiranyirazo* is therefore not inconsistent with its decision in the *Milosevic* case. The measure of 'substantial trial disruptions' was used in both cases. Applying that measure, or its equivalent, to Mr. Nzirorera's case, demonstrates that the Trial Chamber erred in proceeding in the absence of an accused who was legitimately sick and had done nothing to disrupt his trial.

15. The prosecution also criticizes Mr. Nzirorera's citation to the decision on the Special Court of Sierra Leone in the *Sesay* case.[9] This is a legitimate criticism. Mr.

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[7] *Milosevic* decision at para. 14

[8] See *Prosecutor v Milosevic*, No. IT-02-54-A-R77.4, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 11

[9] *Prosecutor v Sesay et al*, No. SCSL-2004-15-T, *Ruling on the Issue of the Refusal of the Third Accused Augustine Gbao to Attend Hearing of the Special Court of Sierra Leone on 7 July 2004 and Succeeding Days* (12 July 2004)

Nzirorera meant to refer to the *Ruling on the Issue of the Refusal of Accused Sesay and Kallon to Appeal for their Trial* (19 January 2005), where the *Sesay* Trial Chamber held that:

> "The Chamber accordingly emphasizes that it is settled law, nationally and internationally, that while an accused person has the right to be tried in his presence, there are circumstances under which a trial in the absence of the accused can be permitted. While due consideration must be given to insure that all rights to a fair trial are respected, an Accused person charged with serious crimes who refuses to appear in court should not be permitted to obstruct the judicial machinery by preventing the commencement or a continuation of trials by deliberately being absent, after his initial appearance, or by refusing to appear in court after he has been afforded the right to do so, and particularly in circumstances as in this case, where no just cause, **such as illness,** has been advanced to justify the absence."[10] (emphasis added)

16. Mr. Nzirorera apologizes for the incorrect citation.

17. The *Sesay* decision, as well as those of the Appeals Chamber in *Zigiranyirazo* and *Milosevic*, demonstrates that the Trial Chamber erred as a matter of law in believing that it could proceed in the absence of an accused who was legitimately ill, and had just cause not to be present.

18. The prosecution has notably made no attempt to defend the Trial Chamber's self-created test for the right to proceed in the absence of the accused—whether the testimony being heard that day goes to the acts and conduct of the accused. That criterion, as opposed to disruption or refusal to appear, in which the accused impliedly waives his right to be present, is also unsupported in any other decisions of the Appeals Chamber or other Tribunals. The Trial Chamber committed an error of law by adopting such a criterion in Mr. Nzirorera's case.

19. The prosecution also claims not to understand the remedy sought by Mr. Nzirorera and protests that rehearing the entire testimony of the witness Twahirwa would be disproportionate to the violation of the right of the accused to be present.[11]

20. Mr. Nzirorera seeks the reversal of the Trial Chamber's decision that the trial can proceed in the absence of an accused when the testimony does not go to his own acts

[10] Para. 15
[11] Prosecution brief at paras. 2,5 and fn. 10

and conduct. A definitive ruling on this question was the reason why certification to appeal was granted by the Trial Chamber.[12] Should the decision be reversed, Mr. Nzirorera seeks the same remedy as provided by the Appeals Chamber in *Zigiranyirazo*—exclusion of the testimony of the witness Twahirwa taken when Mr. Nzirorera was not present. This would not require exclusion of his entire testimony. [13]

21. The prosecution has failed to justify the sweeping overhaul of the right of an accused to be present at his trial implemented by the Trial Chamber in its decision. The Appeals Chamber is urged not to discard years of precedent and rule-making for the simple expedient of the Tribunal's completion strategy. Its jurisprudence will live on, and be judged, long after its doors have closed.

22. It is respectfully requested that the decision of the Trial Chamber be reversed.

Word count: 1687

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

[12] *Decision on Joseph Nzirorera's Motion for Stay of Proceedings While he is Unfit to Attend Trial or Certification to Appeal* (11 July 2007) at para. 25

[13] Since the testimony was elicited on behalf of the co-accused, they should be given the option of recalling the witness for cross-examination in the presence of Mr. Nzirorera, just as the prosecution was given the option of recalling the witness Bagaragaza in the *Zigiranyirazo* case.