

ICTR-98-41-I
20-2-2002
(7886 - 7883)

7886
#JM



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

UNITED NATIONS
NATIONS UNIES

Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzania
Tel: 255 27 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/2504373 or 1 212 963 2848/49

*Office of the president
Bureau Du President*

The Bureau: Judge Navanethem Pillay
Judge Erik Møse
Judge William H. Sekule

Original: English

Registrar: Adama Dieng

Decision of: 20 February 2002

The Prosecutor
Vesus
Théoneste Bagosora
Gratien Kabiligi
Anatole Nsengiyumva
Aloys Ntabakuze
Case No. : ICTR-98-41-I

JUDICIAL RECORDS/ARCHIVES
ICTR
2002 FEB 20 P 3: 57
Handwritten signature and date

Determination of the Bureau pursuant to Rule 15(B)

1. The Bureau, comprising Judge Navanethem Pillay President, Judge Erik Møse Vice-President and Judge William H. Sekule, Presiding Judge of Trial Chamber II, convened on 15 February 2002 to consider the motion for the disqualification of the Judges of Trial Chamber III (the "Motion").
2. On 24 January 2002, Théoneste Bagosora, Gratien Kabiligi, Anatole Nsengiyumva and Aloys Ntabakuze (the "Accused") jointly filed a motion before Trial Chamber III for the disqualification of Judges Lloyd G. Williams, Yakov. A. Ostrovsky and Pavel Dolenc, from sitting in adjudication of their case (the "Motion").
3. The Presiding Judge of Trial Chamber III, Judge Williams, having considered the Motion and having conferred with Judges Ostrovsky and Dolenc, took the view that the circumstances relied upon by the Accused did not warrant a disqualification of any of the Judges from Trial Chamber III, from this case, but decided in the interests of justice, to refer the matter to the Bureau for consideration, pursuant to Rule 15(B) of the Tribunal's Rules of Procedure and Evidence (the "Rules"), which provides that the Bureau shall determine matters of this nature, if necessary.
4. Judge Williams, who is also a member of the Bureau, elected to recuse himself for the determination of this matter and therefore the Bureau is composed as set forth in paragraph 1, above.
5. In considering the Motion, the Bureau examined the Decisions rendered by Trial Chamber III on 29 November 2001¹ and 5 December 2001², the Prosecutor's motion of 5 July 2001 and the Accused's response thereto, and the Rules and case law referred to in the pleadings relating to Orders for Protection of Witnesses.
6. With regard to the 29 November Decision, the source of the complaint by the Accused, the Bureau notes that Trial Chamber III took several factors into consideration, such as the length of trial, the number of witnesses, the objective conditions in Rwanda, the subjective fears of potential witnesses, the capacity of the Tribunal's Witnesses and Victims Support Section to provide protection. The Chamber stated that:

"...deliberation about the foregoing issues cannot be done in a factual vacuum. Rather, the Chamber must approach these issues with a reasoned appreciation of the practicalities of implementing any resulting order and an understanding of the idiosyncratic factual circumstances of this particular case."³

7. As an additional consideration, Trial Chamber III noted:

"Moreover, the Chamber must take into account the importance and the high profile and influence of the four Accused in this case and their possible connections and influences notwithstanding the fact that they are confined at the Tribunal's Detention Facility."⁴

¹ Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, dated 29 November 2001 (the "29 November Decision").

² Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, dated 5 December 2001.

³ Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, dated 29 November 2001, page 7, paragraph 20.

⁴ Ibid.

8. It is the quoted text in paragraph 7 above to which the Defence raise objection, submitting that:

8.1. Trial Chamber III focused their attention on the importance, high profile and influence of the four Accused and their possible outside connections and influences, and held that due to their past, they have been able to maintain contact with the outside world that could enable them to endanger the lives of prosecution witnesses;

8.2. The Chamber made these findings before the commencement of the trial, without considering any evidence in respect of the allegations against them. Further, none of the aspects of these findings were raised during the hearing on 6 September 2001, which implies that the Chamber considered these aspects not as a result of an *inter partes* hearing, but alone during its deliberation and on a basis totally unknown to the Accused;

8.3. These findings express a preconception that is particularly prejudicial to the Accused and they no longer believe that they could have a fair trial.

Deliberations

9. The Bureau is of the view that the words "...importance and high profile and influence..." in the 29 November Decision, relate to the status and office of the Accused, as alleged in their respective indictments and not statements of fact or preconceptions of the Judges of Trial Chamber III. Moreover, the Judges use the words "...possible connections and influences..." (emphasis added).⁵ The construction placed by the Defence on these words, namely: that the Accused, due to their past, have been able to maintain contacts with the outside world, thus being in a position to endanger the lives of witnesses, is unreasonable and goes beyond their ordinary meaning.

10. The Bureau observes that the Judges of Trial Chamber III cited Article 21 of the Statute and Rules 69 and 75 of the Rules and noted that the spirit of the provisions is the protection of witnesses, but with respect for the rights of the Accused and the requisites of fair trial.

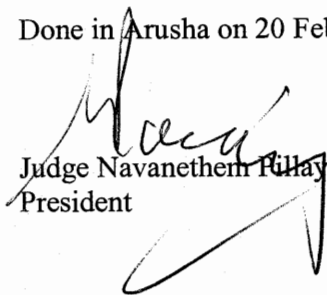
11. The Bureau is of the view that risk of interference or coercion to witnesses if their identities are disclosed to accused persons, is relevant in determining whether there is a need to implement witness protection measures and if so, the nature of such measures. The jurisprudence in both Tribunals in rulings relating to witness protection measures is that judges regularly consider the risk to the witness if his identity is disclosed to an accused ahead of time. In matters such as bail applications, provisional releases and protection of witnesses, it is a normal practice in national courts and legitimate judicial activity for judges to assess the risk to the witness emanating from the accused. It is incorrect to conclude that in undertaking the exercise of weighing the probabilities, judges are forming preconceptions on the personalities and guilt of accused persons.

For the aforementioned reasons, the Bureau is satisfied that there are no grounds that warrant the disqualification of Judges Lloyd G. Williams, Yakov. A. Ostrovsky and Pavel

⁵ *Ibid*

Dolenc from taking any further part in the criminal proceedings against Théoneste Bagosora, Gratien Kabiligi, Anatole Nsengiyumva and Aloys Ntabakuze.

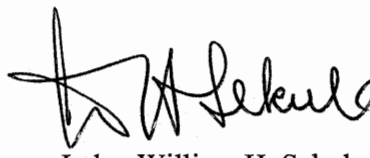
Done in Arusha on 20 February 2002,



Judge Navanethem Pillay
President



Judge Erik Møse
Vice-President



Judge William H. Sekule
Presiding Judge of T/C II

(seal of the Tribunal)