International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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ICTR-98-44-T
17-5-2004
(12303 - 12296)

THE BUREAU

Before: Judge Erik Møse
Judge William H. Sekule

Registrar: Adama Dieng

Date: 17 May 2004

THE PROSECUTOR

v.

EDOUARD KAREMERA

ANDRE RWAMAKUBA

MATHIEU NGIRUMPATSE

JOSEPH NZIRORERA

Case No. : ICTR-98-44-T

DECISION ON MOTION BY KAREMERA FOR DISQUALIFICATION OF TRIAL JUDGES

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as the Bureau, composed of Judge Erik Møse, President of the Tribunal, and Judge William H. Sekule, Presiding Judge of Trial Chamber II, in accordance with Rule 23(A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the "Motion for Disqualification of Trial Chamber III Judges", filed by the Defence for Karemera on 29 March 2004;

CONSIDERING the Prosecution "Consolidated Response to Requests by Nzirorera, Ngirumpatse, and Karemera to Disqualify Judge Vaz, Judge Arrey and Judge Lattanzi", filed on 7 April 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Accused, Edouard Karemera, requests the disqualification of all three judges hearing his trial, Judges Vaz, Lattanzi, and Arrey, on the basis of their lack of impartiality, pursuant to Rule 15(B). Similar applications, also decided by the Bureau today, have been filed by two co-Accused, Mathieu Ngirumpatse and Joseph Nzirorera.[1]

2. Judge Vaz, who is normally a member of the Bureau in her capacity as Vice-President of the Tribunal under Rule 23(A), has recused herself from consideration of the present application. As the position of Presiding Judge of Trial Chamber III is currently vacant, the Bureau is presently composed of Judges Møse and Sekule.

SUBMISSIONS

3. The Defence gives an account of previous proceedings in the case, particularly in 1999 which, in its view, is relevant to the present application for recusal. The Defence submits that the Accused entertains a "reasonable suspicion of bias on the part of the Judges of the Chamber" on the basis of "glaring irregularities" in the trial proceedings. Recent decisions of the Chamber are cited as evidence of this bias. The Chamber is said to have issued a decision on a Prosecution motion to amend the Indictment without awaiting the translation of documents relevant to the case, and to have otherwise been unreceptive to requests for extension of time filed by the Defence. These decisions violated the rights of the Accused and demonstrated excessive concern with the judicial calendar.

4. According to the Defence, the Chamber denied a Defence objection to two paragraphs of the amended Indictment which allegedly contained words that had previously been rejected by the Chamber. The Presiding Judge disallowed questions to a witness concerning his membership in organizations in Rwanda, which the Defence considers inconsistent with another decision requiring the disclosure of a witness information sheet which refers to the same information. The Chamber is alleged to have adopted an "adversarial stance" in decisions of 8 October 2003 and 13 February 2004 concerning the amendment of the Indictment. Finally, Article 12 *quarter* of the Statute was violated by permitting the *ad litem* judges to participate in a decision granting leave to amend the Indictment, and to preside over the initial appearance of the Accused under the revised Indictment.

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[1] Motion for Disqualification of Judges Andresia Vaz, Florence Rita Arrey, and Flavia Lattanzi, 30 March 2004 (Nzirorera); Request to the Bureau for the Recusal of the Judges of Trial Chamber III, 30 March 2004 (Ngirumpatse).

5. The Prosecution opposes the application in a consolidated response to all three applications for disqualification alleging bias on the basis of decisions in the case. It argues that no decision has been rendered by the Presiding Judge in accordance with Rule 15(B) and that, accordingly, the Bureau is not properly seized of the application. Further, the only bases for disqualification provided for in Rule 15(A) are "personal interest" or "association", neither of which have been asserted by the Defence. Even assuming that rulings in the case in which the Judges are sitting can be used as evidence of bias, the presumption of judicial impartiality has not been rebutted by the Defence.

DELIBERATIONS

6. On 30 March 2004, the Presiding Judge announced the Judges' view that there was no need for their withdrawal from the case on the basis of the present application.[2] In accordance with Rule 15(B), the application is now properly before the Bureau.

7. Rule 15(A), "Disqualification of Judges", provides that:

> A Judge may not sit at trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case.

Although the only grounds of disqualification expressly mentioned are "personal interest" or "association", Rule 15(A) has been interpreted more broadly as "co-terminous with the statutory requirement of impartiality and thus as including within its scope all possible bases of disqualification" on the basis of lack of impartiality.[3] Article 20 of the Statute guarantees a "fair and public hearing", and Article 12 requires judges to be "persons of...impartiality". Article 14(1) of the International Covenant on Civil and Political Rights expressly grants the right to "a fair and public hearing by a competent, independent and impartial tribunal". In light of these mandatory requirements of a fair hearing, and the Bureau's mandate to evaluate challenges to judicial impartiality, Rule 15(A) must be read broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.

8. The Appeals Chamber thoroughly reviewed national and international definitions of impartiality in *Furundzija*.[4] The requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias. An appearance of bias is established if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a

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[2] T. 30 March 2004 p. 1 ("The Judges were placed before a written motion by the Accused Karemera, and the Judges considered Rule 15 of the Rules, and have decided that there is no need for disqualification of the Judges for this Trial. It is, at this very moment, up to the Bureau of the Tribunal to speal with regard to the Disqualification motion which has been filed"). The Presiding Judge announced the Judges' decision not to recuse themselves in relation to the applications of Nzirorera and Ngirumpatse on 7 April: T. 7 April 2004 p. 56.

[3] *Blagojevic et al.*, Decision on Blagojevic's Application Pursuant to Rule 15(B), 19 March 2003, para. 10; see also *Bagosora et al.*, Determination of the Bureau Pursuant to Rule 15(B), 20 Feburary 2002, paras. 9-11 (where the Chamber considered the content of a decision as possible evidence of bias); *Nahimana et al.*, T. 19 September 2000 p. 6 (in oral decision on motion for disqualification, finding that Rule 15(A) must be interpreted in light of, *inter alia*, the requirement of impartiality in Article 14(1) of the International Covenant on Civil and Political Rights).

[4] *Furundzija*, Judgement (AC), 21 July 2000, paras. 181-88; see also *Brdanin & Talic*, Decision on Application By Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, paras. 9-14 ("In my view, there is therefore no difference in substance between the various legal systems as to the tests to be applied concerning the disqualification of judges").

cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[5]

9. The apprehension of bias test reflects the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[6] Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[7] The Appeals Chamber quoted approvingly the following formulation of the objective test for apprehension of bias:

> This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances.[8]

Thus, a mere feeling or suspicion of bias by the Accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.

10. Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection in Article 12 of the Statute. The moving party bears the burden of displacing that presumption, which has been described by the Appeals Chamber as imposing a "high threshold":

> The reason for this high threshold is that, just as any real appearance of bias [on] the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias....'It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially and without prejudice, rather than that he will decide the case adversely to one party [...]. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'[9]

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[5] *Furundzija*, Judgement (AC), 21 July 2000, para. 189. The objective test has, in substance, been adopted in a number of decisions before this Tribunal: *Nzirorera et al.*, Re. Application for the Disqualification of Judge Mehmet Güney (Bureau), 26 September 2000, paras. 8-9; *Nahimana et al.*, Oral Decision (TC), T. 19 September 2000, p. 10; *Nyiramasuhuko & Ntahobali*, Determination of the Bureau in Terms of Rule 15(B) (Bureau), 7 June 2000, p. 5; *Kabiligi*, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction (TC), 4 November 1999, p. 8.

[6] *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart); quoted in *Furundzija*, Judgement (AC), 21 July 2000, para. 195; *Brdanin & Talic*, Decision on Application By Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson From the Appeals Chamber (Sierra Leone AC), 13 March 2004, para. 16. (describing the principle as "sacred and overriding").

[7] *Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71 ("What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are connected, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified").

[8] *Furundzija*, Judgement (AC), 21 July 2000, para. 185, quoting *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 111.

[9] *Delalic*, Judgement (AC), para. 707, quoting *Re. JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Aus.).

11. The Defence does not allege that any interest or association of the Judges gives rise to an apprehension of bias; its submission is that the Accused has grounds for the reasonable suspicion of bias on the basis of decisions in the case itself.

12. An attempt to show bias on similar grounds was considered by the Bureau of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blagojević*. The Defence alleged that the Trial Chamber had, on remand from the Appeals Chamber, deliberately ignored a direction from the Appeals to apply a criterion that would have favoured the provisional release of the Accused. In considering actual bias, although the Bureau "would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, it would be a truly extraordinary case in which they would".[10] As to the objective test of bias, the Bureau concluded that the allegedly erroneous decision was not attributable to bias against the Accused, but was more likely explained by a disagreement as a matter of law with the Appeals Chamber. Such disagreements in the future might favour the Accused, and could not be equated with a bias against the Accused.[11] Allegations of bias based on the content of judicial proceedings have also been considered by the Supreme Court of the United States, where the objective test is also well-established:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion....Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favouritism or antagonism that would make fair judgment impossible.[12]

13. Where such allegations are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test described above. Error, if any, on a point of law is insufficient; what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.

14. In a section entitled "Background to the Proceedings", the Defence adverts to certain aspects of the early stages of the proceedings against the Accused, particularly during 1999. In the Bureau's view, none of the decisions from that period are relevant to the claim of apprehended bias and, accordingly, the claims of alleged irregularity need not be considered here.

15. The Defence complains that the Chamber authorized the amendment of the Indictment in its decision of 13 February 2004 without awaiting the translation of certain "documents in the case" into French, the working language of the Accused.[13] The Defence asserts that it made several requests for such translations and that, in rendering the decision, the Chamber deliberately ignored Article 20(4)(a) of the Statute. The Defence has not specified the documents which it claims had not been translated; given references to its submissions requesting that the decision on the amendment of the Indictment be delayed until

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[10] *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15(B), 19 March 2003, para. 14.
[11] *Id.* para. 15.
[12] *Liteky v. United States*, (1994) 510 U.S. 540, 555.
[13] Motion for Disqualification of Trial Chamber III Judges, 29 March 2004, para. 1.

translations had been provided; or the Chamber's response to those submissions. Even assuming that such requests were made, there is nothing in Article 20(4)(a) that would appear to require translation of all "documents in the case", or that such translation must precede a decision granting leave to amend the Indictment. No apprehension of bias can be said to arise from the Chamber rendering its decision under these circumstances.

16. On 23 February, the Chamber rejected a Defence motion to reject two paragraphs of the amended Indictment, as filed by the Prosecution in accordance with the Chamber's decision of 13 February 2004.[14] The Defence motion objected that the decision of 13 February 2004 had required the Prosecution to delete any reference to the presence of the Accused at the specified location in paragraphs 34.2 and 53.1 of the Indictment. The Chamber, sitting as Judge Arrey, ruled orally as follows:

> The second decision is on the motion by Karemera filed today, asking the Court to reject the indictment filed by the Prosecutor on the 18th of February this year to sanction the Prosecutor for refusal to comply with the Chamber's decision of 13 February this year. The Chamber has verified that the Prosecutor has removed all allegations of Karemera's physical presence at Bisesero on or about the 13th of May 1994 from paragraph 34.2 and 53.1 of his amended indictment filed on the 18th of February this year. The Chamber is satisfied that the Prosecutor's modifications of paragraphs 34.2 and 53.1 comply with the Chamber's decision of 13th February this year.
>
> Considering that the paragraph 53 contains no allegations of Karemera's physical presence at Bisesero on or about 13 May 1994, the Chamber therefore rejects the motion.[15]

The Bureau has confirmed that the revised version of the two paragraphs in the Indictment contain no reference to the physical presence of the Accused at the location specified. No reasonable observer could doubt the correctness of this decision, much less apprehend that it evinces bias against the Accused.

17. The Defence complains of a ruling of the Chamber *ex proprio motu* of 2 December 2003 disallowing questions to a Prosecution witness as to his associations with, or membership in, certain organizations in Rwanda from 1997 onwards.[16] The decision is said to be inconsistent with a ruling requiring the Defence to disclose a witness information sheet on which that information was provided, and that it is based on an improper concern not to risk a breakdown in cooperation with Rwanda. The Chamber explained its ruling as follows:

> Well, your question does not concern the examination-in-chief of the witness. You have got the document, but we don't allow you to ask that question, which, for us, has nothing to do with the matter in hand. You may question the witness as to the facts he has borne witness to here, but not as going to any associations he might have belonged to.[17]

The Chamber's ruling is based on relevance, given the scope of the examination-in-chief of the witness, and does not categorically exclude questions concerning these organizations.[18] Nor is there any inherent contradiction, as submitted by the Defence, between ordering the

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[14] *Id.* para. 2.
[15] T. 23 February 2004 p. 2.
[16] Motion for Disqualification of Trial Chamber III Judges, 29 March 2004, para. 3.
[17] T. 2 December 2004 p. 81.
[18] On at least one other occasion, the Judges did not intervene to preclude such questions. T. 8 December 2003 p. 10.

Prosecution to disclose certain information, while also ruling that the same information is beyond the scope of a particular cross-examination. The Chamber's decision appears to be grounded in legal reasoning which does not seem incorrect or influenced by improper considerations. Under these circumstances, the decision cannot reasonably be apprehended as arising from bias against the Accused.

18. The Defence considers the timing of certain decisions to reflect undue concern with the judicial calendar at the expense of the rights of the Accused.[19] In particular, the Defence refers to the decision of 13 February 2004 granting the Prosecution motion for leave to amend the Indictment; and two decisions concerning the time-limits for the Defence to file submissions on the Prosecution motion. The Defence concedes that the Chamber's decision of 3 February 2004 actually gave the Defence additional time to file its submissions, based on the recent appointment of Lead Counsel for the Accused.[20] The application for an additional extension of time was ruled inadmissible as it had been filed by a legal assistant without the necessary authorization from Lead Counsel.[21] Nothing in these decisions suggests that the Chamber disregarded the rights of the Accused, or that its decision of 13 February was made before the expiry of any time-limit within which a party was entitled to respond. Indeed, additional time for that purpose was granted by the Trial Chamber. Under these circumstances, the timing of the decision of 13 February 2004 cannot reasonably be apprehended as showing bias against the Accused.

19. The Defence alleges that the Chamber adopted an "adversarial stance" in its decisions of 8 October 2003 and 13 February 2004, both concerning motions by the Prosecution for leave to amend the Indictment. The application offers no details as to what it is, precisely, that the Defence considers "adversarial" in the decisions. Indeed, the first decision, far from being adverse to the interests of the Accused, denied the Prosecution's requests to make additions to the Indictment. That decision was vacated by the Appeals Chamber on 19 December 2003 and remanded to the Trial Chamber for further consideration.[22] The decision of 13 February 2004 was rendered in accordance with the guidance of the Appeals Chamber. The Trial Chamber cannot be accused of bias or lack of independence because it reversed its previous ruling in order to abide by the directions of the Appeals Chamber.

20. Finally, the Defence complains that the participation of the *ad litem* judges in the decision to permit amendment of the Indictment, and the fact that a new initial appearance of the Accused in light of the new Indictments was presided over by an *ad litem* judge, violated the Statute of the Tribunal and the Rules. In its decision concerning the participation of the *ad litem* judges in the decision to grant leave to amend the Indictment, the Chamber distinguished between confirmation of an Indictment under the Rules, in respect of which the *ad litem* judges are incompetent, and modification of an Indictment. The Chamber articulates its reasoning clearly and the Defence has not shown the decision to be manifestly incorrect or unreasoned. The Chamber further held that *ad litem* judges generally had the same competence as permanent judges once the trial had commenced and that, accordingly, an *ad litem* judge could preside over an initial appearance in respect of an Indictment revised after the start of the trial.[23] In the Bureau's view, this interpretation is supported by the wording of

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[19] Motion for Disqualification of Trial Chamber III Judges, 29 March 2004, para. 4.

[20] *Karemera et al.*, Décision Prorogeant les Délais de Depôt des Observations Supplémentaires à la Requête du Procureur du 29 Août 2003 et à la Requête du Procureur en Modification de l'Acte d'Accusation Deposée le 23 Janvier 2004 (TC), 3 February 2004.

[21] *Karemera et al.*, Décision Sur la Requête de Karemera en Extension du Délais de Depôt des Observations Supplémentaires à la Requête du Procureur du 29 Août 2003 et à la Requête du Procureur en Modification de l'Acte d'Accusation Deposée le 23 Janvier 2004 (TC), 11 February 2004

[22] *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2004.

[23] *Karemera et al.*, Décision Relative aux Requêtes de Karemera et Nzirorera...(TC), 29 March 2004.

the Statute. However, even assuming as argued by the Defence that the decision concerning the power of *ad litem* judges is incorrect, it is not indicative of bias against the Accused for the reasons set forth by the ICTY Bureau in its *Blagojevic* decision. The Defence has not shown that permitting *ad litem* judges to participate in such decision or preside over initial appearances is disadvantageous to the Accused, as compared to the Prosecution.

21. The applicant has failed to establish that a reasonable apprehension of bias could arise on the basis of the arguments advanced by the Defence, whether viewed individually or cumulatively.

FOR THE ABOVE REASONS, THE BUREAU

DENIES the application.

Arusha, 17 May 2004

Erik Møse
President

William H. Sekule
Presiding Judge of Trial Chamber II

[Seal of the Tribunal]