International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER III

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 NZIRORERA FOR DISQUALIFICATION OF TRIAL JUDGES

The Office of the Prosecutor Counsel for Nzirorera
Don Webster Peter Robinson
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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 Judges Andrésia Vaz, Florence Rita Arrey, and Flavia Lattanzi", filed by the Defence for Nzirorera on 30 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, Joseph Nzirorera, 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 Edouard Karemera.

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 comprised of Judges Møse and Sekule.

SUBMISSIONS

3. The Defence submits that bias may be established on the basis of decisions in the very proceedings in which disqualification is sought. It relies on five sets of decisions adverse to the accused, in three of which costs were also denied. On 29 September 2003, the Trial Chamber, differently constituted but including Judge Vaz, denied costs for a Defence motion which sought authorization to interview three Prosecution witnesses, ruling that the motion was unnecessary as the individuals were not protected witnesses. The Defence then filed motions for reconsideration of, and subsequently certification of an appeal from, the denial of costs, arguing that the applicable witness protection decision governed all potential Prosecution witnesses, not just protected witnesses, and that its motion was a reasonable effort at compliance. The Chamber denied both motions. The Defence argues that the decision itself, followed by the refusal to acknowledge error, "can only be seen by a reasonable observer as evidence of bias". Costs were again denied in relation to a Defence motion for disclosure of documents under Rule 68 that the Chamber considered partly duplicative with a motion brought under Rule 66. The denial of half of the Defence costs is said to have been "grossly disproportionate" to the time actually spent drafting the duplicative content, and indicates bias.

4. As presently constituted, the Chamber ruled that the Defence had not shown that evidence relating to the identity of those responsible for assassinating President Habyarimana was material to the case, despite also ruling that evidence of attacks against Tutsi as early as 1991 was relevant evidence. The Defence considers this decision to be biased, and to represent a double-standard in the treatment of Prosecution and Defence evidence. Costs are said to have been unjustifiably denied again in respect of two motions challenging the competence of the Tribunal and of the ad litem judges to approve amendments to an Indictment. The denial of costs "showed particular sensitivity and bias, since sanctions were not even requested by the prosecution". Further, the Chamber exhibited a double-standard in its application of sanctions by refusing to reprimand the Prosecution for failing to comply with its disclosure obligations, and even reversed a ruling requiring the Prosecution to disclose the prior testimony of its witness before the Tribunal.

5. The Defence also alleges that there has been unequal treatment in the promptness of the Chamber's decisions. The Chamber has taken months to decide Defence motions for the production of evidence, yet allegedly ruled on two motions filed by the Accused before the Defence had the opportunity to reply to the Prosecution submissions. The Prosecution has repeatedly failed to file its responses to Defence motions within the statutory time-limit without incurring any sanctions.

6. 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, and that the record of decisions is not a valid basis for asserting bias. Even assuming that such decisions can be used as evidence of bias, the presumption of judicial impartiality has not been rebutted by the Defence.

DELIBERATIONS

7. On 7 April 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. In accordance with Rule 15(B), the application is now properly before the Bureau.

8. 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. 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.

9. The Appeals Chamber thoroughly reviewed national and international definitions of impartiality in Furundzija. 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 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
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> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

10. 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”. Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified. 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.

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.

11. 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.'

12. The Defence does not allege that any interest or association of the Judges gives rise to an apprehension of bias; its position is that actual bias, or alternatively, a reasonable apprehension of bias, is demonstrated by the record of decisions in the case itself. It is argued that a pattern of erroneous legal rulings have been made by the Chamber to the detriment of the Accused which, in themselves, show a generalized bias against the Accused, and in favour of the Prosecution.

13. A similar allegation of bias was considered by the Bureau of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Blagojevic. The Defence alleged that the Trial Chamber had, on remand from the Appeals Chamber, deliberately ignored a direction from the Appeals Chamber 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". 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. 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 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.

14. 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.

15. The first decision invoked by the Defence as evidence of bias is that of 29 September 2003, in which the Chamber, sitting as Judge Vaz, denied a motion by which the Nzirorera Defence sought authorization to contact three named individuals who were on the Prosecution witness list. The Chamber held that the Defence only needed such authorization in respect of protected Prosecution witnesses, and denied costs. The Defence then asked the Chamber to reconsider its decision on costs, arguing that the Chamber's authorization was required because the applicable witness protection decision also encompasses "potential Prosecution witnesses and is not, by its terms, limited to protected witnesses." The Chamber, sitting as Judges Williams, Vaz, and Khan, denied that motion as well as a request to the Chamber to certify an appeal to the Appeals Chamber on the issue of costs.

16. The Bureau has considered the Defence motions and the decisions thereon. There is no basis for concluding that the Chamber was incorrect in its determination that the witness protection decision applied only to protected witnesses, and that the motion should be denied. It follows from the rulings that costs were denied because the Chamber believed that it should have been obvious to the Defence that the three witnesses whom it wished to interview were not protected. Further, the reconsideration decision relies on the Defence's failure to mention the Prosecution's lack of cooperation until the reconsideration motion itself, a submission which should have been made in the principal motion. The Chamber's view that the decisions denying costs could not significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, or that an immediate resolution of the matters at issue would materially advance the proceedings, appear legitimate. The Bureau has also noted the Chamber's remark that it had previously brought to the attention of Counsel that he should have regard for judicial time and the resources of the Tribunal. Nothing in the decisions suggests that the judges were animated by any concern other than relevant legal issues, and there is no basis for an apprehension of bias in an objective observer, fully apprised of the relevant circumstances.

17. In its Decision of 7 October 2003 on the Defence motion for disclosure of exculpatory evidence, the Chamber, composed of Judges Williams, Vaz, and Khan, denied half of the costs associated with the motion, explaining that a similar motion had been brought under a different provision of the Rules, Rule 66(B). The Chamber stated that

> …some of the requests made in the present Motion are similar to requests made in the Rule 66(B) Motion. Besides, all of the issues raised in the present Motion and those raised in the Rule 66(B) Motion should have been dealt with in one motion filed pursuant to both Rule 66(B) and Rule 68.

The Defence complains that only one of the fifteen requests overlap and that, accordingly, the extent of the denial of sanction is "grossly disproportionate". The Defence does not contest that the requests were duplicative, but claims that the extent of the sanction is disproportionate.

18. The motions in question overlap to a greater extent than indicated by the Defence in its application. Aside from the extent of duplication, however, the Chamber made clear that it was denying costs because the entire subject-matter would have been more efficiently raised in a single, consolidated motion. Given the specific and general duplication described by the Chamber, it cannot be said that the Chamber abused its discretion in a manner indicative of bias against the accused, or was motivated by any concern other than minimizing redundant submissions.

19. Further, two of the three judges who participated in these decisions denying costs, Judges Williams and Khan, are not amongst the judges named in the present motion as being biased. Indeed, no suggestion has been made by the Defence that either of them were, or appeared to be, biased. It is difficult to see how a decision by a Chamber in which Judge Vaz was only one of three judges could be indicative of her bias without also alleging bias by the other two. The agreement of these two other Judges, who are not implicated in the "pattern" of subsequent trial decisions, strongly counters the allegation of bias in relation to these rulings, in which Judge Vaz was only one of three judges.

20. The Defence also alleges that bias arises from that part of a decision refusing to grant an order under Rule 66(B) directing the Prosecution to disclose documents pertaining to the assassination of President Habyarimana on 6 April 1994. The Chamber held that the Defence had not shown "the materiality of the items requested as pertaining to the assassination of President Habyarimana and others on 6 April 1994". In denying certification of appeal, the Chamber further elaborated its reasons:

> (i) The Defence has not demonstrated a possible link between President Habyarimana's assassination and the charges against the Accused in this trial. The two issues are clearly distinguishable and, from a legal point of view, anything but "inextricably intertwined".
> (ii) The personal responsibility for President Habyarimana's assassination has no

> potential bearing on the characterization of the subsequent events in Rwanda in 1994 as an internal conflict and on the applicability of Article 3 Common to the Geneva Conventions and of Additional Protocol II to these events. The internal nature of the conflict is uncontroversial in view of the Security Council Resolution 955 (1994) which implements "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" as Article 4 into the Statute of the Tribunal.
> (iii) The Chamber notes that Article 6 par. 4, the Statute's only explicit provision on mitigating circumstances, is not applicable. Moreover, the Defence has not demonstrated that the non-participation of the Accused in additional crimes which are not covered by the current indictment has any bearing on the present case. Therefore the Chamber finds that the materials on President Habyarimana's assassination are not relevant for the determination of possibly mitigating circumstances.

21. The relevance of circumstances surrounding the assassination of President Habyarimana is a complex question, which includes consideration of the Indictment; of the Prosecution's case as represented in its pre-trial brief and witness statements; and of the nature of the Accused's defence. The Bureau observes that the Chamber's decision is based purely on legal arguments. Even if it may be possible to hold another view, there is no basis for finding real or apprehended bias. Further, the impugned decision is limited to the specific documents requested in the Defence motion of 6 October 2003. The alleged double-standard with the Chamber's admission of evidence concerning killings of Tutsis in 1991 is misguided: the relevance of any particular category evidence is a function of a variety of factors requiring a concrete assessment of the facts in issue.

22. The Defence cites the denial of costs in relation to two motions concerning the competence of the Tribunal and the ad litem judges, both decided on 29 March 2004, as evidence of a reasonable apprehension of bias. The first challenged the continuing authority of the Security Council to operate an international criminal tribunal on the basis of threats to peace and security that were present in 1994, but which have since disappeared. The second motion, which is a half-page in length, challenges the Indictment as amended on 18 February 2004 because the ad litem judges had acted ultra vires and in violation of Article 12(2) quarter of the Statute by participating in the decision to authorize that amendment. The Chamber denied both motions, and all costs arising from the motion challenging the continuing jurisdiction of the Tribunal. As to the motion concerning the ad litem judges, the Chamber distinguished between confirmation of an Indictment under the Rules, in respect of which the ad litem judges were incompetent, and modification of an Indictment. The costs arising from the motion were denied in part. In denying costs challenging the authority of the ad litem judges, the Defence discerns a "particular sensitivity and bias, since sanctions were not even requested by the prosecution".

23. It is the view of the Bureau that neither of these decisions suggests bias. The judicial challenge to the Security Council's continuing jurisdiction over the prosecution of those alleged to be responsible for committing international crimes in Rwanda in 1994 is at variance with established law cited by the Trial Chamber in its Decision. The Chamber has discretion to deny costs in such circumstances. The Chamber's decision to deny half of the costs related to the motion concerning the ad litem judges may have been based on its unusual brevity and lack of argumentation. In any event, denying half of the costs associated with a motion which is half-a-page long can hardly be characterized as a disproportionate or abusive exercise of discretion, much less as demonstrative of real, or justifiably apprehended, bias on the part of the judges.

24. The Defence questions the Chamber's alleged reluctance to impose sanctions on the Prosecution for alleged violations of its disclosure obligations. The Defence called for sanctions during the testimony of an investigator whose prior testimony before the Tribunal in other cases had not been disclosed to the Defence. In response to a request by the Defence for sanctions against the Prosecution for its failure to disclose the transcripts, the Chamber ruled "that it is not Rule 66(A)(ii) that applies in the instance, but rather 66(B). We do not consider that the Prosecution has violated his

obligation to disclose, and therefore there is no reason [to] impose sanction against the Prosecutor". The Defence recalled to the Chamber that it had ruled on 8 August 2003 that "testimonies given by witnesses in other proceedings before the Tribunal fall under the Prosecutor's obligation of disclosure under Rule 66(A)(ii)" and were to be disclosed before the end of August. The Chamber responded, "But we are telling you that on this specific point that is not the case. So we move forwards". The Bureau observes that the ruling was very brief. However, the need to respond quickly and extemporaneously to motions as they are raised by the parties during testimony may diminish the opportunity for reasons. No reasonable person would apprehend bias on the basis of this single decision.

25. The Defence further complains that sanctions were not imposed in a written decision of 20 October 2003 in which the Chamber recognized that the Prosecution had violated its disclosure obligations. However, the Chamber also acknowledged that the effect of the violation had been mitigated by the Prosecution's subsequent compliance with its obligations, and reproached the Prosecution for its untimely disclosure in strong language. In these circumstances, the Chamber's approach cannot reasonably be characterized as an abuse of its discretion or as creating an impression of bias.

26. The Defence applied orally for sanctions as a result of an alleged failure of timely disclosure in respect of Prosecution Witness GBV. The Chamber determined that there was only a slight delay in the disclosure of the witness statement which did not warrant postponing the testimony of the witness, which was the Defence's principal application. The Chamber did not address the sanctions portion of the motion, and the Defence did not remind the Chamber that this had formed part of its motion. Under these circumstances, the decision does not appear to be improper or disproportionate, and it is well-understood that sanctions are not mandatory in respect of minor violations of extensive disclosure obligations. The Defence has not adequately detailed the circumstances of the ruling concerning Witness GFA to establish that the decision could give rise to a reasonable apprehension of bias.

27. Finally, the Defence contrasts the Chamber's alleged slowness in deciding Defence motions for obtaining evidence, while tolerating the Prosecution's repeated late filing of responses to those and other motions. The pattern is not probative of bias, real or reasonably perceived. Many factors affect the timing of decisions. The Defence's attempt to show bias based upon a statistical analysis of the time required to render decisions of a particular type, or because two decisions were rendered before the Defence was given an opportunity to reply, is misguided.

28. 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	William H. Sekule
President	Presiding Judge of Trial Chamber II

[Seal of the Tribunal]