



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

THE BUREAU

Before: Judge Arlette Ramaroson
Judge William H. Sekule
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 28 May 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON MOTION FOR DISQUALIFICATION OF JUDGES

The Office of the Prosecutor

Barbara Mulvaney
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as the Bureau, composed of Judge Arlette Ramaroson, Vice-President of the Tribunal, Judge William H. Sekule, Presiding Judge of Trial Chamber II and Judge Khalida Rachid Khan, Presiding Judge of Trial Chamber III, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence (the “Rules”);

NOTING the President’s Memorandum ICTR/PRES/037/07 dated 23 May 2007 referring the Bagosora Defence Motion of 17 May 2007 for Disqualification of the Judges to the Bureau in accordance with Rule 15 of the Rules;

BEING SEIZED of “Bagosora Defence Motion to Disqualify Trial Chamber I”, filed on 17 May 2007 (the “Motion”);

CONSIDERING the “Prosecutor’s Response to Bagosora Defence Motion filed 17 May 2007 Requesting Disqualification of Trial Chamber I”, filed on 22 May 2007;

CONSIDERING the “Bagosora Defence Reply to Prosecution Response”, filed on 24 May 2007;

HEREBY DECIDES the Motion.

INTRODUCTION

1. Théoneste Bagosora requests the disqualification of all three judges hearing his trial, Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov on the basis of actual bias, or, alternatively, a reasonable apprehension of bias pursuant to Rule 15 of the Rules.

2. Pursuant to Rule 23 (A), the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers. Judge Erik Møse, normally a member of the Bureau in his capacity as President of the Tribunal and Presiding Judge of Trial Chamber I, has recused himself from consideration of the current Motion. The Bureau is therefore presently composed of Judges Arlette Ramaroson, Vice-President of the Tribunal, William H. Sekule, Presiding Judge of Trial Chamber II, and Khalida Rachid Khan, Presiding Judge of Trial Chamber III.

SUBMISSIONS

3. The Accused submits that decisions issued within the past six months consistently and uniquely favour the Prosecution, refuse to consider his submissions, fail to provide a legal basis for their conclusions, and are timed to prejudice the Accused such that they show actual bias or give rise to a reasonable apprehension of bias on the part of the Chamber, which ought to result in disqualification.

4. In addition, the Accused submits that certain decisions expose the Trial Chamber’s pre-disposition regarding the guilt of the Accused such that the only course of action to avoid mistrial is dismissal of the Bench.

5. The Prosecution opposes the Motion on the basis that the Accused’s failure to persuade the Court is no evidence of bias. The Prosecution submits that the Accused has not demonstrated any actual or reasonably apprehended bias on the part of the Trial Chamber and has not pointed to any decision which was reached by anything other than a proper

process of legal reasoning. The Accused is simply dissatisfied with various rulings and asserts that the Trial Chamber's failure to rule in his favour amounts to judicial bias. Such an argument falls a long way short of displacing the presumption of judicial impartiality.

DELIBERATIONS

6. Rule 15 (A) provides that a Judge may not “sit 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”. This provision has been interpreted broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.¹ The requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias.² An appearance of bias is established if (a) 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; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.³

7. 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.”⁴ Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.⁵ 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.⁶

¹ *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 8 (citing *Prosecutor v. Blagojević et al.*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15 (B) (Bureau), 19 March 2003, para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-I, Determination of the Bureau Pursuant to Rule 15 (B) (Bureau), 20 February 2002, paras. 9-11; & *Prosecutor v. Nahimana et al.*, T. 19 September 2000 p. 6).

² *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment (AC), 21 July 2000, paras. 181-88. See also *Prosecutor v. Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, paras. 9-14.

³ *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

⁴ *Furundžija*, Judgment (AC), 21 July 2000, para. 195 (quoting *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart)); *Brđanin and Talić*, Decision on Application by Momir Talić 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; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9.

⁵ *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (citing *Furundžija*, Judgment (AC), 21 July 2000, para. 185). See also *Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71: “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”.

⁶ This “objective test” has, in substance, been adopted in a number of decisions before this Tribunal: *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 9; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 9; *Prosecutor v. Nzirorera et al.*, Re. Application for the Disqualification of Judge Mehmet Güney (Bureau), 26 September 2000, paras. 8-9; *Prosecutor v. Nahimana et al.*, Oral Decision (TC), T. 19 September 2000, p. 10; *Nyiramasuhuko and Ntahobali*, Determination of the Bureau in Terms of Rule 15 (B) (Bureau), 7 June 2000, p. 5; *Prosecutor v. Kabiligi*, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction (TC), 4 November 1999, para. 8.

8. The Bureau recalls that 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, and that the moving party bears the burden of displacing this presumption.⁷

9. The Bureau notes that the Motion does not allege that any interest or association of the Judges gives rise to an apprehension of bias. Rather, it is argued that erroneous legal rulings rendered by the Chamber over the past six months reveal a pattern of bias, actual or reasonably apprehended, against the Accused.

10. With respect to the issue of bias as evidenced through Chamber's decisions, the Bureau held in *Blagojević* that although it "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."⁸ 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.⁹

11. The Bureau notes that the submissions of the Accused are, in large part, aimed at the merits of the challenged decisions. To the extent that the Accused appears to be seeking appellate review or reconsideration of the challenged decisions on the basis of alleged errors of law or abuse of discretion, the Bureau reiterates that this is inappropriate pursuant to the jurisprudence discussed above. The Bureau will now examine the challenged decisions in turn.

a) Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana pursuant to Rule 68

12. The Accused submits that the Trial Chamber's refusal to order the production of this evidence hindered his capacity to present his defence, and is evidence of the Trial Chamber's actual or "latent" bias against the Accused. The use of the term "latent" bias throughout the Motion suggests some confusion on behalf of the Accused. The Bureau stresses that the

⁷ *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (quoting *Prosecutor v. Delalić*, Judgment (AC), para. 707). The reason for this threshold is that while any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice were judges to be disqualified on the basis of unfounded and unsupported allegations of apparent bias. *See id.*: "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."

⁸ *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15(B) (Bureau), 19 March 2003, para. 14.

⁹ *See e.g., Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant"); *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13.

objective test does not purport to detect any subjective “latent” bias, but rather to determine whether a reasonable person, properly informed, would reasonably apprehend bias.¹⁰

13. The Accused alleges that three recent decisions addressing disclosure and investigations concerning the assassination of President Habyarimana show bias or suggest a reasonable apprehension of bias.¹¹ The Accused argues that the assassination of President Habyarimana is the acknowledged trigger of the massacres and therefore essential to the Prosecution’s conspiracy charge and, more generally, informs and underscores its entire case. Therefore, the Accused submits, evidence of the identity of the persons involved in shooting down the President’s plane is potentially exculpatory pursuant to Rule 68 of the Rules and of direct relevance to his defence. The Accused argues that, in each of the decisions, the Trial Chamber failed to consider its submissions on the centrality of this event to the case.

14. The Bureau has reviewed the decisions and finds that the Trial Chamber addressed the Accused’s submissions regarding the relevance of the identity of the President’s assassins to the case. The Trial Chamber has consistently found that: (i) none of the Accused is charged with the assassination of President Habyarimana; (ii) the Prosecution led no direct evidence on this issue; (iii) the issue is collateral; and (iv) evidence of the identity of the President’s assassins does not tend to make any of the allegations against the Accused more or less likely.¹² Indeed, the Trial Chamber also addressed these arguments in four decisions issued prior to those challenged here.¹³ To the extent that the Accused submits that the sheer number of decisions rendered against his position on this issue somehow suggests bias, the Bureau notes that where a single issue has been the subject of multiple decisions, the consistency of the Trial Chamber’s position cannot be the basis for a finding of bias or the appearance thereof.

15. The Accused submits that the timing of the 17 October 2006 “Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana” demonstrates actual bias against the Accused, or supports finding a reasonable apprehension of bias because it was not issued until almost one year after the Motion was filed. The Accused suggests that this shows bias because if the Trial Chamber had decided to grant his request, then the Prosecution would have had very little time to investigate and search for relevant documents before the end of the trial, which was coming to a close. The Bureau is not persuaded by this wholly speculative argument. The Accused suggests, but does not show, prejudice. Even a showing of actual prejudice, without more, would be insufficient to

¹⁰ *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

¹¹ The three decisions are: *Bagosora et al.*, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006; *Bagosora et al.*, Decision on Request for Certification of Appeal on Disclosure and Investigations Concerning the Assassination of President Habyarimana, 12 December 2006; *Bagosora et al.*, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests, 18 April 2007.

¹² *Bagosora et al.*, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006, para. 2 (referring to four prior decisions addressing the issue of the relevance of evidence concerning the assassination of President Habyarimana to this trial, and quoting its extensive discussion of this issue from its earlier “Decision on Request for Subpoenas of United Nations Officials (TC)”, 6 October 2006, paras. 12-18, which lays out Trial Chamber I’s consistent reasoning on this matter); *Bagosora et al.*, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests (TC), 18 April 2007, para. 19.

¹³ *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 5; *Bagosora et al.*, Decision on Request for Cooperation of the Government of France (TC), 6 October 2006, paras. 3-6; *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, paras. 6-7.

show bias.¹⁴ The Bureau recalls that “many factors affect the timing of decisions” and, in the instant case, finds no evidence that the timing of the Decision demonstrates partiality on the part of the Trial Chamber.¹⁵

16. Finally, the Accused submits that the 12 December 2006 “Decision on Request for Certification of Appeal on Disclosure and Investigations Concerning the Assassination of President Habyarimana” contains evidence of actual bias by the use of language which suggests that a conviction and appeal are foregone conclusions. In denying the Accused’s request for certification, Trial Chamber I stated:

Certification of an interlocutory appeal on these matters would not materially advance the proceedings; on the contrary, it would draw the Appeals Chamber into an unwarranted and premature review of the evidence, which is best reserved for the appeal from the final judgment.¹⁶

17. The Bureau recognises that, taken in isolation, the phrasing of the final clause of the selected quotation is vague and open to misinterpretation, but does not accept that this proves or even suggests that the Trial Chamber is pre-disposed to believe that the Accused will be convicted. Despite the suggestion that there is more than one extract from these decisions showing evidence of actual bias, the above-quoted passage is the only extract the Accused brought to the Bureau’s attention. This isolated remark found in a single decision does not show actual bias or give rise to a reasonable apprehension of bias. Moreover, the Bureau notes that the denial of the request for certification was based on application of the relevant law and assessment of the relevant facts and, thus, does not show bias or give rise to a reasonable apprehension of bias.

b) Request for Exclusion of Bagosora Agenda

18. The Accused submits that three recent decisions related to the admission of a set of photocopied pages alleged to contain his handwriting, known as the “Bagosora agenda”, show actual bias or would lead a reasonable observer to apprehend bias.¹⁷ The Accused recalls that he objected to the admission of the “Bagosora agenda” on the basis that the original, complete agenda has never been disclosed, and that the photocopies admitted into evidence contain marks of tampering and falsification. He submits that the Trial Chamber’s refusal to both order the production of the original agenda and exclude the photocopied extracts shows bias or gives rise to a reasonable apprehension of bias.

19. Regarding the 11 April 2007 “Decision on Bagosora Motion for Disclosure of Agenda”, the Accused submits that the Trial Chamber’s deference to the Prosecution’s claim that it is not in possession of the entire Agenda demonstrates actual bias against the Accused. Alternatively, it gives rise to a reasonable apprehension of bias by creating a belief that the Chamber will accept the bald assertions of the Prosecution, notwithstanding contrary evidence. The Bureau notes that, in reaching its conclusion, the Trial Chamber considered the submissions of the parties and the relevant evidence concerning the issue, including a

¹⁴ Cf., *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; “what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant”).

¹⁵ *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 27.

¹⁶ *Bagosora et al.*, Decision on request for certification of appeal on disclosure and investigations concerning the assassination of President Habyarimana (TC), 12 December 2006, para 4.

¹⁷ These decisions are: *Bagosora et al.*, Decision on Bagosora Motion for Disclosure of Agenda (TC), 11 April 2007; *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007; *Bagosora et al.*, Decision on Request for Certification or Reconsideration Concerning the “Bagosora Agenda” (TC), 8 May 2007.

clarification the Chamber requested from the Prosecution.¹⁸ The Bureau finds nothing in the Decision that demonstrates actual bias or would give rise to a reasonable apprehension of bias.

20. Turning to the 11 April 2007 “Decision on Bagosora Motion to Exclude Photocopies of Agenda”, the Accused alleges that the failure of the Trial Chamber to address his concerns regarding the admission of evidence bearing marks of falsification gives rise to a reasonable apprehension of bias. The Bureau does not accept the contention that the Trial Chamber failed to address the Accused’s submissions regarding falsification. Noting the distinction between the admissibility of evidence and the weight ultimately attached to it, the Trial Chamber found that the Accused’s allegations were relevant to the weight to be attached to the photocopies of the Agenda and would be considered when the Chamber evaluates the evidence as a whole. However, his submissions did not impact admissibility, which was based on the testimony of a handwriting expert.¹⁹ The Bureau considers that this Decision does not give rise to a reasonable apprehension of bias.

21. The Accused submits that the Trial Chamber’s refusal to reconsider the merits of his arguments regarding the Agenda in connection with his request to reconsider or certify its decisions regarding the Agenda displays bias or gives rise to a reasonable apprehension thereof. The Accused further submits that the timing of the decision itself displays bias. As the Bureau noted above, the Trial Chamber’s consistency on an issue that is the subject of repetitive motions cannot give rise to a reasonable apprehension of bias. With respect to the alleged inconvenient timing of this Decision, the Bureau finds no evidence that it demonstrates partiality on the part of the Judges.²⁰

c) Request to Exclude Testimony Adduced in Relation to Immigration Documents

22. The Accused submits that the 30 April 2007 “Decision on Bagosora Motion to Exclude Testimony Relating to Immigration Documents” reinforces the reasonable apprehension of bias by continuing the trend of decisions which ignore the Accused’s submissions and consequently favour the Prosecution. The Bureau notes that the Accused does not specify which, if any, of his arguments were ignored, but rather seek to reargue the merits. As noted above, the Bureau’s role is not to review or reconsider the Trial Chamber’s decisions for possible error, but rather to determine if the decision demonstrates actual bias or gives rise to a reasonable apprehension of bias. The Bureau concludes that the Trial Chamber considered the submissions of the parties, and the Decision was rendered on the basis of applicable law and assessment of relevant facts; it does not suggest actual bias against the Accused or give rise to a reasonable apprehension thereof.

d) Request to Admit Evidence from Witness B-06

23. The Accused submits that the Trial Chamber’s Decision, which refused to admit into evidence the written statement of Witness B-06, continued the trend of negative outcomes for the Accused, and increased the likelihood of a reasonable apprehension of bias as perceived by an informed observer.²¹ In addition to re-arguing the merits of the Motion, the Accused submits that the Trial Chamber refused to consider his explanations as to why he had not sought admission of Witness B-06’s statement at an earlier stage of the proceedings.

¹⁸ *Bagosora et al.*, Decision on Bagosora Motion for Disclosure of Agenda (TC), 11 April 2007, paras. 5 - 8.

¹⁹ *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, paras. 5-6.

²⁰ *Cf.*, *Karemera et al.*, Decision on Motion by Nzirerera for Disqualification of Trial Judges, 17 May 2004, para. 27.

²¹ *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness B-06, 3 April 2007.

According to the Accused, these explanations were submitted in his Reply to the Prosecution Response. The Accused fails to mention that the Reply was filed on 31 March 2007, nearly three weeks after it was due. The Bureau notes that the Trial Chamber provided a reasoned opinion in support of its conclusion based on assessment of the relevant facts and concludes that it does not show bias or give rise to a reasonable apprehension of bias. With regard to the alleged trend of negative outcomes, it is worth noting that on the same day that the Trial Chamber denied the request to admit the statement of Witness B-06, it granted the Accused's request to admit the statement of Witness G-10, noting the importance of G-10's statement to the Defence case.²²

24. The Accused submits that the Trial Chamber again failed to consider his explanations for the timing of his request to admit the statement of Witness B-06 when it denied his request for certification or reconsideration, and that the Trial Chamber's excessive concern for adherence to the judicial timetable in preference to preservation of the right of the Accused to a fair trial is a further example of the Trial Chamber's actual bias against the Accused. Alternatively, it gives rise to a reasonable apprehension of bias. The Bureau has reviewed the Decision and notes that the Trial Chamber denied the requests based on its finding that the Accused had not met the standard for certification to appeal or the standard for reconsideration.

25. Thus, the Bureau considers that these decisions do not show actual bias. Neither do they give rise to a reasonable apprehension of bias.

e) Request for Suspension of Proceedings and Exclusion of Evidence Falling Outside the Indictment

26. The Accused's submissions related to this section and the following section principally arise from the Trial Chamber's 2 May 2007 "Decision on Bagosora Motion for Additional Time for Closing Brief and On Related Matters". The Accused takes no issue with the first part of the Decision, which grants its second request for an extension of time to file its closing brief. Rather the Accused submits that the Trial Chamber's statements regarding other related matters suggest bias. The first of these statements concerns the Accused's pending request for suspension of proceedings. The Trial Chamber noted that its 13 March 2007 Decision granting the Accused's first request for an extension of time to file his closing brief²³ "made it unnecessary to rule on a Bagosora request to suspend proceedings pending decisions on certain motions".²⁴

27. The Accused submits that the Trial Chamber's conclusion that it need not rule on Bagosora's request to suspend proceedings because it had granted the Accused an extension of time to file its closing brief denied the Accused his right to a reasoned opinion. The Accused also submits that not all of the pending motions that were the basis of its request to suspend proceedings had been decided as of 2 May 2007 when the Trial Chamber stated that it considered a ruling on the suspension motion unnecessary. Thus, the Accused submits that this ruling contributes to a reasonable apprehension of bias by creating a perception that not only will the Trial Chamber refuse to consider the submissions of the Accused, in some cases it will refuse to rule at all. The Bureau finds unconvincing the Accused's suggestion that, having twice granted him additional time to file his closing brief, the Trial Chamber

²² *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness G-10 (TC), 3 April 2007, paras. 4-5.

²³ *Bagosora et al.*, Decision on Bagosora Motion Concerning Scheduling of its Closing Brief (TC), 13 March 2007.

²⁴ *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007, para. 4.

displayed actual or reasonably perceived bias against him by refusing to rule on the motion to suspend proceedings.

28. One of the pending motions that provided the basis for the Accused's request for suspension was a request for exclusion of evidence. The Decision on this motion was rendered on 11 May 2007.²⁵ The Accused submits that the timing of this Decision - which was rendered nearly one year after the underlying motion was filed and three days before the due date for filing of his closing brief - made any meaningful consideration of its contents impossible before the filing of his closing brief. It is submitted that this gives rise to a reasonable apprehension of bias against the Accused. The Bureau reiterates that many factors affect the timing of decisions and finds no evidence that the timing of the Decision demonstrates any partiality on the part of the Trial Chamber.²⁶ Moreover, a showing of possible prejudice to the Accused is not sufficient, of itself, to show bias, actual or reasonably apprehended.²⁷

f) Request to Hear Testimony of Witness Gatsinzi and for Enforcement of Outstanding Subpoena

29. The 2 May 2007 "Decision on Bagosora Motion for Additional Time for Closing Brief and On Related Matters" also addressed the issue of a pending subpoena against General Marcel Gatsinzi, explaining in brief the history of this issue and noting that General Gatsinzi was unwilling to testify as a witness for the Accused in Arusha and that the Chamber could "do nothing more at this time."²⁸ The Accused submits that the Trial Chamber's refusal to come to a decision on his outstanding motion for enforcement of the subpoena against General Gatsinzi represents total avoidance of its fundamental duties and notes that the 2 May 2007 Decision is unsupported by any legal authority.²⁹ The Bureau notes that the Accused disagrees with the Trial Chamber's Decision but reiterates that an error of law, if any, is not sufficient to show actual bias or give rise to a reasonable apprehension of bias.³⁰ The Bureau finds nothing in the Decision that could lead an independent observer to conclude that the Trial Chamber is pre-disposed against the Accused.

g) Request for Admission into Evidence of Rwandan School Archives

30. The Accused alleges that the Trial Chamber's refusal to admit into evidence Rwandan school archives relating to Prosecution Witness ABQ,³¹ and its refusal to

²⁵ *Bagosora et al.*, Decision on Bagosora Motion for the Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007.

²⁶ *Cf.*, *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges (Bureau), 17 May 2004, para. 27.

²⁷ *Cf.*, *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant").

²⁸ *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007, paras. 5, 7.

²⁹ *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007.

³⁰ *See e.g.*, *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant"); *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13.

³¹ *Bagosora et al.*, Decision on Bagosora Defence Request for Admission of Documents (TC), 21 March 2007.

reconsider or certify this Decision for appeal,³² demonstrate actual bias against the Accused. Alternatively, they create a reasonable apprehension of bias by giving rise to the perception that the Trial Chamber will refuse to consider unavoidable delays in cooperation from sovereign states as sufficient justification for alleged 'late' filings. The Accused further submits that the Trial Chamber's refusal to alter judicial deadlines, even where they may impact the fairness of the proceedings, creates a reasonable apprehension of bias. The Bureau has reviewed the relevant decisions and notes that, in reaching its conclusion, the Trial Chamber considered the submissions of the Accused regarding timeliness, but noted that: (i) Witness ABQ's credibility had been at issue since 2004, (ii) the Accused did not seek the documents until November 2006, and (iii) the Accused did not establish that he had sought to obtain them from Rwandan authorities prior to that time. The Bureau considers that nothing in this Decision demonstrates any actual bias or gives rise to a reasonable apprehension of bias.

CONCLUSION

31. Decisions are rendered on a case by case basis and form part of the inherent discretion and duty of Trial Chambers to control the proceedings in order to ensure a fair and expeditious trial.³³ The Accused has failed to demonstrate that, in rendering the decisions challenged herein, the Judges were animated by any concern other than the relevant legal issues. Neither have the submissions established any trend suggesting a pre-disposition against the Accused. Accordingly, the Bureau finds no evidence of actual bias against the Accused and finds that an objective observer, fully apprised of the relevant circumstances, would not apprehend bias in the instant case.

FOR THE ABOVE REASONS, THE BUREAU

DENIES the Motion.

Arusha, 28 May 2007

Arlette Ramaroson
Vice-President

William H. Sekule
Presiding Judge, Trial
Chamber II

Khalida Rachid Khan
Presiding Judge, Trial
Chamber III

[Seal of the Tribunal]

³² *Bagosora et al.*, Decision on Bagosora Request for certification or reconsideration concerning admission of school documents (TC), 9 May 2007.

³³ *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges (Bureau), paras. 5, 16, 24, 27 (finding, in response to allegations of unequal treatment, that apparently different outcomes reflect the Chamber's view on the merits of the matters before it).