

ICTR-98-44-T  
27-2-2008  
(34104-34101)

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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 27 February 2008

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**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR DISQUALIFICATION OF  
JUDGES BYRON, KAM AND JOENSEN**

*Rule 15 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Don Webster  
Alayne Frankson-Wallace  
Iain Morley  
Saidou N'Dow  
Gerda Visser  
Sunkarie Ballah-Conteh  
Takeh Sendze

**Defence Counsel for Édouard Karemera:**  
Dior Diagne Mbaye and Félix Sow

**Defence Counsel for Mathieu Ngirumpatse:**  
Chantal Hounkpatin and Frédéric Weyl

**Defence Counsel for Joseph Nzirorera:**  
Peter Robinson and Patrick Nimy Mayidika Ngimbi

1. The seventh trial session in this case is scheduled to begin on 10 March 2008. Joseph Nzirorera moves the Judges of this Chamber to voluntarily disqualify themselves from his trial for lack of impartiality.<sup>1</sup> Should the Judges decline to do so, he requests that the matter be referred to the Bureau.<sup>2</sup> The Prosecution opposes the Motion, contesting any basis for apprehending bias on the part of the Chamber.<sup>3</sup>
2. Joseph Nzirorera submits that the Chamber's receipt of, acceptance of, and failure to disclose *ex parte* submissions by the Prosecution, one of which contains allegations of improper conduct by the Defence,<sup>4</sup> demonstrates both actual bias and the appearance of bias.<sup>5</sup> He contends that his inability to learn of and respond to such allegations runs contrary to the precepts of a fair trial.<sup>6</sup>
3. The Chamber has previously expressed its view that the law on the admission of *ex parte* filings is clear and guarantees the rights of each party.<sup>7</sup> When adjudicating on a motion filed *ex parte*, the Chamber has considered as a preliminary matter whether the *ex parte* nature of the filing is appropriate.<sup>8</sup> As such, if a decision is rendered pursuant to an *ex parte* application and does not order the re-filing of such application as *inter partes*, then the matter of having filed the application *ex parte* becomes settled in the exercise of judicial discretion.<sup>9</sup>
4. Rule 15 (A) of the Rules of Procedure and Evidence 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". The requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of

<sup>1</sup> Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen, filed 8 February 2008 ("Nzirorera's Motion"). See also Reply Brief: Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen, filed 15 February 2008 ("Nzirorera's Reply").

<sup>2</sup> *Ibid.*

<sup>3</sup> Prosecutor's Response to Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, filed 13 February 2008 ("Prosecutor's Response").

<sup>4</sup> Joseph Nzirorera refers to the Prosecutor's Confidential and *Ex Parte* Motion to Withhold Disclosure of E-Mail Correspondence pursuant to Rule 66(C) – Witness AMA, filed 26 November 2007.

<sup>5</sup> Nzirorera's Motion, para. 33.

<sup>6</sup> Nzirorera's Motion, para. 15; Nzirorera's Reply, para. 15.

<sup>7</sup> *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Defence Motion for an Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion (TC), 30 May 2006, para. 4.

<sup>8</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008, para. 5.

<sup>9</sup> *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva* ("Bagosora et al."), Case No. ICTR-98-41-T, Decision on *Ex Parte* Motion (TC), 10 November 2004, where the content of an *ex parte* application was not considered because the *ex parte* nature of the filing was deemed inappropriate.

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bias.<sup>11</sup> 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.<sup>12</sup> Moreover, Rule 15 has been interpreted broadly to permit any ground of impartiality to be raised as a basis for disqualification.<sup>13</sup> Judicial decisions alone almost never constitute a valid basis for alleging bias or the appearance thereof.<sup>14</sup> They are almost invariably grounds for appeal, not for recusal, unless they display a deep-seated favouritism or antagonism that would make a fair judgement impossible.<sup>15</sup>

5. Joseph Nzirorera's failure to persuade the Chamber to disclose *ex parte* submissions to him is no evidence of bias. His dissatisfaction with the Chamber's decisions<sup>16</sup> is limited to what he interprets to be errors of law. Joseph Nzirorera has not offered any evidence or argument to show that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against him, 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.

#### FOR THE ABOVE REASONS,

We, the Judges of this Chamber, have decided not to recuse ourselves from the trial of Joseph Nzirorera and, accordingly, refer the matter to the Bureau for its consideration.

<sup>11</sup> *The Prosecutor v. Anto Furundžija*, Judgment (AC), 21 July 2000, paras. 181-88.

<sup>12</sup> *Ibid.*, para. 189.

<sup>13</sup> See e.g. *Bagosora et al.*, Determination of the Bureau Pursuant to Rule 15 (B), 20 February 2002, paras. 9-11; *The Prosecutor v. Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 8.

<sup>14</sup> See e.g. *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Trial Judges (Bureau), 17 May 2004, para. 12, citing United States Supreme Court judgement *Liteky v. United States*, (1994) 510 U.S. 540, 555. See also Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 13.

<sup>15</sup> *Ibid.*

<sup>16</sup> The impugned decisions are *Karemera et al.*, Decision on Defence Motion for an Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion (TC), 30 May 2006; Decision on Motions to Disclose a Prosecution Witness Statement and to Unseal Confidential Documents, 25 October 2006; Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials, 18 January 2008.

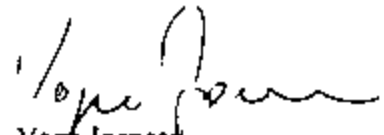
Arusha, 27 February 2008, done in English.



Dennis C. M. Byron  
Presiding Judge



With the consent and behalf  
of  
Gberdao Gustave Kam  
Judge  
(Absent during signature)



Vagh Joensen  
Judge

[Seal of the Tribunal]

