

ICTR-98-44-T
7-3-2008
(34184 -34178)

34184
Hm



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

THE BUREAU

Before: Judge Khalida Rachid Khan
Judge William H. Sekule
Judge Erik Møse

Registrar: Mr. Adama Dieng

Date: 7 March 2008

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED
UNICTR

1 2008 MAR - 7 P 1:50
[Handwritten signature]

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

Office of the Prosecutor:

Mr. Don Webster
Ms. Alayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow
Ms. Sunkarie Bailah-Conteh
Mr. Takeh Sendze

Defence Counsel for Joseph Nzirorera

Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi

[Handwritten signature]

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as the Bureau, composed of Judges Khalida Rachid Khan, William H. Sekule, and Erik Møse, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence (the "Rules");

NOTING the Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, filed 27 February 2008;

NOTING the President's Internal Memorandum dated 27 February 2008, referring Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron, Kam, and Joensen to the Bureau in accordance with Rule 15 (B) of the Rules;

BEING SEIZED of "Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen", filed on 8 February 2008 (the "Motion");

CONSIDERING the "Prosecutor's Response to Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen", filed on 13 February 2008 (the "Response");

CONSIDERING the "Reply Brief: Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen", filed on 15 February 2008 (the "Reply");

HEREBY DECIDES the Motion.

INTRODUCTION

1. Pursuant to Rule 23 (A), the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers. Judge Dennis C.M. Byron, President of the Tribunal, has recused himself from consideration of the current Motion. The Bureau is therefore presently composed of Judges Khalida Rachid Khan, Vice-President of the Tribunal and Presiding Judge of Trial Chamber III, William H. Sekule, Presiding Judge of Trial Chamber II, and Erik Møse, Presiding Judge of Trial Chamber I.

2. The Defence for Joseph Nzirorera (the "Defence") requests that the Bureau disqualify Judges Byron, Kam, and Joensen from the proceedings in the *Prosecutor v. Karemera et al.* The Defence submits that they should be disqualified on the basis of "actual bias and the appearance of bias" pursuant to Rule 15 of the Rules arising from their receipt of and failure to disclose *ex parte* communications from the Prosecution alleging misconduct by the defence.¹

3. The Prosecution opposes the Motion, and submits that there is "no basis for apprehending bias" on the part of the three Judges.²

¹ Motion, para. 1.

² Response, para. 1.

DISCUSSION

The Law on Judicial Disqualification as a Result of Actual or Apprehended Bias

4. 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 to permit any allegation of bias to be raised before the Bureau as a basis for disqualification.³ The requirement of impartiality is violated not only where a Judge is actually biased, but also where there is an appearance of bias.⁴ 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.⁵

5. 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 While the viewpoint of the accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.⁷ 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.⁸

³ *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).

⁴ *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.

⁵ *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

⁶ *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.

⁷ See e.g., *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (citing *Furundžija*, Judgment (AC), 21 July 2000, para. 185).

⁸ This "objective test" has, in substance, been adopted in a number of decisions before this Tribunal: *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion to Vacate Decisions and for Disqualification for Judges Byron and Kam (Bureau), 14 June 2007, para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disqualification of Judges (Bureau), 28 May 2007, para. 7; *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.



6. 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 this presumption, which has been described by the Appeals Chamber as imposing a "high threshold".⁹ The reason for this high threshold is that while any real or apparent 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 if judges were to be disqualified on the basis of unfounded and unsupported allegations of bias.¹⁰ As noted by the Appeals Chamber:

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.¹¹

7. With respect to the issue of bias as evidenced through a Trial 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."¹² Where allegations of bias are made on the basis of a Trial Chamber's decisions, the Bureau's obligations are well-established:

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.¹³

The Trial Chamber's Receipt of and Failure to Disclose Ex Parte Communications

8. The Defence does not allege that any interest or association of the Judges gives rise to an apprehension of bias. Rather, it requests that the Judges be disqualified from the *Karemera et al.* proceedings "as a result of actual bias and the appearance of bias arising from their receipt of and failure to disclose secret communications from the prosecution alleging

⁹ *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (quoting *Prosecutor v. Delalić*, Judgment (AC), para. 707).

¹⁰ See *Ibid.*

¹¹ *Delalić*, Judgment (AC), para. 707 (quoting *Re: JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Aus)).

¹² *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15(B) (Bureau), 19 March 2003, para. 14.

¹³ 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.

misconduct by the defence."¹⁴ The Defence bases its claim on three Trial Chamber decisions denying Defence requests for disclosure of *ex parte* filings by the Prosecution.¹⁵

9. The Bureau notes that in the three decisions brought to its attention by the Defence, as well as in other decisions involving *ex parte* filings and issues of disclosure referred to in the Prosecution's Response, the *Karemera et al.* Trial Chamber consistently applied relevant legal principles to *ex parte* filings by both the Prosecution and the Defence.¹⁶ The Trial Chamber explained these principles in detail in its 18 January 2008 Decision:

As a general rule, motions must be filed *inter partes*. Rule 73(E) contemplates the filing of motions *inter partes*, giving a "responding party" five days from the receipt of the motion to reply. However, *ex parte* applications may be necessary when they respond to the interests of justice and when the disclosure to the other party of the information contained in the application would likely prejudice the persons related to the application. When a Trial Chamber renders a decision on an *ex parte* application, as a preliminary matter it considers whether the *ex parte* nature of the filing is appropriate.¹⁷

10. In addition, two of the three decisions mentioned in the Defence Motion concern sub-Rules 66 (C) and 68 (D) of the Rules,¹⁸ which explicitly authorize Trial Chambers to consider, *in camera* and *ex parte*, materials "sought to be kept confidential" by the Prosecution. Where the Chamber is convinced that the disclosure of such materials "may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State", the Chamber may relieve the Prosecution from its disclosure obligations under sub-Rules 66 (A) and (B), and sub-Rule 68 (A), respectively.

11. The Bureau finds nothing in the Defence motion to suggest that the Trial Chamber's decisions were "not genuinely related to the application of law." Moreover, in the case of the two decisions involving sub-Rules 66 (C) and 68 (D), the Bureau finds that the non-disclosure of which the Defence complains is expressly contemplated by their plain language.

12. To the extent that the Defence argues that the Trial Chamber's persistence in denying his requests for disclosure somehow shows bias, the Bureau reiterates that a Trial Chamber's

¹⁴ Motion, para. 1.

¹⁵ Motion, paras. 2-8. The three 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 (TC), 25 October 2006; Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008.

¹⁶ See e.g., *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, paras. 3-4 (citations omitted); Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008, para. 5; see also Decision on Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, para. 6.

¹⁷ *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.

¹⁸ *Karemera et al.*, Decision on Motions to Disclose a Prosecution Witness Statement and to Unseal Confidential Documents (TC), 25 October 2006; Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008.



consistency on an issue that is the subject of repetitive motions cannot be the basis for a finding of bias and does not give rise to a reasonable apprehension of bias.¹⁹

13. The gist of the Defence complaint involves the Trial Chamber's handling of a Prosecution request to withhold disclosure of correspondence with a witness alleging tampering by persons possibly associated with one of the defence teams. The Prosecution application, based on sub-Rule 66 (C), sought to withhold disclosure of the correspondence alleging defence misconduct on the basis of ongoing investigations and the fears of the witness involved, reasons which fall squarely within the province of that sub-Rule. In the Bureau's view, the fact that the Trial Chamber considered the Prosecution application on the basis of relevant legal principles cannot, as a matter of law, show actual bias or give rise to a reasonable apprehension thereof.²⁰

14. The Bureau does not find the Defence's comparison with the disqualification of the first *Karemera et al.* Trial Chamber convincing. In that instance, one of the Judges had an association with a member of the Prosecution team which she did not disclose.²¹ The other Judges were aware of the association and acquiesced in continuing the trial.²² Here, the challenged non-disclosures resulted from the application of laws that expressly allow for non-disclosure under specific circumstances, and the Defence has not shown that these rulings are, or could reasonably be perceived as attributable to bias against the Defence.

15. The Defence has failed to demonstrate that, in rendering decisions on *ex parte* filings, the Judges showed a pre-disposition against it, or were concerned with anything other than the relevant legal issues. Therefore, the Bureau finds no evidence of actual bias against the Defence and finds that an objective observer, fully apprised of the relevant circumstances, would not apprehend bias in this case.

¹⁹ *Prosecutor v. Bagasora et al.*, Decision on Motion for Disqualification of Judges (Bureau), 28 May 2007, paras. 14, 21.

²⁰ The Trial Chamber ultimately decided that the correspondence in question did not qualify as a witness statement, and therefore was not subject to disclosure pursuant to sub-Rule 66 (A), and, by extension, would not qualify for a request for non-disclosure under sub-Rule 66 (C). Moreover, the Chamber noted that the witness in question was never called to testify on behalf of the Prosecution. On these bases, the Trial Chamber ruled that the Prosecution application was moot. *Karemera et al.*, Decision on the Confidential and Ex Parte Prosecution Motion to Withhold Disclosure of E-mail Correspondence Concerning Witness AMA, 19 December 2007, paras. 3 - 5. The Bureau notes that the Defence does not suggest that this decision was based on anything other than the application of law.

²¹ *Karemera et al.*, Case No. ICTR-98-55-AR15bis.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004, para. 67.


²² *Ibid.*, para. 69.

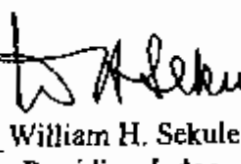
Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case No. ICTR-98-44-T

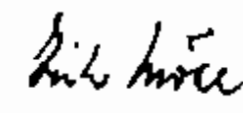
FOR THESE REASONS, THE BUREAU

DENIES the Motion.

Arusha, 7 March 2008


Khalida Raafid Khan
Vice-President;
Presiding Judge,
Trial Chamber III


William H. Sekule
Presiding Judge,
Trial Chamber II


Erik Mose
Presiding Judge,
Trial Chamber I

[Seal of the Tribunal]

