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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, Presiding

Registrar: Mr. Adama Dieng

Date: 20 February 2009

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON JOSEPH NZIRORERA'S MOTION FOR DISQUALIFICATION OF JUDGE BYRON AND STAY OF PROCEEDINGS

Office of the Prosecutor:
Mr. Don Webster
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

Defence Counsel for Joseph Nzirorera
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. Pursuant to Rule 15 of the Rules of Procedure and Evidence,[1] the Defence for Joseph Nzirorera ("Defence") requests that Judge Khalida Rachid Khan, as Presiding Judge of Trial Chamber III, disqualify President Byron from participation in consideration of the issue of whether Mathieu Ngirumpatse's case should be severed from the *Karemera et al.* Trial. The Defence submits that President Byron should be disqualified, as a result of actual bias and the appearance of bias arising from his role as President of the Tribunal.[2]

2. The Prosecution opposes the Motion, and submits that the Defence has failed to show that Judge Byron should be disqualified.[3]

DISCUSSION

Preliminary Matter

3. The Defence requests issuance of an order staying any proceedings in the *Karemera et al.* Trial concerning the severance of Mr. Ngirumpatse until the issue of disqualification is resolved. Such an order is beyond the scope of authority vested in the Presiding Judge of a Trial Chamber pursuant to Rule 15 (B), which authorises the Presiding Judge of a Trial Chamber to consider the issue of disqualification of a Judge in his or her Trial Chamber.

The Law on Judicial Disqualification

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.[4] The requirement of impartiality is violated not only where a Judge is actually biased, but also where there is an appearance of bias.[5] 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

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[1] Unless specified otherwise, all references to Rules in this Decision are to the Rules of Procedure and Evidence.

[2] Joseph Nzirorera's Motion for Disqualification of President/Judge Byron and Stay of Proceedings", filed on 9 February 2009, ("Motion").

[3] Prosecutor's Response to Joseph Nzirorera's Motion for Disqualification of President/Judge Byron and Stay of Proceedings, filed on 11 February 2009 ("Response").

[4] *The Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 8 (citing *The 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; *The 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; *The Prosecutor v. Nahimana et al.*, T. 19 September 2000 p. 6).

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

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.[6]

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."[7] While the viewpoint of the accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[8] 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.[9]

6. Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection enumerated in Article 12 of the Statute.[10] The moving party bears the burden of displacing this presumption, which has been described by the Appeals Chamber as imposing a "high threshold".[11] 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, so to would disqualifying Judges on the basis of unfounded allegations of bias.[12] 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

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[6] *Furundžija*, Judgment (AC), para. 189.

[7] *Furundžija*, Judgment (AC), para. 195 (citations omitted); *Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), para. 9; *The 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), para. 9.

[8] *See e.g.*, *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), para. 9 (*citing Furundžija*, Judgment (AC), para. 185).

[9] This "objective test" has, in substance, been adopted in a number of decisions before this Tribunal: *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen (Bureau), 7 March 2008, para. 5; *Karemera et al.*, Decision on Motion to Vacate Decisions and for Disqualification for Judges Byron and Kam (Bureau), 14 June 2007, para. 10; *Bagosora et al.*, Decision on Motion for Disqualifcation of Judges (Bureau), 28 May 2007, para. 7; *The 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; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 9; *The Prosecutor v. Nzirorera et al.*, Re. Application for the Disqualification of Judge Mehmet Güney (Bureau), 26 September 2000, paras. 8-9; *Nahimana et al.*, T. 19 September 2000, p. 10; *The Prosecutor v. Nyiramasuhuko and Ntahobali*, Determination of the Bureau in Terms of Rule 15 (B) (Bureau), 7 June 2000, p. 5; *The 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.

[10] Article 12 of the Statute provides that judges "shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices...."

[11] *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), para. 9 (quoting *The Prosecutor v. Delalić*, Judgment (AC), para. 707).

[12] *See Ibid.*

> disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[13]

7. With respect to the issue of bias as evidenced through a Trial Chamber's decisions, the Bureau of the International Criminal Tribunal for the former Yugoslavia 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."[14] Where allegations of bias are made on the basis of a Trial Chamber's decisions, the obligations of the reviewing judge are well-established:[15]

> 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.[16]

8. Rule 15 (B) authorizes any party to apply to the Presiding Judge of a Chamber for the disqualification of a judge of that Chamber from a case on the grounds enumerated in Rule 15 (A). After the Presiding Judge has discussed the matter with the Judge in question, he or she will render a decision on the matter.[17] Acting in my capacity as Presiding Judge of Trial Chamber III, I have discussed the matter with Judge Byron, and now turn to the merits of the Motion.

Should Judge Byron be Disqualified?

9. The Defence argues that President Byron has a conflict of interest between his role as President of the Tribunal and his role as Presiding Judge in the *Karemera et al.*

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[13] *Delalic*, Judgement (AC), para 707 (citations omitted).

[14] *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15(B) (Bureau), para. 14.

[15] These obligations were enumerated in reference to the Bureau, which consists of the President and Vice-President of the Tribunal, as well as the Presiding Judges of the three Trial Chambers. Pursuant to Rule 15 (B), the Bureau is authorised to determine issues of disqualification based on the grounds listed in Rule 15 (A). Pursuant to Rule 15 (B) and the jurisprudence of the Appeals Chamber, the Presiding Judges of the three Trial Chambers are empowered to consider disqualification of Judges in their Chamber in the first instance, and the Bureau may review their decision, as necessary. *Seromba*, Case No. ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006, para. 5. Thus, the same obligations apply to the Presiding Judges as to the Bureau when asked to determine bias as a result of the decisions of a Judge or Chamber.

[16] *See e.g., Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 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), para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), para. 13.

[17] *Seromba*, Case No. ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006, para. 5.

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Trial. In the language of Rule 15 (A), the Defence suggests that President Byron's role as President is a "personal interest" or an "association" which "might affect his impartiality."[18] It also submits that this supposed conflict of interest creates a reasonable apprehension of bias.[19]

10. The Defence does not claim that President Byron is biased or may be reasonably perceived to be biased against Mr. Nzirorera. Rather, the Defence suggests the actual bias or apprehension of bias arises only in relation to the issue of severance of Mr. Ngirumpatse's case from the *Karemera et al.* trial.

11. In support of its position, the Defence relies on President Byron's 13 October 2008 statement to the United Nations General Assembly, where he said that the Tribunal was "planning to deliver judgements in respect of 38 accused in the next 14 months."[20] The Defence claims this statement is a promise by President Byron to the United Nations that judgement in the case against Nzirorera will be delivered by the end of 2009.[21]

12. The Defence mischaracterizes President Byron's statement as a promise. This statement, like similar statements in the Completion Strategy,[22] expresses goals or target dates that the President anticipates will be met. Moreover, as the Appeals Chamber has stated, "when assessing the implications of resolution 1503 and resolution 1534 to on-going trials, the overriding consideration must be strict adherence to the minimum guarantees afforded to accused persons pursuant to Article 20 of the Tribunal's Statute."[23] The same considerations apply in the present circumstances. Nothing in President Byron's statement before the General Assembly suggests that he has failed, or may fail to strictly adhere to these guarantees. Moreover, the Defence has not otherwise shown that Judge Byron's role as President of the Tribunal, in itself, prevents him from strictly adhering to the minimum guarantees afforded to accused persons before this Tribunal.

13. The Defence submits that Judge Byron's alleged "conflict of interest has already manifested itself plainly during the trial."[24] In support of this submission, the Defence contrasts certain of the *Karemera et al.* Chamber's decisions that it claims have a bearing on the time in which the trial could be completed that were rendered before Judge Byron

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[18] Motion, paras. 7, 18, 20.
[19] *Ibid.*
[20] Motion, para. 10 (quoting Address by Judge Dennis Byron to United Nations General Assembly (13 October 2008)).
[21] Motion, para. 11.
[22] *See e.g.*, Report on the completion strategy of the International Criminal Tribunal for Rwanda, S/2008/726, 21 November 2008, ("Completion Strategy") para. 18 (noting that "Judgement delivery remains anticipated for the end of 2009" in the *Karemera et al.* trial).
[23] *Karemera et al.*, Case No. ICTR-98-44-AR15bis.3, Decision on Appeals Pursuant to Rule 15 *bis* (D) (AC), 20 April 2007, para. 24. The Appeals Chamber was referring to United Nations Security Council resolutions 1503 (2003) and 1534 (2004), which, among other things, urged this Tribunal to formalize a completion strategy and requested the President and Prosecutor of the Tribunal to report on progress in implementing the completion strategy every six months. In other words, these resolutions may be described as the sources of the Tribunal's completion strategy.
[24] Motion, para. 13.

became President of the Tribunal, with similar decisions rendered after he became President. According to the Defence, these comparisons show that Judge Byron and the Trial Chamber have become stricter with regard to decisions which may affect the time in which the trial can be completed since he became President of the Tribunal.[25]

14. In other words, the Defence argues that decisions rendered after Judge Byron became President reveal a pre-disposition to decide matters in such a way that expedites completion of the *Karemera et al.* Trial. Even if proven, it is unclear that such a pre-disposition warrants disqualification pursuant to Rule 15. Article 19 of the Statute obliges all Trial Chambers to ensure, among other things, that a trial is expeditious. Article 20 (4)(c) entitles the accused to trial without undue delay. Thus, in many instances, Judges before this Tribunal are obliged to take into account temporal concerns when deciding interlocutory motions or managing the proceedings. That the relative importance of temporal concerns may shift over the life of a case is not sufficient to show bias pursuant to Rule 15.

15. There are additional problems with the Defence's line of reasoning. Comparing decisions rendered on distinct motions to detect a pattern or change in viewpoint is troublesome, in that all decisions are made on an individual basis as a result of consideration of the particular request before a Trial Chamber. Moreover, Judge Byron did not render these decisions on his own; they were decided by the entire three judge panel. The Defence does not suggest that either Judge Kam or Judge Joensen are biased, therefore, in order to show that decisions of the *Karemera et al.* Bench are the result of bias, the Defence must be able to show how Judge Byron was able to dictate the outcome of the decisions.

16. Despite these serious reservations, I have considered the decisions in question. Without dwelling on their substance, it is sufficient to note that each decision was based on the application of law, and took into account the minimum guarantees afforded to the Accused before this Tribunal. The Defence has not shown that the decisions in question were based on a pre-disposition or personal investment in the outcome by Judge Byron resulting from his role as President of the Tribunal, or that, having read these decisions, an informed and objective observer would reasonably perceive bias on the part of Judge Byron.

17. In addition, as the Prosecution accurately observes, the logic of the Defence argument is flawed.[26] The Defence speculates that President Byron will favour severance of Mr. Ngirumpatse's case from the *Karemera et al.* Trial because, in the Defence's view, only severance is compatible with the President's purported promise to the General Assembly. But the President's statement to the General Assembly envisioned the completion of Mr. Ngirumpatse's case by the end of 2009 as well. By the Defence's logic, a decision to sever his case will require that Mr. Ngirumpatse's separate trial also be completed by the end of 2009 in order for the President to "keep" his purported promise. In any event, it is not clear that a decision to sever Mr. Ngirumpatse's case from

[25] Motion, paras. 13-17.
[26] Response, para. 12.

the *Karemera et al.* Trial would make completion of all trials by the end of 2009 any more likely than a decision not to sever his case.

18. Finally, Rule 82 (B) states that "The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice." This sub-Rule establishes a standard that any Trial Chamber must apply when considering the issue of severance. The Defence has not shown that there is a real risk that Judge Byron will not apply this standard.

19. Therefore, the Defence has failed to show that Judge Byron's role as President amounts to a personal interest or association that might affect his impartiality. Nor has it shown that an objective observer, fully apprised of the relevant circumstances, would perceive that Judge Byron was biased as a result of his role as President.

FOR THESE REASONS,

The Motion is **DENIED**.

Arusha 20 February 2009

Khalida Rachid Khan
Presiding Judge,
Trial Chamber III

[Seal of the Tribunal]