

ICTR-98-44-T
31-10-2008
(38153-38148)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Khalida Rachid Khan
Presiding Judge, Trial Chamber III

Registrar: Mr. Adama Dieng

Date Filed: 31 October 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S MOTION FOR
DISQUALIFICATION OF PRESIDENT/JUDGE BYRON

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves, pursuant to Rule 15, for the disqualification of his Presiding Judge, President Dennis C.M. Byron, from participating in the decision on the issue of severance of Mathieu Ngirumpatse from the trial.

2. Rule 15 (A) provides in pertinent part 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. He shall in any such circumstance withdraw from that case.

3. Mr. Nzirorera contends that President Byron has a conflict of interest between his role as President of the Tribunal, particularly with respect to the Completion Strategy, and his role as a judge on Mr. Nzirorera's Trial Chamber. This conflict of interest is grounds for disqualification under Rule 15 in three ways: (1) his role as President is a personal interest which might affect his impartiality; (2) his role as President is an association which might affect his impartiality; and (3) his role and statements as President, and his actions as Presiding Judge in this case, would cause a reasonable person to apprehend bias on this issue.

4. Mr. Nzirorera addresses this motion to The Honorable Khalida Rachid Khan, Presiding Judge of Trial Chamber III, pursuant to Rule 15(B). He requests that she confer with Judge Byron. After her consultation and the issuance of her decision, Mr. Nzirorera will decide whether it is necessary to appeal her decision to the Bureau.

5. In his capacity as President of the Tribunal, Judge Byron recently addressed the United Nations General Assembly. He said:

Mr. President, the Tribunal has set for itself a very high standard of performance. The workload for which we are planning is far higher than at any other period in its history. If one were to use the number of judgements delivered as a measurement standard, then the Tribunal will produce, within the next 14 months, a quantum of work almost

equivalent, and maybe exceeding, the quantum of work produced over the previous 14 years. Since 1998, 31 trial judgments involving 37 accused have been rendered. We are now planning to deliver judgments in respect of 38 accused in the next 14 months.¹

6. Thus, in effect, Judge Byron, in his capacity as President, promised the United Nations to complete Mr. Nzirorera's trial, and deliver the judgement, by December 2009.

7. Mr. Nzirorera opposes the proposed severance of Mathieu Ngirumpatse's case from their joint trial. He prefers waiting the six months or so for Mr. Ngirumpatse to regain his health to suffering the prejudice which would inure to him as a result of the severance. But to adopt this course would mean that it would not be possible for Judge Byron to keep President Byron's promise to the United Nations. Therefore, Judge Byron has a conflict of interest between his role and actions as President and that of a judge deciding the merits of the severance issue.

8. This conflict of interest has already manifested itself plainly during the trial. Before he became President, Judge Byron and the Trial Chamber put no limitations on the number of witnesses the prosecution called in its case. They allowed it to call as many witnesses as it felt it needed to prove his case and take whatever time it needed.

9. Since becoming President, Judge Byron and the Trial Chamber have issued orders drastically limiting the amount of time and number of witnesses that the defence would be allowed to call.²

10. Before becoming President, Judge Byron and the Trial Chamber allowed wide latitude to the prosecution when it did not meet the deadlines he had established.³ Now,

¹ Address by Judge Dennis Byron to United Nations General Assembly (13 October 2008). See also Report of the International Criminal Tribunal to the United Nations General Assembly (4 August 2008) at para. 32

² *Decision on Edouard Karemera's Motion to Vary his Witness List and for Extension of Protective Measures* (2 June 2008) at para. 10; *Decision on Motions for Reconsideration and Extension of Time Concerning the Presentation of Mathieu Ngirumpatse's Case* (17 September 2008) at para. 16; *Order to Joseph Nzirorera to Reduce his Witness List* (24 October 2008)

he and the Trial Chamber regularly issue severe warnings and threaten sanctions against individual members of all defence teams, for perceived late filings in relation to the defence case.⁴

11. In addition, in an effort to expedite the proceedings, acting alone during the judicial recess, Judge Byron unilaterally ordered the disclosure of the *ex parte* list of Mr. Nzirorera's witness, which he had induced the defence to file upon assurances of confidentiality.⁵ He and the Trial Chamber did the same for Mathieu Ngirumpatse.⁶

12. These facts demonstrate that Judge Byron's role as President of the Tribunal, and his duty to implement the Completion Strategy, directly conflict with his role as judge of Mr. Nzirorera's case when it comes to an issue which effects the time in which the case can be completed.

13. This conflict of interest stemming from Judge Byron's personal position as President, and his association and obligation to the United Nations with respect to the Completion Strategy, create both actual bias and the reasonable apprehension of bias when it comes to a decision on severance which will determine whether Judge Byron will act to keep President Byron's promise to the United Nations.

³ See, for example, *Oral Decision on Motion to Exclude Testimony of Alison Des Forges* (Transcript of 3 October 2005) at page 18; *Decision on Prosecution Request for Additional Time to File Expert Report and Joseph Nzirorera's Motion to Exclude Testimony of Charles Ntampaka* (12 December 2005) at para. 7; *Decision on Defence Motions to Exclude the Testimony of Professor Andre Guichaoua* (20 April 2006); *Joseph Nzirorera's Notice of 15th Violation of Rule 72(E) and Motion to Strike* (24 September 2008)

⁴ *Decision Ordering the Defence of Edouard Karemera to Immediately File the Order of Witnesses* (25 June 2008); *Warning to the Defence of Edouard Karemera for Refusing to Obey the Orders of the Chamber* (27 June 2008); *Order to the Defence of Edouard Karemera to Explain the Violation of the Chamber's Orders Concerning the Presentation of his Case* (3 July 2008) at para. 5; *Order Concerning Mathieu Ngirumpatse's Brief on the Order of 25 June Specifying the List of His Witnesses* (30 July 2008) at para. 10; *Order to Joseph Nzirorera on the Presentation of his Defence Evidence* (30 July 2008) at para. 11

⁵ *Order to Joseph Nzirorera on the Presentation of his Defence Evidence* (30 July 2008); *Joseph Nzirorera's Emergency Motion for No Contact Order* (31 July 2008)

⁶ *Order on the Brief of Mathieu Ngirumpatse after the Decision of 17 April 2008 Regarding the Administration of the Defence Case* (25 June 2008)

14. The ICTR Bureau has held that an appearance of bias is established if (1) a judge is a party to a 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 the judge is involved; or (2) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁷

15. Mr. Nzirorera contends that the decision on severance will lead to the promotion of a cause in which Judge Byron is involved—the United Nations Completion Strategy—by virtue of his position as President; and that a reasonable observer, properly informed, would reasonably apprehend that as to this issue, Judge Byron is not free from bias.

16. As the Bureau has observed, the apprehension of bias test reflects the maxim that “justice should not only be done, but should undoubtedly and manifestly be seen to be done.”⁸

17. By filing this motion, Mr. Nzirorera intends no disrespect for the judge involved. He appreciates the hard work and dedication of President Byron and Judge Byron to the Tribunal and to his case. However, the issue of severance is one instance where the same person wearing two hats should not be allowed to decide.

18. Therefore, it is respectfully requested that Judge Byron be disqualified from participation in the consideration of the issue of whether Mathieu Ngirumpatse's case should be severed from Mr. Nzirorera's trial.

⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 4

⁸ *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam* (14 June 2007) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 5

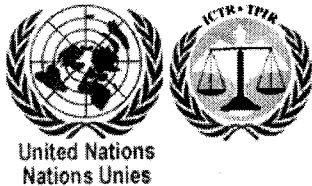
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Respectfully submitted,

A handwritten signature in cursive script that reads "Peter Robinson". The signature is written in black ink and is positioned below the typed name.

PETER ROBINSON

Lead Counsel for Joseph Nzirorera



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Robinson (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
	Case Name: The Prosecutor vs. Joseph Nzirorera			Case Number: ICTR-98-44-T
Dates:	Transmitted: 30 October 2008		Document's date: 31 October 2008	
No. of Pages:	6	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	JOSEPH NZIRORERA'S MOTION FOR DISQUALIFICATION OF PRESIDENT/JUDGE BYRON			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Judgement	<input checked="" type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
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		<input type="checkbox"/> Accused particulars		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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III - TRANSLATION PRIORITISATION (For Official use ONLY)

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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: