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IN TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date Filed: 13 February 2008

The PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

Prosecutor's Response to Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen

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For the Prosecutor:
Mr. Don Webster
Ms. Alayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

For the Accused:
Ms. Dior Diagne and Mr. Moussa Félix Sow *for Édouard Karemera*
Ms. Chantal Hounkpatin and Mr. Frederick Weyl *for Mathieu Ngirumpatse*
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi *for Joseph Nzirorera*

Part I—Overview

1. On 8 February 2008, Joseph Nzirorera (hereinafter "the Accused") filed a motion asking that the judges of Trial Chamber III (Judges Byron, Kam and Joensen) voluntarily disqualify themselves from his trial as a result of what he alleges "to be actual bias and the appearance of bias arising from their receipt of and failure to disclose secret communication from the prosecution alleging misconduct by the defence."[1] The prosecution vigorously opposes this motion and submits that, contrary to the argument of the Accused, there is no basis for apprehending bias on the part of Trial Chamber III.

Part II—Response to the Motion

2. As a preliminary matter, the prosecution notes the ironic symmetry presented by Nzirorera's current motion and this Chamber's disposition of his previous *Ex parte Motion for Order for Interview of Defense Witnesses NZ1, NZ2 and NZ3*.[2] At that time Nzirorera had filed an *ex parte* application in which he wantonly maligned the prosecution, and through fortuitous circumstance, the motion was disclosed to the Prosecutor in error.[3] Unlike Nzirorera, however, the prosecution explained how it came into possession of that *ex parte* filing.[4]

3. Not only does Nzirorera now refuse to explain how he "fortuitously" gained access to the prosecution's *ex parte* filing, he has the effrontery to refer to its contents to impugn the integrity of the judges of this Trial Chamber in his present motion to disqualify them.[5] Trial Chamber III had already denied his motion to disclose the prosecution's *ex parte* filing.[6] Nzirorera goes as far as to suggest that the judges of this Chamber have colluded with the prosecution to conceal "secret

[1] Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, 8 February 2008.
[2] See *Prosecutor v. Karemera et al*., Decision on Nzirorera's Ex parte Motion for Order to Interview of Defense Witnesses NZ1, NZ2 and NZZ3 of 12 July 2006.
[3] See Nzirorera Ex parte Motion for Subpoena to Interview NZ1, filed 23 January 2006. See also TT 24 May 2006, p3. See also Nzirorera's Motion for Order concerning Unlawful Disclosure of Confidential Ex Parte Defense Filing and for Stay of Proceedings of 30 January 2006. See particularly paragraphs 7 – 9 and paragraphs 11 and 12 wherein Nzirorera insists that "The Trial Chamber must take swift and decisive action to determine the circumstances surrounding the unlawful disclosure of the confidential, *ex parte* filing to the prosecution" and prays the Chamber to "stay proceedings in this case until this matter is resolved". Nzirorera's *ex parte* filing had accused the prosecution of "offer[ing] greater benefits to [a potential witness] to cooperate with the prosecution", and accused the prosecution of doing this three times before with witnesses who were first interviewed by Nzirorera's defense team. See Prosecutor's Response to Nzirorera's Ex Parte Motion for Order for Interview of Defense Witness NZ1 of 27 January 2006 at para. 4.
[4] See Prosecutor's Response to Nzirorera's Ex Parte Motion for Order for Interview of Defense Witness NZ1 of 27 January 2006 at para. 3.
[5] See Nzirorera motion at paras 10 and 11.
[6] See Decision on Joseph Nzirorera's Motion for Unsealing Ex parte Submission and for Disclosure of Withheld Materials of 18 January 2008.

communications", which is a patently ridiculous accusation.[7] At the very least, Nzirorera's motion is contumacious.

4. One wonders how an *ex parte* application filed by the Accused should be permissible, whereas *ex parte* applications duly filed by the Prosecutor pursuant to Rule 66(C) or Rule 68(D) are inherently suspect.[8] When this Trial Chamber decided Nzirorera's *ex parte* application, it reasoned as follows:[9]

> Applications may be filed *ex parte* when they are necessary in the interest of justice, that is, where the disclosure to the other party in the proceedings of the information conveyed by the application would be likely to prejudice unfairly either the applicant or some person involved in or related to that application.

5. This Chamber adopted the very same reasoning to resolve Nzirorera's application to unseal any *ex parte* applications that had been filed by the prosecution.[10] That decision also made it quite explicit that, "[w]hen 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."[11] Consequently, this Chamber carefully considered Nzirorera's motion to unseal and disclose any previously filed *ex parte* submissions and declined his application. Unsatisfied with that decision, Nzirorera now alleges bias.

6. Trial Chamber judges are presumed to be impartial.[12] The onus rests upon the Accused to displace this presumption by demonstrating an objectively justified apprehension of bias under circumstances that would lead a reasonable observer, properly informed, to reasonably apprehend bias.[13] A mere feeling or suspicion of bias by the accused is insufficient.[14]

7. In this case and in other ICTR and ICTY Bureau decisions, it has consistently been held that the burden of displacing the presumption of impartiality enjoyed by judges imposes a "high threshold" on the moving party. In *Delilac*,[15] the Appeal Chamber made the following formulation:

> The reason for this high threshold is that, just as any real appearance of bias [on] the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias…. '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

[7] See Nzirorera motion at paras. 9, 16 and 23.
[8] Nzirorera presumes to have filed his *ex parte* motion as a public document, even though the essential content of the motion had been filed *ex-parte confidentially* in the Annexes to the motion. See Nzirorera's Ex parte Motion for Order to Interview of Defense Witnesses NZ1 of 23 January 2006 and Nzirorera's Ex parte Motion for Order to Interview of Defense Witnesses NZ2 and NZ3 of 13 March 2006.
[9] See *Prosecutor v. Karemera et al*., Decision on Nzirorera's Ex parte Motion for Order to Interview of Defense Witnesses NZ1, NZ2 and NZZ3 of 12 July 2006 at para. 6.
[10] See Decision on Joseph Nzirorera's Motion for Unsealing Ex parte Submission and for Disclosure of Withheld Materials of 18 January 2008 at para. 5.
[11] Ibid.
[12] Rules of Procedure and Evidence, Article 12.
[13] *Furundžija*, Judgment (AC), 21 July 2000, para. 189.
[14] Prosecutor v Bagosora et al., "Decision on Motion for Disqualification of Judges," (Bureau) 28 May 2007, paragraph 8.
[15] *Delilac*, Judgment (AC), para.707, quoting *Re. JRL; Ex parte CJL* (1986) 161 CLR 342, 352(Aus.).

> 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.'[16]

8. In the present application, Nzirorera has not demonstrated any objective basis for an apprehension of bias. The arguments advanced by the Accused go no farther than to suggest that because this Trial Chamber has decided certain issues adverse to his perceived interests, there must be bias. Nzirorera in no manner advances any argument to suggest that the Chamber's decisions were "attributable to a pre-disposition against the applicant, and not genuinely related to the application of the law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts."[17] The mere fact that a court renders a decision adverse to a party, or refuses to do as a party wishes, is not evidence of bias.[18]

9. The Bureau has previously held that where allegations of bias are made on the basis of a Chamber's judicial decisions that it,

> "… 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."[19]

10. The Bureau has also previously clarified that the standpoint of the accused may be a relevant consideration, but that the decisive question is whether a perception of lack of impartiality is objectively justified.[20] 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.[21]

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[16] *Delalic*, Judgment (AC), para. 707, quoting *Re. JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Aus.).
[17] Ibid at paragraph 10.
[18] Prosecutor v Ntahobali, "Decision on Motion for Disqualification of Judges," Bureau, 7 March 2006 at paragraph 9. The Bureau held "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 he will decide the case adversely to one party."
[19] See Decision on Motion by Nzirorera for Disqualification of Trial Judges of 17 May 2004.
[20] See Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam of 14 June 2007, at para. 10. *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).
[21] This "objective test" has, in substance, been adopted in a number of decisions before this Tribunal: *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,

11. The prosecution submits that Nzirorera's present application cannot possibly meet the well established legal standards that the Bureau has already fully articulated in its previous decisions of his other complaints.[22]

Part III—Relief Sought

12. As previously noted, Nzirorera has made several similar motions in the past.[23] In each case the presiding judge of the Trial Chamber referred his complaints to the Bureau. Presumably, this case should be no different. Consequently, the prosecution recommends that Nzirorera's motion and this prosecution response should be forwarded to the Bureau for disposition.

13. The prosecution further urges the Trial Chamber to order Nzirorera to explain the "fortuitous circumstances" under which he received a copy of the Prosecutor's *ex parte* submission.

14. The prosecution submits that Nzirorera has not demonstrated actual or apprehended bias and that the request for disqualification of Judges Byron, Kam and Joensen should be dismissed in its entirety.

Respectfully submitted

Dated in Arusha, this 13th day of February 2008

For the Prosecutor:

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Senior Trial Attorney

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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.

[22] Ibid.

[23] *Karemera et al*.; Joseph Nzirorera's Motion for Disqualification of Judges Andresia Vaz, Florence Rita Arrey, and Flavia Lattanzi, 30 March 2004.; Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 4 June 2007.