

ICTR-98-44-T
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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 8 February 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES
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JOSEPH NZIRORERA'S MOTION
FOR DISQUALIFICATION OF
JUDGES BYRON, KAM, AND JOENSEN

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, that the Judges of the Trial Chamber voluntarily disqualify themselves from his trial 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 misconduct by the defence. Should the members of the Trial Chamber decline to disqualify themselves, Mr. Nzirorera requests that the matter be referred to the Bureau for its determination.

History

2. The matter of *ex parte* communications between the prosecution and this Trial Chamber has been a matter of ongoing concern.

3. In his *Motion for Order Requiring Notice of Ex Parte Filings and to Unseal* (19 December 2005), filed at the conclusion of the very first trial session in this case, Mr. Nzirorera observed:

“As a matter of principle it cannot be reiterated strongly enough that secret, private communications between the prosecution and the Trial Chamber severely undermine the confidence of the defence and the public in the fairness of these proceedings. They are incessant in this case, and the prosecution is persistent and obstinate in making *confidential* filings, even when such filings are unnecessary....”¹

4. The Trial Chamber denied the motion.²

5. On 5 June 2006, Mr. Nzirorera once again complained about the Trial Chamber’s having received and withheld *ex parte* material, this time relating to Witnesses T and HH. His counsel said:

“And I have to say, also, that we feel that the Trial Chamber has failed in its responsibility to our clients. And I’m sorry to say that, but *ex parte* proceedings, you know how we feel about those. They create a higher duty on the Trial Chamber to act on behalf of the Accused, because we’re

¹ Para. 5

² *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006)

not present...when you do take on the responsibility of deciding to keep things from the Defence and act along with the Prosecutor, jointly, the two of you reviewing and determining things and while we are in the dark, I think that the Trial Chamber has to exercise that responsibility with tremendous care.”³

6. The Trial Chamber denied the motion.⁴

7. On 3 December 2007, as the prosecution closed its case, Mr. Nzirorera again requested disclosure of the prosecution’s *ex parte* submissions. He noted that:

“The prosecution has from time to time alluded to investigations into violation of witness protection orders⁵ or the recanting of previous statements of its witnesses⁶ which may or may not involve members of the defence teams. It would have been highly improper for the prosecution to have made *ex parte* submissions on such matters to the Trial Chamber which can cast doubt on the integrity of its opponents in the litigation. In the unlikely event that the Trial Chamber would have permitted any submissions of this nature to have been made, or withheld from the defence, they should now be disclosed since the prosecution has now called all of its witnesses and there can be no interference with its witnesses at this stage.”⁷

8. The Trial Chamber denied this motion as well.⁸

Grounds for Disqualification

9. Fortuitously, Mr. Nzirorera has been able to obtain access to one of the *ex parte* filings of the prosecution which the Trial Chamber has tried to keep from him. Its content is deeply disturbing. The Trial Chamber’s receipt of and refusal to disclose this document to the defence is, in Mr. Nzirorera’s view, evidence of actual bias and the reasonable appearance of bias.

³ Transcript of 5 June 2006 @ 37

⁴ Transcript of 6 June 2006 @ 17-18; *Decision on Motions to Disclose a Prosecution Witness Statement and to Unseal Confidential Documents* (25 October 2006)

⁵ Such as with witness AWD

⁶ Such as with witness AWB

⁷ *Joseph Nzirorera’s Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials* (3 December 2007) at para. 9

⁸ *Decision on Joseph Nzirorera’s Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials* (18 January 2008)

10. In its confidential and *ex parte* Motion to Withhold Disclosure of E-mail Correspondence pursuant to Rule 66(C)—Witness AMA (26 November 2007), the prosecution leveled serious accusations at defence counsel and the defence teams of “witness tampering”. It claimed that many of its witnesses had been threatened by the defence teams in this case and that the defence teams had disclosed their identities in their communities, causing them to fear for their safety.⁹

11. The prosecution further claimed that it was pursuing ongoing investigations into defence counsel and the defence teams¹⁰ and expressed the fear that the witness in question would refuse to testify due to the intimidation of him by the defence teams.¹¹ In fact, the witness did not testify, for reasons which were never explained by the prosecution.

12. Such a submission, gratuitous and unnecessary for the determination of the motion in support of which it was filed, was designed to, and had the effect of, justifying why the prosecution case has been so weak. The implication is that witnesses with solid evidence against the accused have been tampered with and scared off by criminal acts of the defence counsel and defence teams.

13. The defence never had the opportunity to know of or answer these allegations because the Trial Chamber refused to disclose the *ex parte* submission to the defence, even after the prosecution closed its case and the witness’ testimony was no longer

⁹ Para. 3

¹⁰ Para 6

¹¹ Para 5

needed, and the Trial Chamber was specifically requested to disclose submissions of this nature.¹²

14. The Trial Chamber' secret receipt of these serious allegations against the defence teams, and its refusal to disclose that such allegations had been made to it or to provide the defence an opportunity to be heard, demonstrates actual bias and the appearance of bias on behalf of its Judges.

15. What kind of fair trial can Mr. Nzirorera expect when the prosecution is allowed to malign him and his defence team in secret communications with the Trial Chamber and he is never given an opportunity to learn of or respond to those allegations? The receipt and concealment of these serious allegations against his defence counsel and team members by the Trial Chamber demonstrates that it has acted in concert with the prosecution against the accused and their defence teams. No reasonable person could believe that Mr. Nzirorera can or will receive a fair trial under these circumstances.

16. In addition, Mr. Nzirorera has no way of knowing what other *ex parte* communications have taken place between the prosecution and the Trial Chamber, since the Trial Chamber refuses to disclose any such communications. While he fortuitously learned of the motion referred to above, despite the efforts of the prosecution and Trial Chamber to conceal it, Mr. Nzirorera does not know of the contents of the other communications. Neither he, nor a reasonable person, could be expected to trust that the Trial Chamber has not received other improper submissions in light of the circumstances concerning the submissions relating to Witness AMA.

¹² *Decision on Joseph Nzirorera's Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials* (18 January 2008)

The Law Concerning Disqualification

17. 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.”

18. The Appeals Chamber has held that there are two ways in which a judge may be disqualified pursuant to this Rule—for actual bias, or for the reasonable appearance of bias. The Appeals Chamber explained that there is an unacceptable appearance of bias if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹³

19. The Appeals Chamber also affirmed that the fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial.¹⁴

20. The Bureau of the ICTR has held that 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.”¹⁵

21. Mr. Nzirorera has already been the victim once before at this Tribunal of bias resulting from the close relationship between the prosecution and the Trial Chamber. The Appeals Chamber found that:

“...in addition to the admitted fact of association and cohabitation, Judge Vaz did not disclose these facts until defence counsel expressly raised this matter in court...The Appeals Chamber finds that these circumstances could well lead a reasonable, informed observer, to

¹³ *Prosecutor v Furundzija*, No. IT-95-17-A, *Judgement* (21 July 2000) at para. 189

¹⁴ *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 177

¹⁵ *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

objectively apprehend bias.”¹⁶

22. The Appeals Chamber found that the remaining Judges should also be disqualified because they acquiesced in the nondisclosure.¹⁷

23. The same result should occur here. The judges received secret communications from the prosecution containing allegations of serious misconduct by defence counsel and the defence teams. Like Judge Vaz, they did not disclose it—in fact they affirmatively refused to disclose it. The information only came to light when defence counsel came upon the information by other means.

24. The law of the ad hoc tribunals has followed the majority of both common law and civil law systems in holding judges to a high standard of both actual and perceived impartiality. The most well known case on disqualification involved General Pinochet of Argentina, who was arrested in the United Kingdom. In *R v. Bow St. Magistrate's Court ex p Pinochet Ugarte* (2000) 1 A.C. 147, Lord Hoffmann was disqualified because he had been a director of Amnesty International, an organization that had investigated General Pinochet. While there was no question that Lord Hoffman could be objective when deciding the case, the Court decided that the appearance of bias, or lack of impartiality, required that he be disqualified.¹⁸

25. Another important case on disqualification was decided in the Appeals Chamber of the Special Court of Sierra Leone. There, the disqualification of the President of the Appeals Chamber was sought as a result of writings he had published on the subject of the civil war in Sierra Leone. Again, no one suggested that the Judge bore

¹⁶ *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of the Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material* (22 October 2004) at para. 67

¹⁷ Para. 69

¹⁸ *Rev v Sussex Justices, Ex parte McCarthy* (1923) 1 K.B 256 at pg 259.

actual bias. However, the Appeals Chamber held that disqualification was necessary because "an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality."¹⁹

26. The European Convention on Human Rights has generated a large amount of jurisprudence on the interpretation of Article 6 of that Convention which provides, *inter alia*, that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The jurisprudence there has established not only that disqualification must be granted upon the perception of bias by a reasonable person, but that disqualification must be granted when the accused has a subjective feeling, which is objectively justified, that he will not receive a fair trial.²⁰ Mr. Nzirorera has such a feeling.

27. In his article entitled, "Judicial Impartiality under the European Convention on Human Rights", President Wildhaber of the European Court of Human Rights wrote:

"Impartiality lies at the very heart of the notion of justice and fair trial. It is therefore not surprising that it occupies a prominent place in the due process guarantees enshrined in the European Convention on Human Rights and in the case-law of the European Court of Human Rights. Public perception that justice is impartial is the foundation for the confidence which citizens must have in their judicial system."

28. The practice in the major national systems of the world has also placed a high premium on the absence of the appearance of bias. In the case of *Webb*, the High Court of

¹⁹ *Prosecutor v Sesay*, No. SCSL-2004-15-AR15 (13 March 2004)

²⁰ *Hauschildt v Denmark*, ECHR judgement of 24 May 1989, Series A, No. 154, para. 48; *De Cubber v Belgium*, ECHR judgement of 26 October 1984, Series A, No. 86, para 26; *Nortier v Netherlands*, ECHR judgement of 24 August 1993, Series A, No. 267, para 33.

Australia held that the court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias".²¹

29. The Supreme Court of Canada has also applied this objective test for disqualification. It has interpreted section 11(d) of the Canadian Charter of Rights and Freedoms as seeking to achieve two objectives:

"First, section 11(d) seeks to ensure that a person charged with an offence is tried by a Tribunal which is not biased in any way and is able to render a decision based solely on the merits of the particular case before it. Secondly, 11(d) seeks to maintain the institutional integrity of the judicial system by foreclosing any reasonable apprehension of bias on the part of the tribunal, particularly on the basis of its relationship to the executive arm of government." (emphasis added)²²

30. In *South African Rugby Football Union Case*, the Supreme Court of South Africa stated that "[t]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."²³

31. In the United States, pursuant to Title 28 of the United States Code, section 455(a), a Judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

32. In *Furundzija*, the Appeals Chamber noted that "this is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial. For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be

²¹ *Webb v The Queen* (1994) 181 C.L.R. 41 (30 June 1994)

²² *R v Genereux* (1992) 1 SCR 259, 70 CCC 3d 1, 88 DLR 4th 110

²³ *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* (1999) 7 BCLR 725 (CC) (3 June 1999)

challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality."²⁴

32. Therefore, the circumstances of Mr. Nzirorera's case must be viewed with this perspective. It is one of the most important cases in international criminal jurisprudence. To allow it to be decided by Judges who are tainted by secret information fed to them by the prosecution, and who concealed that information from the defence and the public, will forever call into question the integrity of the judgement in the case and the legitimacy of this Tribunal.

33. Mr. Nzirorera's counsel regrets the circumstances which have led to the filing of this motion. He has high personal regard for the three Judges of the Trial Chamber. But he has consistently protested against the stream of *ex parte* submissions between the prosecution and the Trial Chamber, and squarely provided the Trial Chamber with an opportunity to disclose those submissions to the defence. Its failure to do so, in light of the contents of those submissions which have now been revealed, is more than disturbing. It demonstrates both actual bias and the appearance of bias and requires disqualification of the Judges.


34. No reasonable observer can expect the accused or their counsel to have any trust in a Trial Chamber which is receiving from the prosecution and concealing secret allegations of serious misconduct by the defence—allegations which are unfounded, but which the defence were never given the opportunity to refute. The situation presented

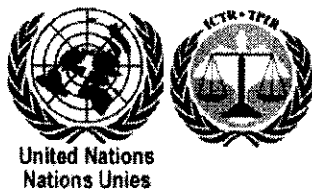
²⁴ *Prosecutor v Furundzija*, No.IT-95-17/1-A, *Judgement* (21 July 2000) at para. 188

herein is no different than if a member of the prosecution team was whispering allegations about the criminal conduct of the defence counsel into the ears of the judges, and the judges stood there and listened, then refused to disclose the existence of such conversation to the defence when requested.

35. Given the history of how the prosecution has conducted Mr. Nzirorera's trial, it is not surprising that it has resorted to trying to smear defence counsel and the accused behind their backs. However, despite its frequent tolerance of prosecutorial misconduct, it is nevertheless very disappointing to Mr. Nzirorera and his counsel that the Trial Chamber has allowed itself to be used in this manner and then refused to disclose the *ex parte* submissions when specifically requested to do so.

36. For all of the above reasons, it is respectfully submitted that the Judges of the Trial Chamber should be disqualified from all further proceedings in Mr. Nzirorera's case.

Respectfully submitted,

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"/> Appeals Chamber / Arusha F. A. Talon
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Case Name:	The Prosecutor vs. Joseph Nzirorera		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 8 February 2008		Document's date: 8 February 2008	
No. of Pages:	11	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 JUDGES BYRON, KAM, AND JOENSEN			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
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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 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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