

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: 15 February 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES
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2008 FEB 15 A 9:52

Joseph Nzirorera

REPLY BRIEF:
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 has moved, 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.

2. On 13 February 2008, the prosecution filed its *Prosecutor's Response to Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen*. Mr. Nzirorera now replies.

3. Mr. Nzirorera does not take issue with the right of the prosecution to file an *ex parte* application in support of a motion to withhold disclosure pursuant to Rule 66(C). He takes issue with the fact that the prosecution abused the privilege by making serious allegations against his defence team which were gratuitous and unnecessary for the disposition of the motion to withhold disclosure of the statement of a witness.

4. In contrast, when he filed his *Ex Parte Motion for Order for Interview of Defence Witness DNZ 1* (23 January 2006) and *Ex Parte Motion for Order for Interview of Defence Witnesses DNZ 2 and DNZ 3* (13 March 2006), he filed both motions publicly. Only the Annexes were confidential. In the Annex to the *Ex Parte Motion for Order for Interview of Defence Witness DNZ 1* (23 January 2006), Mr. Nzirorera did not gratuitously malign the prosecution, but stated only those facts necessary for a determination of the motion. No allegations of criminal activity or misconduct on the part of the prosecution were made.

5. In its *Response*, the prosecution makes no effort to justify its allegations of witness tampering and unlawful disclosure of witness identities made against Mr. Nzirorera's defence team in its secret communication with the Trial Chamber.

6. The matter complained of in the *Motion for Disqualification* is the actions of the Judges once the poison was placed on their table.

7. First, the Judges were wrong to decide the motion without revealing the allegations to Mr. Nzirorera and giving him a chance to respond. This could have been done without revealing the disclosure sought to be kept confidential. The Trial Chamber could and should have issued an order informing the defence that the prosecution was seeking to withhold a witness statement on the grounds that the defence had been tampering with witnesses and revealing their identities in the community.

8. Second, having decided the motion without notifying the defence of these serious allegations, the Trial Chamber should have disclosed the application once the witness in question was withdrawn. The reason for the *ex parte* process no longer existed and there was no longer need to keep the substance of the motion from the defence.

9. This would have been particularly appropriate because the prosecution provided no reason that the witness was withdrawn, leaving the damning impression that the defence had succeeded in tampering with him.

10. Third, having been presented with a motion seeking disclosure of the *ex parte* motion, the Trial Chamber should have disclosed it instead of forever seeking to conceal the fact that it had been poisoned by the unsubstantiated and undisclosed allegations of witness tampering and unlawful disclosure of witness identities.

11. This was the very same pattern that led the Appeals Chamber to conclude that Judge Vaz should be disqualified from Mr. Nzirorera's trial—she had a private relationship with the prosecution, failed to disclose it, and refused to acknowledge it when confronted.

12. The same result should occur here. The judges received private communications from the prosecution containing serious allegations of criminal conduct by the defence team of Mr. Nzirorera. It failed to disclose them even after the need for confidentiality had lapsed, and then refused to acknowledge having received them when presented with a motion seeking disclosure of the communications.

13. The prosecution and the defence disagree over whether a reasonable person, informed of these facts, would apprehend bias. Mr. Nzirorera maintains that when Judges receive secret communications from the prosecution alleging criminal conduct by his defence team, and withhold those facts from the defence even after the reason for nondisclosure has ended, a reasonable person would consider that the Judges have given credence to the allegations and have become biased against the interest of the accused and the credibility of his defence team.

14. The prosecution claims the *Motion for Disqualification* is contumacious.¹ In fact, counsel would be contumacious to his duty to his client if he remained silent in the face of learning of the secret communications between the prosecution and Judges. While Mr. Nzirorera and his counsel did not relish filing the motion, they make no apologies for its filing or its content.

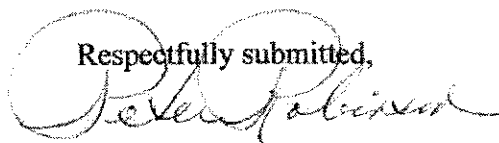
15. One of the qualities of a professional judge is to be able to look at a situation objectively and apply the appropriate test, even to his or her own conduct or inaction.

¹ *Response* at para. 3

Mr. Nzirorera believes that the Judges he seeks to disqualify can recognize, in hindsight, that it was inappropriate to receive and keep confidential the serious allegations made against the defence team of Mr. Nzirorera and that Mr. Nzirorera, or even an outsider, could objectively apprehend that the scales of justice had been unacceptably tilted by these events.

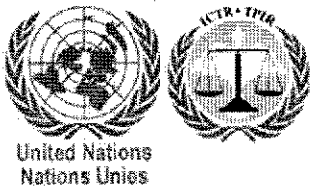
16. Therefore, it is respectfully requested that the Motion for Disqualification be granted, either by the Judges themselves, or by the Bureau.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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

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Case Name:	The Prosecutor vs. Joseph Nzirorera			Case Number: ICTR-98-44-T
Dates:	Transmitted: 15 February 2008		Document's date: 15 February 2008	
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<input type="checkbox"/> Strictly Confidential / Under Seal	<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence	
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