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ICTR-97-21-T
07-03-2006
(2201 - 2195)

THE BUREAU

Before: Judge Erik Møse
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 7 March 2006

THE PROSECUTOR

v.

ARSÈNE SHALOM NTAHOBALI

Case No.: ICTR-97-21-T

DECISION ON MOTION FOR DISQUALIFICATION OF JUDGES

The Office of the Prosecutor

Silvana Arbia
Adelaide Whest
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Holo Makwaia
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Me Normand Marquis
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 2200

SITTING as the Bureau, composed of Judge Erik Møse, President of the Tribunal, and Judge Khalida Rachid Khan, Presiding Judge of Trial Chamber III, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the "Requête Devant le Bureau de Arsène Shalom Ntahobali en Récusation des Juges de la Chambre de Première Instance II", filed by the Defence for Ntahobali on 2 March 2006;

CONSIDERING the Prosecution's "Submissions to Ntahobali's Motion for Recusal of Judges", filed on 6 March 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. In his motion, Arsène Shalom Ntahobali requests the disqualification of all three judges hearing his trial, Judges Sekule, Ramaroson and Bossa, on the basis of an alleged lack of impartiality pursuant to Rule 15 (B).

2. During a Status Conference on 8 February 2006, the Presiding Judge addressed a number of scheduling matters concerning the few witnesses remaining to be called for the Nyiramasuhuko and Ntahobali defence. In this context, he invited Counsel for Mr. Ntahobali to indicate, for the sake of planning, whether he intended to testify on his own behalf. The Presiding Judge noted that as the testimony for the Ntahohali Defence case was expected to be concluded by 10 March 2006 at the latest, arrangements would have to be made to facilitate this testimony as soon as practicable.[1] The Judge further expressed his expectation that proceedings would resume on 13 February 2006 and requested the Defence to work towards ensuring a continuous flow of witnesses so as to enable continuous testimony of the remaining few witnesses.[2] Despite this, a number of trial days were lost in the days that followed as a result of a lack of Defence witnesses.[3]

3. In a letter to the Trial Chamber of 17 February 2006, the Defence indicated that Mr. Ntahobali was still not ready to give a definitive answer as to his intention to testify on his own behalf, but that in any event, he would be testifying as the last witness. On 20 February 2006, the Presiding Judge directed that if Mr. Ntahobali does intend to testify, he should be ready to start his testimony on 2 March 2006.[4]

4. On 2 March 2006, Defence Counsel, rather than presenting the evidence of Mr. Ntahobali, instead announced that the present motion for disqualification had been filed before the Bureau. In response, the Presiding Judge adjourned the proceedings pending resolution of the matter by the Bureau.[5]

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[1] T. 8 February 2006, page 4.
[2] T. 8 February 2006, pp. 4, 21-22 ("We'll resume on ... 13th of February to continue with the next witness. And we will urge the Defence of Ntahobali, in collaboration with the witness protection unit, to work to ensure that these other witnesses who are scheduled ... arrive and ... the Chamber is kept informed of progress ... so that we are able to continue next week and ... ultimately, conclusively, that all the witnesses are heard as planned").
[3] *See e.g.* T. 13 February 2006, 20 February 2006 and 23 February 2006 (unanticipated adjournments sought due either to allegedly inadequate preparation time, or witness illness or unavailability).
[4] T. 20 February 2006, pp. 5-6.
[5] *Id.*, pp. 6-7.

SUBMISSIONS

5. In its motion, the Defence submits that the modalities adopted by the Trial Chamber to ascertain whether Mr. Ntahobali intended to testify in his own defence and to schedule this testimony gives rise to the need for disqualification of the entire bench. Other decisions taken in the course of the trial are also alleged to give rise to a reasonable apprehension of bias on the part of the Chamber, which similarly ought to result in disqualification.

6. The Prosecution opposes the motion for disqualification on the basis that it fails either to demonstrate how any such alleged errors would be attributable to a pre-disposition against Mr. Ntahobali or that the Judges were animated by any concern other than the relevant legal issues in rendering their decisions.

DELIBERATIONS

7. Judges Ramaroson and Sekule, who, pursuant to Rule 23 (A), are normally members of the Bureau in their capacity as Vice-President of the Tribunal and Presiding Judge of Trial Chamber II respectively, have recused themselves from consideration of the current motion. The Bureau is therefore presently composed of Judges Møse and Khan.

8. 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 broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.[6] The Appeals Chamber in *Furundžija* has found that the requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias.[7] 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 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.[8]

9. 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".[9] Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[10] Thus, a mere feeling or suspicion of bias by the

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[6] Rule 15 (A) has been interpreted as "co-terminous with the statutory requirement of impartiality and thus as including within its scope all possible bases of disqualification" on the basis of lack of impartiality: *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15 (B), 19 March 2003, para. 10; *see also Bagosora et al.*, Determination of the Bureau Pursuant to Rule 15 (B), 20 February 2002, paras. 9-11; *Nahimana et al.*, T. 19 September 2000 p. 6.

[7] *Furundžija*, Judgment (AC), 21 July 2000, paras. 181-88. *See also Brđanin and Talić*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, paras. 9-14.

[8] *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

[9] *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart); *quoted in Furundžija*, Judgment (AC), 21 July 2000, para. 195; *Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *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.

[10] This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. (*Furundžija*, Judgment (AC), 21 July 2000, para. 185). *See also Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71: "In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified".

Accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.[11] Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection in Article 12 of the Statute. The moving party bears the burden of displacing that presumption.[12]

10. The motion does not allege that any interest or association of the Judges gives rise to an apprehension of bias. Rather, it contends that Mr. Ntahobali has grounds for the reasonable suspicion of bias on the basis of decisions in the case itself.

11. In *Karemera*, the Bureau considered the issue of judicial impartiality as evidenced through a Chamber's decisions.[13] It relied on the reasoning of the Bureau of the International Criminal Tribunal for the Former Yugoslavia in *Blagojević*, where that Bureau, although not entirely ruling out the possibility that decisions rendered by a Judge or Chamber in the course of trial could by themselves suffice to establish actual bias, observed that they would only serve to do so in the most exceptional of cases.[14]

12. 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.[15]

13. The motion alleges impropriety on numerous grounds. Firstly, it alleges that upon being requested to indicate whether or not Mr. Ntahobali intended to testify in his defence, Counsel were improperly impeded from making legal submissions concerning the right of the Accused not to be compelled to testify.[16] It submits that the Chamber thus failed to consider

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[11] The objective test has, in substance, been adopted in a number of decisions before this Tribunal: *Karemera*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 9; *Nzirorera et al.*, Re. Application for the Disqualification of Judge Mehmet Güney (Bureau), 26 September 2000, paras. 8-9; *Nahimana et al.*, Oral Decision (TC), T. 19 September 2000, p. 10; *Nyiramasuhuko and Ntahobali*, Determination of the Bureau in Terms of Rule 15 (B) (Bureau), 7 June 2000, p. 5; *Kabiligi*, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction (TC), 4 November 1999, p. 8.

[12] *Delalić*, Judgment (AC), para. 707. The reason for this threshold is that while any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice where judges to be disqualified on the basis of unfounded and unsupported allegations of apparent bias. *See id.*: "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 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."

[13] *Karemera*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 12.

[14] *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15 (B), 19 March 2003, para. 14. Allegations of bias based on the content of judicial proceedings have also been considered by the United States Supreme Court, where it has been emphasised that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. ... Almost invariably; they are proper grounds for appeal, not for recusal. ... [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings ... do not constitute a basis for a bias or partiality motion unless they display a deep-seated favouritism or antagonism that would make fair judgment impossible" (*Liteky v. United States*, 510 U.S. 540, 555 (1994)).

[15] *Karemera*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13.

[16] Motion, paras. 37 *et seq.*

the Accused's arguments, having already pre-determined the matter.[17] However, the Presiding Judge did no more than remind Counsel that the present hearing was a status conference to address issues of planning, inviting Counsel instead to file a motion should the Defence wish to make detailed submissions of law.[18] Further, the Judge fully acknowledged the Accused's right not to be compelled to testify, and his intention was clearly to seek information for planning purposes:

> [W]ith regard to the indication, if any ... whether or not the Accused will give evidence on his own behalf[, t]he legal position is very clear. The Accused has the right to choose to testify on his own behalf. He cannot be compelled..... It is his ... or her prerogative, but the Trial Chamber which ... controls the proceedings, must plan. ... We would expect the Defence of the Accused Ntahobali to indicate to the Trial Chamber so that it's ahle to plan ahead whether or not the Accused intends to give testimony [s]o that we can plan his testimony with a view of seeing how best it will fit ... in the Trial Chamber's plan to complete this Defence in a given time. ... [W]e would [therefore] invite the ... the Defence of Ntahobali to indicate by the end of next week so that we can plan how best, where his testimony, if he is going to testify, is going to be placed. Things cannot be left ... open-ended.[19]

14. There is no indication that the Chamber's request was based on incorrect legal reasoning or influenced by improper considerations. Under these circumstances, it cannot reasonably be apprehended as arising from bias against the Accused.

15. Defence Counsel indicated, in a letter to the Trial Chamber of 17 February 2006, a provisional intention on the part of Mr. Ntahobali to testify. The motion alleges that the Chamber thereafter improperly ordered the Accused to begin his testimony on 2 March 2006 as opposed to allowing hitn to ehoose the timing of his testimony.[20]

16. The Bureau observes that on 20 February 2006, Defence Counsel had requested a further adjournment, citing lack of preparedness to commence the examination in chief of Witness WCMNA and indicating probable delays also with regard to the next witness to testify.[21] The Prosecution then renewed its protest against being, once again, unaware as to which witness would testify and when. It averred that if in future a further unforeseen adjournment was forced due to the non-availability of other Defence witnesses, then Mr. Ntahobali himself should testify.[22] The Presiding Judge directed that

> if the Accused intends to testify on his behalf, he should be ready to start his testimony on the 2nd of March in all circumstances. ... So from the 2nd of March ... [the Accused's] testimony is expected, if he still intends to start his testimony. So *if there is no witness or a witness is not available, he will begin.* If that ... witness will not have been done by then, he should be ready to start his testimony on that date and day.[23]

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[17] *Id.*, para. 47.
[18] T. 8 February 2006, pp. 12, 22.
[19] T. 8 February 2006, pp. 22-23. *See also id.*, pp. 7 (Defence submissions concerning the need to indicate a date of commencement for the Nsabimana defence) and 17 (OTP concern to be allowed sufficient notice so as to facilitate preparation). It appears that a similar approach to the scheduling of future testimony was adopted *vis-à-vis* the Nyiramasuhuko defence during the same hearing. *See id.*, p. 22: "We do take due note that the Defence of Nyiramasuhuko is considering ... whether or not to call the remaining expert witness. That is their prerogative. But we cannot ... leave it at that, there must be some specific timeframe in order that the Chamber can plan for the next stage. So, we do invite the Defence of Nyiramasuhuko ... to inform the Chamber on this particular issue by the end of next week so that ... the Trial Chamber itself and all the parties can plan ahead."
[20] Motion, *inter alia* paras. 55, 71.
[21] T. 20 February 2006, p. 3.
[22] *Id.*, pp. 3-4.
[23] *Id.*, pp. 5-6 (emphasis added. It should be noted that the Chamber ruled that in the event another witness was available, the testimony of Mr. Ntahobali could be deferred in order to hear that witness). *See also* T. 28 February

17. The Defence alleges that this attempt by the Chamber to direct the timing of the Accused's testimony contravenes the Accused's rights under Article 20 of the Statute.[24] This Tribunal has already determined that no mention of the timing of an appearance of the Accused is to be found in Articles 19 or 20 of the Statute whereas, under Rule 90 (F), the Chamber has the obligation and authority to "exercise control over the mode and order of interrogating witnesses...".[25] The consistent practice before the international tribunals has been that Accused who testify have chosen the timing of their testimony which, in most cases, has been given at or near the end of the Defence case.[26] However, Chambers have also considered the interests of justice and questions of judicial economy in ordering a particular sequence of witnesses.[27] In the present case, the Chamber appears to have afforded Mr. Ntahobali the opportunity to choose the timing of his testimony, subject to the Chamber's duty to efficiently manage trial proceedings and to avoid undue prejudice to other parties stemming from uncertainty and delay.[28] The Chamber's direction on 20 February 2006 that Mr. Ntahobali, should he wish to testify, be ready to do so from 2 March 2006 onwards was motivated by the need to exercise proper control over proceedings and cannot be said to evince bias on the part of the Chamber toward the Accused.

18. The Defence further submits that a perception of bias emerges from alleged double standards in decisions by the Chamber against Mr. Ntabohali.[29] As evidence of bias, the motion cites the differing outcomes of numerous other motions brought by the Ntahobali Defence and Prosecution, respectively.[30]

19. The Bureau notes that such decisions are rendered on a case by case basis and form part of the inherent discretion and duty of the Chamber to control the proceedings in order to ensure an expeditious and fair trial.[31] The Defence has failed to demonstrate that in rendering these decisions, the Judges were animated by any concern other than the relevant legal issues.[32] Accordingly, there is no basis for an apprehension of bias in an objective observer, fully apprised of the relevant circumstances, in the instant case.

20. For instance, the Defence alleges that contrary to the treatment afforded to him, the co-Accused Ms. Nyiramasuhuko was on 16 June 2005 granted a one month adjournment in

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2006, p. 72 ("La Chambre a informé à temps les parties de ce que si l'Accusé Shalom a l'intention de déposer, il devrait commencer la déposition jeudi, c'est-à-dire le ... dans deux jours. De l'avis de la Chambre, cette décision reste valable. ... Si un témoin arrivait la semaine prochaine ou la semaine d'après, nous ne pouvons que retarder la déposition de l'Accusé et prendre ce témoin. Mais nous devons commencer la déposition l'Accusé le jeudi.")

[24] Motion, paras. 45-46, *citing Kordić and Čerkez*, Decision on Prosecutor's Motion on Trial Procedure (TC), 19 March 1999.

[25] *Bagosora*, Decision on Motion to Compel Accused to Testify Prior to other Defence Witnesses (TC), 11 January 2005, para. 4.

[26] *Id.*, para. 5, *citing Kordić and Čerkez*, Decision on Prosecutor's Motion on Trial Procedure (TC), 19 March 1999. By contrast, national practice on this issue appears to diverge significantly (*id.*, para. 6).

[27] *Id., citing Ndayambaje et al.*, Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List (TC), 27 February 2004.

[28] *See supra*, note 23.

[29] Motion, paras. 74 *et seq.*

[30] *See e.g.* Motion, paras. 91-122 (discussing the Chamber's rejection of the Accused's Certification motion *vis-à-vis* its acceptance of an allegedly similar motion from the Prosecution) and 87-91 (allegation of bias in the Chamber's ordering the Accused to testify whilst pending decisions remained before the Chamber).

[31] *Nzirorera*, Decision on Motion by Nzirorera for Disqualification of Trial Judges, paras. 5, 16, 24 and 27 (finding, in response to allegations of unequal treatment, that apparently differential outcomes reflect the Chamber's view on the merits of the matters before it).

[32] *Id.*, paras. 16 and 27 (finding that the timing of decisions was not probative of bias, real or reasonably perceived: "Many factors affect the timing of decisions. The Defence's attempt to show bias based upon [an] analysis of the time required to render decisions of a particular type ... is misguided.")

order to permit her to testify last.[33] In fact, this adjournment was found by the Chamber to be justified in order to allow adequate preparation time in relation to an expert witness.[34] Regarding the timing of Ms. Nyiramasuhuko's testimony, despite her preference to testify last, the Chamber rendered an order substantially similar to the direction it had given on 20 February 2006.[35] The basis of this decision was further elucidated by the Chamber in a decision of 19 August 2005.[36] It is therefore difficult to view the Chamber's directive of 20 February 2006 as prejudicial *vis-à-vis* the treatment accorded to Mr. Ntahobali's co-Accused. Accordingly, no objective perception of bias arises in this context.

21. The Bureau concludes that the motion has failed to establish that a reasonable apprehension of bias could arise on the basis of the arguments advanced by the Defence, whether viewed individually or cumulatively.

FOR THE ABOVE REASONS, THE BUREAU

DENIES the motion.

Arusha, 7 March 2006

Erik Møse
President

Khalida Rachid Khan
Presiding Judge of Trial Chamber III

[Seal of the Tribunal]

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[33] Motion, para. 75.

[34] T. 16 June 2005, p. 3: "In view of the fact that that witness and, indeed, the last - the expert witness cannot be available within a reasonable time to come and testify before the Trial Chamber during the remaining period of this session, and in view of the fact that the Defence of the Accused Shalom Ntahobali could not step in - there is one witness who could possibly testify, but it is not very certain as to when he or she could be available, the Trial Chamber sees that it would be best in the circumstances to adjourn these proceedings to enable adequate preparations being made in preparation for the continuation of the proceedings when we resume next session."

[35] *See Ndayambaje et al.*, Scheduling Order (TC), 5 August 2005 (instructing counsel for Ms. Nyiramasuhuko to put the Accused on the stand to begin her testimony on a particular date or any date thereafter in the event that a preceding witness was unavailable to testify for any reason). The Defence for Ms. Nyiramasuhuko, in a letter to the Registrar dated 25 July 2005, had indicated its intention to call her last.

[36] *See Ndayambaje et al.*, Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73 *ter* to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobali (TC), 19 August 2005, paras. 28-33 ("The Defence alleges inconveniences that will result from tendering its witnesses out of the originally conceived sequence. However, the Chamber finds that the Defence does not provide a cogent argument why the Accused should not testify before Witness WBNM, should the need arise, nor does it demonstrate the prejudice it would suffer. The Chamber is of the opinion that the Defence has had ample opportunity to prepare the testimony of the Accused. ... The Chamber underscores that when seeking to give effect to an Accused's rights under Article 20, it has a duty to ensure that there is a balance between the competing and respective rights of all the Parties in the case. The Chamber thus finds that it would not facilitate fairness to the other Parties and/or serve the interests of justice, to postpone the trial merely to allow the Accused to testify at her own convenience. Accordingly, the Chamber rules that should Witness WBNM be unable to commence his testimony as scheduled, on 29 August 2005, for any justifiable reason, the Defence for Nyiramasuhuko should be prepared to call the Accused Nyiramasuhuko to give testimony on her own behalf. ... The Chamber accordingly finds no merit in the submissions of the Defence.")