UNITED NATIONS
NATIONS UNIES

4031

THE BUREAU

ICTR-2001-66-T
26-4-2006
(4031 - 4025)

**Before:** Judge Erik Møse
Judge Arlette Ramaroson
Judge William H. Sekule
Judge Khalida Rachid Khan

**Registrar:** Adama Dieng

**Date:** 25 April 2006



**THE PROSECUTOR**

**v.**

**ATHANASE SEROMBA**

***Case No.: ICTR-2001-66-T***

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**DECISION ON MOTION FOR DISQUALIFICATION OF JUDGES**

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**The Office of the Prosecutor**

Silvana Arbia, Senior Trial Attorney
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**Counsel for Ntabohali**

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,**

**SITTING** as the Bureau, composed of Judge Erik Møse, President of the Tribunal; Judge Arlette Ramaroson, Vice-President of the Tribunal; Judge William H. Sekule, Presiding Judge of Trial Chamber II; 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 en Extreme Urgence de la Defence aux fins de Recusation des Juges Andresia Vaz, Gustave Kam, et Karin Hokborg", filed by the Defence for Athanase Seromba on 24 April 2006 and the "Acte Rectificatif de la Requête en Extreme Urgence de la Defense", filed by the Defence on 25 April 2006[1];

**CONSIDERING** the "Prosecutor's Response to Seromba's Motion to Disqualify All Three Judges of the Trial Chamber for Alleged Bias", filed on 24 April 2006;

**HEREBY DECIDES** the motion.

## INTRODUCTION

1. The Seromba Defence requests the disqualification of all three judges hearing the trial, Judges Andrésia Vaz, presiding, Gustave Gberdao Kam and Karin Hökborg, pursuant to Rule 15.

2. On Friday 21 April 2006, the Trial Chamber had directed that the Prosecution complete cross-examination of Witness PA1 on that same day, and that the Accused, if he wished to testify, should begin his testimony on Monday 24 April 2006.[2] The Chamber also noted that the only other remaining Defence witness – PS2 – would be heard by video-link on Wednesday 26 April 2006, having granted the Defence motion for such purposes.[3] The Defence did not immediately object to this ruling. The Chamber noted that scheduling of the hearing of the testimony of the Accused on 24 and 25 April 2006 (in the absence of other available Defence witnesses) was necessary to ensure the completion of the trial by the previously-agreed date of 27 April 2006.[4]

3. On 24 April 2006, the morning scheduled for the Accused's testimony, the Defence filed a written motion for reconsideration of the Chamber's oral decision of 21 April 2006 to the effect that if Seromba wished to testify, he should begin his testimony on 24 April 2006.[5] On 24 April 2006, the Chamber heard oral arguments on this motion from both parties and, in an oral decision, denied the motion for reconsideration.[6] In its submissions, the Defence stated that if the Chamber denied its motion for reconsideration, the Defence requested certification for appeal.[7] In its oral ruling, the Trial Chamber also denied certification for appeal of its oral decision denying the motion for reconsideration.[8]

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[1] The latter appears to improve stylistically and typographically on the previous filing, but to be identical to it in substance.
[2] T. 21 April 2006 (English), p. 1.
[3] *Id.*
[4] *Id.* The record suggests that the Defence had previously acknowledged this date and had not objected to it. (*See* T. 18 April 2006 (English), pp. 6-7).
[5] "Requête en Extreme Urgence aux fins de Reconsideration de la Decision du 21 Avril 2006 concernant la Comparution de l'Accusé en Qualité de Témoin", filed by the Defence on 24 April 2006.
[6] T. 24 April 2006 (French), p. 6.
[7] *Id.*, p. 4.
[8] *Id.*, p. 6.

4. On 24 April 2006, after the above rulings, the Defence sought a recess until 2.30 p.m., which the Chamber granted. At that time, the Defence filed the present motion. The Chamber adjourned the proceedings *sine die*.[9]

## SUBMISSIONS

5. In its motion, the Defence requests the Bureau to disqualify Judges Vaz, Hökborg and Kam for their clear "hostility, their partiality, and their personal interest in convicting Athanase Seromba without any regard for the modalities of defence which the latter would or could have presented".[10]

6. The Prosecution opposes the motion for disqualification on the basis that the impugned decisions of the Chamber do not demonstrate bias and as the jurisprudence of the Tribunal recognises no right of an Accused to testify last.[11]

## DELIBERATIONS

1. 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.[12] 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.[13] 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.[14]

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".[15] Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[16] Thus, a mere feeling or suspicion of bias by the

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[9] *Id.*, p. 13.
[10] Motion, p. 11.
[11] Response, p. 1.
[12] 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.
[13] *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.
[14] *Furundžija*, Judgment (AC), 21 July 2000, para. 189.
[15] *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.
[16] 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.[17] 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.[18]

10. The motion alleges that the Judges have a "personal interest" in convicting the Accused.[19] In substance, however, the Defence cites as the basis of its motion several decisions rendered in the course of the trial itself which the Defence allege to be erroneous.[20]

11. In *Karemera,* the Bureau considered the issue of judicial impartiality as evidenced through a Chamber's decisions.[21] 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.[22]

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.[23]

13. The motion alleges, firstly, that the Judges of the Trial Chamber are biased because they ordered the Accused to testify, or otherwise wrongly compelled his testimony.[24] By not

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[17] The objective test has, in substance, been adopted in a number of decisions before this Tribunal: *Ntahobali,* Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9; *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.

[18] *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."

[19] Motion, para. 1.

[20] Motion, para. 4.

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

[22] *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)).

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

[24] Motion, paras. 3-4.

allowing him to testify last, they are alleged to have violated his rights under the Statute and Rules.[25]

14. The Bureau observes that the Defence had previously indicated that the Accused wished to testify on his own behalf.[26] No reasonable allegation of coercion is supported by the record. Further, the Bureau 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."[27] The consistent jurisprudence of the Tribunal demonstrates that there is no right, as such, for an accused to testify last.[28] The Chamber specifically considered judicial economy and the interests of justice in rendering its decisions of 21 April 2006 and 24 April 2006.[29] Further, the Defence has neither alleged nor demonstrated any prejudice to the Accused from this ruling. The Chamber's direction on 21 April 2006 that the Accused testify from 24 April 2006 onwards is therefore consistent with the Tribunal case law and cannot be said to demonstrate bias on the part of the Chamber.

15. The Defence further submits that disqualification of the bench is warranted due to a series of decisions with which the Accused disagrees.[30] It appears to argue that the Chamber is biased because it has denied some Defence motions whilst granting other Prosecution ones.[31] The Bureau recalls 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.[32] Further, and as the Bureau has previously held: "Error, if any, on a point of law is insufficient [to disqualify]."[33]

16. The Defence alleges that the Chamber showed partiality in dealing with Witnesses FE6 and FE35, who complained of being unwell.[34] On 27 March 2006, the Chamber heard from Witness FE6 and the Witnesses and Victims Support Section ("the WVSS"), and requested medical information concerning the condition of FE6. On 27 March 2006, the Chamber was advised by the WVSS that the medical tests for FE6 were negative.[35] Acting in

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[25] Motion, paras. 22, 30-36 and 41.
[26] *See* "Order of Appearance of Defence Witnesses," filed by the Defence with the Registry on 22 March 2006.
[27] *Ntahobali*, Decision on Motion for Disqualification of Judges, (Bureau), 7 March 2006, para. 17; *Bagosora*, Decision on Motion to Compel Accused to Testify Prior to other Defence Witnesses (TC), 11 January 2005, para. 4. Although Accused who testify have chosen the timing of their testimony and, in most cases, have done so at or near the end of the Defence case, Chambers have also considered the interests of justice and questions of judicial economy in ordering a particular sequence of witnesses (*see e.g. 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 Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 17.
[29] *See e.g.* T. 21 April 2006 (English), p. 1.
[30] *See e.g.* Motion, para. 43 (concerning the Chamber's denial of Defence request for certification).
[31] *See e.g.* Motion, paras. 14-15 (referring to the granting of a Prosecution request to adjourn the cross-examination of Defence witness FE36 whilst denying an allegedly-similar request to the Defence). *See, however,* T. 21 November 2005 (English), pp. 1, 35 (showing that this adjournment was granted to the Prosecution in consequence of delays with regard to the disclosure of certain documents). At para. 42, the motion appears to impugn the Chamber's decision to hear a Defence witness (PS2) by video-link. However, in this decision, the Chamber granted a Defence motion to this effect (*see* "Décision Relative à la Requête de la Défense aux fins de Recueillir les Dépositions du Témoin PS2 par voie de Vidéoconférence," 20 April 2006). Granting a Defence motion does not show bias against the Defence in any way.
[32] *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).
[33] *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12.
[34] Motion, paras. 7-16. The Motion appears to contend that this alleged unconcern for witness welfare precluded the Accused from conducting an effective defence, which is equated with bias on the part of the Chamber (*id.*, para. 17).
[35] T. 27 March 2006 (English), p. 39.

its discretion and in view of the condition of the witness before it, the Chamber decided to continue.[36] Its consideration of the state of health of these witnesses appears proper and does not show bias.[37]

17. The Accused further contends that the Chamber demonstrated bias by granting more favourable treatment to Prosecution witnesses than Defence ones.[38] However, the Chamber's overall treatment of Defence witnesses provides no basis for a finding of bias.[39] Nor is bias implied by the Chamber's alleged failure to consider whether or not the Defence intended to recall certain Prosecution witnesses when fixing a date for the conclusion of trial.[40] In the absence of any advance Defence indication of intent to recall any Prosecution witness, such a consideration is merely speculative.

18. The Chamber is further alleged to have shown bias in scheduling a hearing less than an hour after Defence counsel had flown into Arusha from Kigali on that day.[41] In fact, this hearing had been scheduled after conferring with the parties.[42] Despite this, counsel for the accused failed to appear, leaving the Accused unrepresented.[43] The Chamber, although requested to do so by the Prosecution, nevertheless declined to impose sanctions on counsel.[44] Such conduct by the Chamber does not demonstrate bias against the Defence.

19. The motion then impugns the Chamber for allegedly failing to render a decision regarding Defence witness FE36's retraction of his evidence.[45] In fact, the Chamber issued its decision on this issue on 20 April 2006.[46] Bias is also not evidenced by the Chamber's alleged failure to serve its decision of 24 April 2006 in writing.[47] There is no authority for the

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[36] T. 27 March 2006 (English), pp. 39-41. Witness FE6 was in fact able to continue his testimony without physical problems or any apparent difficulty from a reading of the transcript. The Defence conducted a re-examination of Witness FE6 on 28 March 2006 (T. 28 March 2006 (English), pp. 8 *et seq*).

[37] The Chamber's conduct *vis-à-vis* Witness FE35 similarly reveals appropriate concern for the witness' welfare. *See e.g.* T. 22 November 2005, p. 3: "JUDGE VAZ: ... But if you feel, and you tell us, that you cannot, we shall not insist. Are you able to answer questions, as you mentioned a moment ago, Mr. Witness?" THE WITNESS: I'm going to answer the questions which will be put to me, depending on what I know. Immediately I feel tired, I shall inform the Chamber." *See also* T. 27 March 2006, p. 51: "MADAM PRESIDENT: ... "If [Witness] FE32 is ill, he should be taken to see the doctor."

[38] Motion, paras. 18-20.

[39] *See e.g.* footnote 36 and accompanying text. *See further* T. 29 March 2006 (English), p. 3 (Chamber granted an adjournment to the Defence when defence witness Anastase Nkinamubanzi claimed to be sick, with the Chamber ordering that he be taken to the clinic for treatment).

[40] Motion, para. 24.

[41] Motion, para. 25.

[42] T. 7 April 2006 (English), pp. 36-38.

[43] T. 10 April 2006 (English), p. 1: "MADAM PRESIDENT: We felt that at about 4 o'clock all the parties will be here. The only parties missing are the counsel for the Defence who were properly informed. The co-coordinator ... of this Chamber was asked to call on them and ask them what was wrong. Counsel Monthé replied that he was tired. And he also said that Counsel Nekuie was not feeling well. So we find ourselves in circumstances whereby we won't be able to proceed with this trial in view of the fact that the Accused person is not being assisted by counsel."

[44] *Id.*, p. 2: "MADAM PRESIDENT: .... All the parties were aware that trial had to hold, or resume here at 4 o'clock. They have not come. They have decided not to be present and Trial Chamber prefers not to apply any sanctions here and now, for now, and they wish to seek explanations from counsel and subsequently Chamber shall act accordingly."

[45] Motion, para. 37.

[46] *See* "Décision Relative à la Requête de la Défense aux fins de Voir Ordonner l'Ouverture d'une Enquête sur les Circonstances et les Causes Réelles de Rétractation du Témoin Portant le Pseudonyme FE36," 20 April 2006 (confidential) (finding this retraction to have been voluntary). *See further* Response, para. 18: "The inclusion of this argument ... appears to be a deliberate attempt to mislead the Bureau (because the decision was rendered 5 days before the Motion), or appears to show that the Defence prepared the Motion well in advance of 24 April 2006 and therefore timed the Motion for maximum dilatory effect."

[47] Motion, para. 38.

proposition that an oral decision of a Chamber must be served in writing on the parties in order for it to have effect.

20. Finally, the Defence alleges that the Chamber showed bias in denying certification to appeal the Chamber's oral ruling of 24 April 2006.[48] Prior to rendering its decision, the Chamber heard submissions from both parties, where the Prosecution contended that the conditions for appeal were not satisfied, and then adjourned to deliberate.[49] There is nothing to suggest that in rendering this decision, the Judges were animated by any concern other than the relevant legal issues.

21. The Chamber's fixing of a date by which the trial is to be concluded also does not demonstrate bias. Rather, this falls squarely within a Trial Chamber's discretion and authority to control proceedings.

22. The Bureau concludes that the motion has failed to establish that an objective observer, fully apprised of the relevant circumstances, could form a reasonable apprehension of bias 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, 25 April 2006

| Erik Møse | Arlette Ramaroson | William H. Sekule | Khalida Rachid Khan |
|---|---|---|---|
| President | Vice-President | Presiding Judge of Trial Chamber II | Presiding Judge of Trial Chamber III |

[Seal of the Tribunal]

[48] Motion, paras. 43-44.
[49] T. 24 April 2006 (French), pp. 4-5.