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OR: ENG

**The BUREAU**

**Before:** Judge Dennis C.M. Byron, President  
Judge Khalida Rachid Khan, Vice President

**Registrar:** Adama Dieng

**Date:** 25 January 2011

10079-10057  
25 JAN 2011

**THE PROSECUTOR**

v.

**Augustin NGIRABATWARE**

**Case No: ICTR-99-54-T**

**DECISION ON THE DEFENCE MOTION FOR THE DISQUALIFICATION OF THE  
JUDGES OF THE TRIAL CHAMBER**

*(Rule 15 (B) of the Rules of Procedure and Evidence)*

**Office of the Prosecutor:**

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**I. INTRODUCTION**

1. On 5 January 2011, the counsel for the Accused Augustin Ngirabatware (“Defence”) moved the Bureau of the Tribunal seeking, on grounds of “reasonable apprehension [and] appearance of bias”, the disqualification of all the three Judges of the Trial Chamber—Judges Sekule, Bossa and Rajohnson—which is currently seized of his trial.<sup>1</sup> Ngirabatware’s motion (“Disqualification Motion”) cites nine grounds in support of his request of disqualification, primarily alleging differential treatment of the Prosecution and the Defence during the trial proceedings. The Prosecution, in its response of 13 January 2011 (“Prosecution Response”), seeks the dismissal of the Disqualification Motion both on a preliminary procedural objection and on its merits.<sup>2</sup> On 19 January 2011, Ngirabatware filed his Reply to the Prosecution Response.<sup>3</sup>

2. On 17 January 2011, when the trial resumed after the judicial recess, the Trial Chamber, on an oral request of the Defence, adjourned the trial pending the disposal of the Disqualification Motion by the Bureau.<sup>4</sup>

3. Pursuant to Rule 23 of the Rules, the Bureau comprises of the President, the Vice President and the Presiding Judges of the Trial Chambers. As Judge Sekule, the Presiding Judge of Trial Chamber II, has recused himself, being the subject of the Disqualification Motion, the Bureau, for the present purposes, is comprised of President Byron and Vice President Khan.

**II. PRELIMINARY MATTERS**

**a. Admissibility of the Disqualification Motion**

4. Rule 15(B) of the Rules of Procedure and Evidence (“Rules”) of this Tribunal envisions a two-stage process of consideration of an application for disqualification of a Trial Chamber Judge.<sup>5</sup> Any such application is first made to the Presiding Judge of the Trial Chamber that is seized of the proceedings. The Presiding Judge then confers with the Judge

<sup>1</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion for Disqualification of Trial Chamber II’s Judges, 5 January 2011 (“Disqualification Motion”), p. 236.

<sup>2</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecution’s Response to the Defence Motion for Disqualification of Trial Chamber II’s Judges, 13 January 2011 (“Prosecution Response”), pp. 4, 27-28.

<sup>3</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Reply to the Prosecution’s Response to the Defence Motion for Disqualification of Trial Chamber II’s Judges, 19 January 2011.

<sup>4</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Minutes of Proceedings, 17 January 2011, para. 1(a).

<sup>5</sup> *The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006 (“*Seromba* Appeal Decision”), para. 5.

in question. If the applicant disputes the Presiding Judge's decision, he or she may move the Bureau for a *de novo* review.<sup>6</sup>

5. In this case, the Defence has filed the Disqualification Motion before the Bureau in the first instance without first filing it before the Presiding Judge of Trial Chamber seized of the trial. In so doing, the Defence has eliminated a review procedure envisioned by Rule 15 (B). Owing to this procedural irregularity, the Bureau has the discretion to dismiss the Disqualification Motion as improperly filed.<sup>7</sup> The Prosecution has asked the Bureau to adopt this course of action.<sup>8</sup>

6. Applications for the disqualification of the Judges of a bench trying a case have been moved before, and entertained by, the same bench.<sup>9</sup> The Defence did not do so. Nor did it file the application for disqualification before Judge Sekule, the Presiding Judge of Trial Chamber II, a bench of which is seized of Ngirabatware's trial. However, since Judge Sekule is also the Presiding Judge of that bench, and himself a subject of the request for disqualification, the Bureau exercises its discretion to entertain the Disqualification Motion at the first instance. Such a course of action would not be an error.<sup>10</sup> It would serve judicial economy as the trial has been stayed awaiting the decision of the Bureau and an expeditious disposal of the Disqualification Motion would result in its early resumption.

#### **b. Timing of the Disqualification Motion**

7. While the trial commenced on 23 September 2009, the Disqualification Motion was only filed on 5 January 2011.<sup>11</sup> It was filed less than two weeks before the commencement of the last session of the substantive trial and at the end of the Defence evidence when the cross examination of the Accused is well underway. It alleges bias of Judges Sekule, Bossa and Rajohnson for their judicial actions taken from the commencement of the trial.<sup>12</sup> The Defence submits that the Disqualification Motion "could not have been filed sooner, or

<sup>6</sup> *Seromba* Appeal Decision, para. 5.

<sup>7</sup> *Seromba* Appeal Decision, para. 6 (citing *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on the Disqualification of the Appeals Chamber, 9 December 2004, para. 3).

<sup>8</sup> Prosecution Response, para. 7.

<sup>9</sup> See, for example, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Ngirumpatse for Disqualification of Trial Judges (Bureau), 17 May 2004, para. 5.

<sup>10</sup> *Seromba* Appeal Decision, para. 6.

<sup>11</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Minutes of Proceedings, 23 September 2009.

<sup>12</sup> See, for example, Disqualification Motion, paras 485-486 (dealing with bias in the denial of the Defence motion for reconsideration of the decision of 23 September 2009).

later”<sup>13</sup> and it waited until now to observe the disposal of certain Defence motions and the relative treatment of the Trial Chamber towards the Prosecution and the Defence.<sup>14</sup>

8. The Prosecution alleges that the timing of the Disqualification Motion may have been “pre-planned [...] in order to interfere with the resumption of the trial.”<sup>15</sup>

9. The Rules do not envisage a time-frame for the filing of applications for disqualification of Judges. Accordingly, the Disqualification Motion is not barred by any statutory period of limitation. This being so, the Bureau will address the substantive challenges raised in the Disqualification Motion.

### III. DELIBERATIONS

#### a. Applicable Law

10. A judge of this Tribunal 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”.<sup>16</sup> This provision has been interpreted broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.<sup>17</sup> In *Furundžija*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) held 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.<sup>18</sup> 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.<sup>19</sup>

11. 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.”<sup>20</sup> Although the standpoint of the accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.<sup>21</sup> Thus, a mere feeling or suspicion of bias by the

<sup>13</sup> Disqualification Motion, para. 7.

<sup>14</sup> Disqualification Motion, paras 8-11.

<sup>15</sup> Prosecution Response, para. 6.

<sup>16</sup> Rule 15(A) of the Rules of Procedure and Evidence (“Rules”).

<sup>17</sup> *The Prosecutor v. Blagojević*, Case No. IT-02-60-T, Decision on Blagojević’s Application Pursuant to Rule 15 (B), 19 March 2003 (“*Blagojević Decision*”), para. 10.

<sup>18</sup> *The Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement (AC), 21 July 2000 (“*Furundžija Judgement*”), paras 181-88.

<sup>19</sup> *Furundžija Judgement*, para. 189.

<sup>20</sup> *Furundžija Judgement*, para. 195 (quoting *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart)).

<sup>21</sup> *Furundžija Judgement*, para. 185.

accused is insufficient; what is required is an objectively justified apprehension of bias, based on the knowledge of all the relevant circumstances.<sup>22</sup>

12. Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection pursuant to Article 12 of the Statute of the Tribunal. Matters that are ordinarily insufficient to require recusal are “speculations, beliefs, conclusions, suspicions, opinions and similar non-factual matters.”<sup>23</sup> The moving party bears the burden of displacing that presumption, which imposes a high threshold.<sup>24</sup> The reason for this high threshold is that while any real or apparent 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 if judges were to be disqualified on the basis of unfounded and unsupported allegations of bias.<sup>25</sup> Accordingly, the Bureau is not required to act if the burden of proof is not met.<sup>26</sup>

13. In *Karemera*, the Bureau considered the issue of judicial impartiality as evidenced through a Chamber’s decisions.<sup>27</sup> It relied on the ICTY Bureau’s decision in *Blagojević*, where the Bureau, although not entirely ruling out the possibility that decisions rendered by a judge or a 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.<sup>28</sup> In *Ntahobali*, the Bureau of this Tribunal noted that allegations of bias based on the content of judicial proceedings have been considered in *Liteky* by the United States Supreme Court, where it was emphasised that judicial rulings alone almost never constitute a valid basis for a bias application. Most often, they are grounds for appeal, not for recusal. Opinions formed by a judge on the basis of facts introduced or events occurring in the course of the proceedings do not constitute a basis for a bias application unless they display a deep-seated favouritism or antagonism that would make fair judgment impossible.<sup>29</sup>

<sup>22</sup> *The Prosecutor v. Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges, 7 March 2006 (“*Ntahobali Decision*”), para. 9.

<sup>23</sup> *The Prosecutor v. Ieng Sary et al*, Case No. 002/07-12-2009-ECCC/PTC(05), Decision on Ieng Sary’s and Ieng Thirith’s Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, Extraordinary Chambers in the Courts of Cambodia (“ECCC”), 15 June 2010 (“ECCC Decision”), para. 63.

<sup>24</sup> *Ntahobali Decision*, para. 9.

<sup>25</sup> *The Prosecutor v. Ieng Sary et al*, Case No. 002/20-10-2009-ECCC/PTC(03), Decision on Ieng Sary’s Request for Appropriate Measure Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, ECCC, 30 November 2009, para. 7 (citing *The Prosecutor v. Delalić et al.*, IT-96-12-A, Judgement, 20 February 2001, para. 707).

<sup>26</sup> See ECCC Decision, para. 63.

<sup>27</sup> *Ntahobali Decision*, para. 11 (citing *The Prosecutor v. Karemera*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004 (“*Karemera Decision*”), para. 12).

<sup>28</sup> *Ntahobali Decision*, para. 11 (citing *Blagojević Decision*, para. 14).

<sup>29</sup> *Ntahobali Decision*, fn. 14 (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

14. 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, 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.<sup>30</sup>

15. Having addressed the preliminary matters and having delineated the applicable law, the Bureau will now address the substantive allegations of bias against the Judges of the *Ngirabatware* Trial Chamber. It will assess whether these allegations, individually or cumulatively, cross the high threshold required in such applications and overcome the presumption of impartiality attached to the Judges. The Bureau will subsequently review, if required, that if the allegations do cross that high threshold what remedies can be granted to *Ngirabatware*.

**b. Allegations of bias concerning Trial Chamber's decisions on parties' disclosure obligations**

16. The Defence alleges bias on the ground that the Judges took no action against the Prosecution for its claimed violations of disclosure obligations, and, indeed, "encouraged the Prosecution to systematically neglect its disclosure obligations knowing that whatever complaint from the Defence would be dismissed by the Trial Chamber". Conversely, the Defence submits that the Judges were more "receptive" when the Prosecution "complained about the alibi disclosure obligations of the Defence."<sup>31</sup>

17. The Rules contain several provisions outlining the powers of the Trial Chamber to ensure that the trials are both fair and expeditious at every stage of the proceedings. Rule 90(F), for example, envisions that the Trial Chamber shall exercise control over the mode and the order of the presentation of the evidence so as to (1) make it effective for the ascertainment of the truth, and (2) to avoid needless consumption of time. Thus, the Trial Chamber renders judicial decisions on an ongoing basis to ensure an efficient and fair trial. These interlocutory decisions may run into their hundreds during trials such as that of

<sup>30</sup> *Ntahobali* Decision, para. 11 (citing *Karemura* Decision, para. 13).

<sup>31</sup> Disqualification Motion, paras 121-122.

Ngirabatware. The Statute, pursuant to the extraordinary mandate of this Tribunal, does not contemplate that the parties have an immediate right to appeal every interlocutory decision.<sup>32</sup>

18. The Bureau will now deal with the Defence's individual grievances against the decisions of the Trial Chamber on the question of disclosure.

*i. Material under Rule 66(A)(ii)*<sup>33</sup>

19. The Defence impugns the Trial Chamber's reasoning and disposition in a decision rendered on 17 September 2009 claiming that the decision failed to take into account certain submissions of the Defence pertaining to two Prosecution witnesses.<sup>34</sup> The Defence also challenges the reasoning of the Trial Chamber regarding the Defence's obligation to locate material not in the possession of the Prosecution,<sup>35</sup> and about disclosure obligation of the Prosecution in respect of statements of witnesses who testified in previous public trials.<sup>36</sup> It seeks to contrast the Trial Chamber's decision of 17 September 2009 with that Chamber's decision of 24 June 2010 where, according to it, the Trial Chamber took a legally correct position regarding the Prosecution's disclosure obligations under Rule 66(A)(ii) of the Rules.<sup>37</sup>

20. The decision of 17 September 2009 was rendered a few days before the commencement of the trial on 23 September 2009. As its title indicates, it was primarily concerned with numerous "issues related to the preparation of the trial".<sup>38</sup> The Trial Chamber, in about five pages, took detailed note of the submissions of the parties, in particular, of the response and the reply filed by the Defence. Furthermore, the decision was not principally concerned with granting original relief but only concerned the request of reconsideration of the Trial Chamber's previous decision of 15 July 2009 that had set the date of commencement of the trial.<sup>39</sup> The Trial Chamber, in paragraphs 36 to 53 of the decision of 17 September 2009, dealt with various issues pertaining to the staffing of the Defence team, translation, attempted cooperation with States, Rule 90 *bis* motions, the immigration record of a Prosecution witness, identifying information regarding Prosecution witnesses, Witness

<sup>32</sup> *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-A, Decision on Interlocutory Appeal from Refusal to Reconsider Decisions relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", 2 May 2002, paras 13-14.

<sup>33</sup> Disqualification Motion, paras 31-35.

<sup>34</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009 ("*Ngirabatware* 17 September 2009 Decision").

<sup>35</sup> Disqualification Motion, para. 31.

<sup>36</sup> Disqualification Motion, para. 35.

<sup>37</sup> Disqualification Motion, para. 36.

<sup>38</sup> *Ngirabatware* 17 September 2009 Decision, p. 1.

<sup>39</sup> *Ngirabatware* 17 September 2009 Decision, para. 1.

ANAQ, disclosure issues and previous decisions cited by the Defence. The decision clearly dealt with logistical and planning matters in anticipation of the commencement of the trial.

21. The Bureau finds that the decisions of 17 September 2009 and 24 June 2010 were based on correct legal principles and were informed by the factual situations obtaining before the Trial Chamber at the time when they were rendered. The Defence did not seek a certification to appeal the decision of 17 September 2009. The decision of 17 September 2009 is not, or cannot reasonably be perceived as, attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

*ii. Gacaca records of three Prosecution witnesses*<sup>40</sup>

22. The Defence challenges the Trial Chamber's oral ruling of 1 March 2010 in which the Judges directed the parties to proceed with the examination of Prosecution Witnesses AFS, ANAS and ANAU in the absence of their *Gacaca* court records. The Defence claims that, in making this decision, the Trial Chamber "disregarded the fact that the Prosecution was in breach of its disclosure obligations."<sup>41</sup>

23. The Bureau has reviewed the transcript of the trial proceedings of 1 March 2010, including the excerpt cited by the Defence. It concludes that the Trial Chamber reasonably and adequately addressed the Defence's concerns by leaving open the possibility of the recall of those Prosecution witnesses should the *Gacaca* records become available in future. The Defence does not allege, nor does the record indicate, that the *Gacaca* records were in the possession of the Prosecution and that it failed in its obligation to disclose them in advance of the testimony of the Prosecution Witnesses AFS, ANAS and ANAU. In the circumstances of an ongoing trial, the Trial Chamber correctly exercised its discretion to continue with the evidence of the Prosecution witnesses with the possibility of their recall if *Gacaca* records were obtained. The Bureau considers that there was no apparent breach of the Prosecution's disclosure obligations as the Prosecution cannot be compelled to disclose material that it does not possess.

24. The Bureau, accordingly, finds that the Trial Chamber's oral decision of 1 March 2010 is not, or cannot be reasonably perceived as, attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

<sup>40</sup> Disqualification Motion, paras 37-40.

<sup>41</sup> Disqualification Motion, para. 39.



*iii. "Statements" obtained in "assessment meetings" with the witnesses*<sup>42</sup>

25. The Defence challenges the ruling of the Trial Chamber regarding the notes taken by the representatives of the Prosecution during their meetings with the Prosecution witnesses to assess the latter's credibility. It claims, on the basis of the testimony of the Prosecution Investigator Delvaux, that these notes constitute "statements" under Rule 66(A)(ii) and are hence subject to disclosure. The Defence claims that the Trial Chamber erroneously characterised these notes as "internal documents" of the Prosecution and, accordingly, not subject to disclosure pursuant to Rule 70(A) of the Rules. In contrast, the Defence highlights that, in one instance, the Trial Chamber indeed directed the disclosure of the notes pertaining to Witness ANAP.<sup>43</sup>

26. This issue solely concerns the denial of a Defence motion by the Trial Chamber on the basis of an interpretation of the Rules. In the Bureau's view, the Bench was operating on a correct application of the Rules to specific fact situations before it. When viewed in its entirety, the Bureau concludes that the Trial Chamber's conduct was not, or could not reasonably be perceived as, attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

*iv. Identifying information or previous "statements" of witnesses*<sup>44</sup>

27. The Defence claims that the Prosecution provided incomplete or inaccurate identifying information regarding the Prosecution Witness ANAE, creating difficulties for the Defence investigation of that witness. It submits that despite this background, the Trial Chamber refused to adjourn the proceedings holding that the inaccuracies be put to the witness in her cross-examination to challenge her credibility.<sup>45</sup> The Defence further claims that despite the witness's testimony that she had signed "documents" during her meetings with the Prosecution investigators,<sup>46</sup> those "statements" were not disclosed to the Defence in breach of the Prosecution's obligation under Rule 66(A)(ii). In the Defence's view, the Trial Chamber's refusal to direct disclosure demonstrates its bias against Ngirabatware.<sup>47</sup>

28. On 13 October 2009, the Trial Chamber denied the postponement of the testimony of Witness ANAE on the basis of alleged incomplete or false identifying information. The Trial Chamber reached this conclusion on the submission of the Prosecution that the witness could have been easily investigated through the details of the contact person who was named in

<sup>42</sup> Disqualification Motion, paras 41-54.

<sup>43</sup> Disqualification Motion, para. 53.

<sup>44</sup> Disqualification Motion, paras 55-69.

<sup>45</sup> Disqualification Motion, para. 62.

<sup>46</sup> Disqualification Motion, para. 65.

<sup>47</sup> Disqualification Motion, para. 68.

paragraph 14 of her witness statement.<sup>48</sup> Furthermore, the Trial Chamber's decision of 21 October 2009 was consistent with settled jurisprudence when it ruled against the production of "statements" of Witness ANAE upon being informed by the Prosecution that no such statement existed.<sup>49</sup>

29. The Bureau, therefore, concludes that the Trial Chamber's decisions, individually or cumulatively, are not, or cannot reasonably be perceived as, attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

*v. Alleged late disclosure of documents and information*<sup>50</sup>

30. The Defence contends that the Trial Chamber has not taken into account the breaches of the Prosecution's disclosure obligations and encouraged the Prosecution to neglect its obligations knowing that the Defence objections would be dismissed by the Trial Chamber.<sup>51</sup> It claims that the Trial Chamber was "much more receptive" when the Prosecution complained about the alibi disclosure obligation of the Defence.<sup>52</sup>

31. In support of this ground, the Defence has cited (1) the Trial Chamber's decision of 15 July 2009 allegedly acknowledging late disclosure but not permitting statutorily permitted sixty days under Rule 66(A)(ii),<sup>53</sup> (2) late disclosure of will-say of Witness ANAP that contained new allegations,<sup>54</sup> (3) late disclosure of will-say of Witness ANAM that contained a new allegation of rape,<sup>55</sup> (4) late disclosure of identity of Witness ANAM's parents and the Witness' family relationship with Witness ANAG,<sup>56</sup> (5) late disclosure of will-say of Witness ANAU,<sup>57</sup> (6) the Trial Chamber's refusal to apply provisions of Rule 66(A)(ii) to the statements of the Prosecution Witness Ngarambe,<sup>58</sup> and (7) delayed or non-receipt of translations of documents.<sup>59</sup>

32. This ground principally concerns the Defence's allegations regarding the disclosure of will-say statements very close to the testimony of the concerned witness. While it is undeniable that the Defence should have a reasonable time to prepare regarding a disclosure of any new fact in a will-say statement, the length of that time depends on individual circumstances of every particular disclosure. The Bureau, therefore, rejects the Defence's contention that denial of more

<sup>48</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Transcript, 13 October 2009, pp. 26-33.

<sup>49</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Transcript, 21 October 2009, p. 9.

<sup>50</sup> Disqualification Motion, paras 70-123.

<sup>51</sup> Disqualification Motion, para. 121.

<sup>52</sup> Disqualification Motion, para. 121.

<sup>53</sup> Disqualification Motion, paras 70-72.

<sup>54</sup> Disqualification Motion, paras 73-84.

<sup>55</sup> Disqualification Motion, paras 85-91.

<sup>56</sup> Disqualification Motion, paras 92-98.

<sup>57</sup> Disqualification Motion, paras 99-103.

<sup>58</sup> Disqualification Motion, paras 104-115.

<sup>59</sup> Disqualification Motion, paras 116-120.

time to it than what a Bench composed of Judge Sekule granted to the defence in *Butare* would indicate a bias of Judge Sekule against Ngirabatware.<sup>60</sup>

33. Regarding the material pertaining to the Witness Ngarambe, while the Defence submitted that this material was covered by Rule 66(A)(ii), the Trial Chamber ruled that it “may not strictly come within the scope of Rule 66”.<sup>61</sup> Thus, the issue raised by the Defence is not one of bias but the Defence’s grievance with a decision of the Trial Chamber.

34. The Bureau reaches the same conclusion regarding the Trial Chamber’s determination that the Defence employ resources available to it for translation of documents.

35. The Bureau, therefore, concludes that the Trial Chamber’s decisions, individually or cumulatively, are not, or cannot reasonably be perceived as, attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

**c. Allegations of bias concerning the Trial Chamber’s decisions on admission of documents during trial<sup>62</sup>**

36. The Defence claims that the Trial Chamber has adopted a broad approach to admitting documents tendered by the Prosecution while it has interpreted the Rules and the jurisprudence restrictively, or allegedly created procedures non-existent in the Rules or in the jurisprudence, to deny admission of documents tendered by the Defence. In support of this ground, it cites the Trial Chamber’s treatment of (1) documents tendered through the Prosecution Investigator Delvaux,<sup>63</sup> (2) a trial judgement from Gisenyi during the testimony of Witness ANAM,<sup>64</sup> (3) the guilty plea of Prosecution Witness ANAS,<sup>65</sup> (4) a *Gacaca* court judgement in the case of the Prosecution Witness ANAO,<sup>66</sup> (5) minutes of the Rubona *Gacaca* proceedings,<sup>67</sup> (6) minutes of the Busheke *Gacaca* proceedings,<sup>68</sup> (7) statement of Prosecution Witness ANAO before Rwandan authorities in Gisenyi,<sup>69</sup> (8) statement of Prosecution Witness ANAR before Rwandan authorities in Gisenyi,<sup>70</sup> (9) certain UNAMIR documents,<sup>71</sup> (10) transcripts of Radio Rwanda broadcasts,<sup>72</sup> (11) transcripts of Romeo Dallaire’s testimony in *Bagosora et al.*,<sup>73</sup> (12) videotape

<sup>60</sup> Disqualification Motion, paras 73-78.

<sup>61</sup> Disqualification Motion, para. 108 (citing the Transcript of 24 August 2010).

<sup>62</sup> Disqualification Motion, pp. 43-85.

<sup>63</sup> Disqualification Motion, paras 124-135.

<sup>64</sup> Disqualification Motion, paras 136-141.

<sup>65</sup> Disqualification Motion, paras 142-144.

<sup>66</sup> Disqualification Motion, paras 145-147.

<sup>67</sup> Disqualification Motion, paras 148-150.

<sup>68</sup> Disqualification Motion, paras 151-154.

<sup>69</sup> Disqualification Motion, paras 155-157.

<sup>70</sup> Disqualification Motion, paras 158-160.

<sup>71</sup> Disqualification Motion, paras 161-194.

<sup>72</sup> Disqualification Motion, paras 195-210.

<sup>73</sup> Disqualification Motion, paras 211-227.

of an MRND rally in 1992,<sup>74</sup> and (13) Ngirabatware's diary.<sup>75</sup> Finally, the Defence submits that the Trial Chamber allowed the Prosecution to question witnesses on issues that were not permissible given the nature of those questions and the stage of the proceedings.<sup>76</sup>

37. The Trial Chamber has clearly enunciated the law that applies in respect of admission of documents during trial. It has adopted the practice that "a party rendering a document should do so through a witness who is either the author of that document or who can speak to its origin and content."<sup>77</sup> In addition, it has asked the party tendering a document to ventilate the reasons behind each request for exhibition of exhibits.<sup>78</sup> The Bureau finds this approach to be consistent with the intent of Rule 89(C) and settled jurisprudence. The grievance of the Defence that the admission of its document has been "time consuming"<sup>79</sup> while the Prosecution's documents have been admitted only after a "witness established a 'connection' with the document" is unsubstantiated.<sup>80</sup> The Bureau notes that the Trial Chamber addressed these matters on a case-by-case-basis and its decisions do not indicate a pre-disposition in favour of the Prosecution and against the Defence.

38. The Defence challenges the Trial Chamber's methodology of admitting a document "for its contents" or for any other stated purpose. It submits that Rule 89(C) "does not distinguish between filing a document for its contents and filing a document in specific aspects."<sup>81</sup> The Bureau notes that the Trial Chamber has adopted a practice consistent with the settled jurisprudence that draws a distinction between the admissibility of a document and the weight accorded to it in the light of all evidence when the Trial Chamber is considering its final judgement.<sup>82</sup>

39. The Bureau considers that the Trial Chamber adopted the correct legal principles in its decisions to allow or disallow a particular line of questioning by the parties. During the examination of 20 Prosecution witnesses and that of the Accused, the Trial Chamber took numerous decisions on an ongoing basis. The Defence has failed to establish, and the Bureau has not found, a pattern of conduct of the Trial Chamber in its decision-making demonstrative of an actual or apparent bias against Ngirabatware. This ground is, accordingly, rejected.

<sup>74</sup> Disqualification Motion, paras 228-230.

<sup>75</sup> Disqualification Motion, paras 231-234.

<sup>76</sup> Disqualification Motion, paras 235-245.

<sup>77</sup> Disqualification Motion, para. 139 (citing the Transcript of 9 February 2010).

<sup>78</sup> Disqualification Motion, para. 142.

<sup>79</sup> Disqualification Motion, para. 142.

<sup>80</sup> Disqualification Motion, para. 124.

<sup>81</sup> Disqualification Motion, para. 141.

<sup>82</sup> *The Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on the Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 10.

**d. Allegations of bias concerning the Trial Chamber's "interference" in the Defence's cross-examination of the Prosecution witnesses and the examination-in-chief of the Accused<sup>83</sup>**

40. The Defence alleges that, in a clear appearance of bias, the Trial Chamber "interfered" in the examination of witnesses by the Defence counsel. It alleges that, in doing so, the Trial Chamber exceeded the limits imposed on it by the Rules. In support, it cites instances from the cross-examination of Prosecution Witnesses ANAP, ANAE, Delvaux, ANAL and ANAN and from the examination-in-chief of the Accused himself.

41. Pursuant to Rule 90(F), the Trial Chamber exercises control over the mode and order of examining witnesses to make that examination effective for the ascertainment of the truth and to avoid needless consumption of time. In addition, Rule 90(G) provides guidelines to be observed during the cross-examination of a witness especially in respect of the types of questions that the counsel can put. This later Rule also grants the Trial Chamber the discretion to permit enquiries into additional matters. In this connection, the Bureau has reviewed the testimonies of Prosecution Witnesses ANAP, ANAE, Delvaux, ANAL and ANAN.

42. The Defence alleges that its counsel was not allowed to put questions to Witness ANAP to challenge her credibility on the ground of conflicting information provided by her in her examination-in-chief and before the Belgian immigration authorities.<sup>84</sup> The Bureau notes that the Presiding Judge did not prevent the counsel from putting questions regarding these contradictions to the witness. Indeed, the Presiding Judge only reminded the counsel to demonstrate the relevance of the line of questioning before embarking upon it.<sup>85</sup> Specifically, the Presiding Judge was concerned about the enquiry into the personal family details of the witness without a demonstration of their relevance.<sup>86</sup> The Presiding Judge reminded counsel to restrict cross-examination to eliciting information from the witness rather than arguing with her, recalling that it was for the Trial Chamber to draw the necessary inferences from any contradictions or inconsistencies in her evidence.<sup>87</sup>

43. The Defence next alleges that its counsel was not allowed to put questions to Prosecution Witness ANAE owing to the interference by the Presiding Judge.<sup>88</sup> The Bureau notes that during this testimony, the Presiding Judge, in exercise of his powers to control the proceedings, requested the Defence counsel to proceed to the next line of examination after the witness had

<sup>83</sup> Disqualification Motion, pp. 85-142.

<sup>84</sup> Disqualification Motion, para. 247.

<sup>85</sup> Disqualification Motion, pp. 87-89 (citing the Transcript of 24 February 2010).

<sup>86</sup> Disqualification Motion, p. 88 (citing the Transcript of 24 February 2010).

<sup>87</sup> Disqualification Motion, pp. 93-98 (citing the Transcript of 25 February 2010).

<sup>88</sup> Disqualification Motion, para. 261.

provided an answer on an issue.<sup>89</sup> Indeed, at a later occasion, when an answer was insufficient, the Presiding Judge also elicited an explanation from the same witness.<sup>90</sup>

44. The Bureau has also considered the Defence's contentions regarding the evidence of Prosecution Investigator Delvaux and Witness ANAL.<sup>91</sup> The excerpted testimonies do not demonstrate, as alleged, that the Presiding Judge "restrained" or "interfered" in the cross-examination of these witnesses.<sup>92</sup> Once the witnesses had provided factual information, the Presiding Judge requested the Defence to move on to the next line of examination instead of engaging in an argument with them. The excerpts cited by the Defence fail to indicate that the Presiding Judge disallowed any questions that sought to elicit factual information. For example, the Presiding Judge permitted questions pursuant to which Investigator Delvaux provided testimony that notes were taken during witness interviews,<sup>93</sup> and Witness ANAL testified about the weapons that were allegedly brought by the Accused.<sup>94</sup>

45. The Bureau has also considered the excerpts from the testimony of Witness ANAN that the Defence cites to claim that the Presiding Judge interfered in the cross-examination of the witness and "indulged"<sup>95</sup> him and allowed the witness to "control and dictate the proceedings."<sup>96</sup> As the Trial Chamber is the guardian and the guarantor of the procedural and substantive rights of an accused, it also has an obligation to strike a balance in seeking to protect the rights of victims and witnesses.<sup>97</sup> It appears from the record that when the witness complained of certain health issues, the Presiding Judge ensured that the witness was provided medical attention.<sup>98</sup> In addition, the Presiding Judges' interventions in the cited excerpts amounted to controlling the trial proceedings and setting forth rules that should inform the examination of witnesses. For example, the Presiding Judge reminded the parties to demonstrate the relevance of a line of examination or putting of a document before that line is adopted or document introduced.<sup>99</sup> The Presiding Judge also sought to control the time that was taken to examine the witness within the parameters of the evidence that he was expected to adduce. The record indicates that the witness himself objected to the time the Defence counsel was taking to

<sup>89</sup> Disqualification Motion, pp. 99-102 (citing the Transcript of 21 October 2009).

<sup>90</sup> Disqualification Motion, p. 101 (citing the Transcript of 21 October 2009).

<sup>91</sup> Disqualification Motion, paras 262-263.

<sup>92</sup> Disqualification Motion, para. 262.

<sup>93</sup> Disqualification Motion, para. 41 (citing the Transcript of 29 September 2009).

<sup>94</sup> Disqualification Motion, para. 283 (citing the Transcript of 7 October 2009).

<sup>95</sup> Disqualification Motion, para. 264.

<sup>96</sup> Disqualification Motion, para. 267.

<sup>97</sup> *The Prosecutor v. Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, p. 6.

<sup>98</sup> Disqualification Motion, p. 106 (citing the Transcript of 2 February 2010).

<sup>99</sup> Disqualification Motion, pp. 109-113, 117 (citing the Transcripts of 2 and 3 February 2010).

examine him: “[W]hen I came here, I asked for one week of leave. Now I realise that the testimony is going to be long if you go into these details.” The Presiding Judge then advised the witness that if he answered the questions “specifically and quickly” the testimony would conclude soon.<sup>100</sup> The Bureau notes that whenever the Presiding Judge advised the Defence counsel to conclude his examination on a particular line of inquiry, it was not to exclude evidence but to note that the witness had responded to the particular factual issue and that the rest was for the parties to argue at a later stage of the proceedings.

46. The Defence next alleges that while the Presiding Judge interfered with the Defence counsel during the cross-examination of the Prosecution witnesses, he was “disposed to allow some largess” to the Prosecution counsel when they cross-examined the Accused.<sup>101</sup> It alleges that on many occasions the Presiding Judge allowed the Prosecution to ask questions completely out of context.<sup>102</sup>

47. The Bureau has considered the relevant testimony excerpted by the Defence. It has also compared this with the cross-examination by the Defence of the Prosecution witnesses. The Bureau concludes that the Trial Chamber has not adopted one attitude during the Defence’s cross-examination of Prosecution witnesses and another during the Prosecution’s cross-examination of Defence witnesses. The Bureau notes that there have been no Defence witnesses yet except the Accused Ngirabatware. On a broad assessment of the two sets of evidence and the Trial Chamber’s handling of the testimonies, the Bureau finds that the Presiding Judge has not adopted a more “interfering” attitude towards the Defence and a more “lenient” attitude towards the Prosecution. The Presiding Judge has stressed the same set of issues during the cross-examination by the Defence as he did during cross-examination by the Prosecution. These issues include: (1) counsel must demonstrate the relevance of a line of questioning or a document to be introduced before questioning; (2) witnesses depose on facts and counsel should not argue with them; and (3) counsel should not be repetitive and focus on relevant issues.

48. The Bureau, therefore, finds that the Trial Chamber has applied settled procedural principles in its allocation of time to the counsel to examine witnesses. These matters remain within its domain and the Trial Chamber correctly exercised its discretion. These decisions, on the totality of circumstances, do not, or cannot be reasonably perceived as, attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

<sup>100</sup> Disqualification Motion, pp. 118-119 (citing the Transcript of 4 February 2010).

<sup>101</sup> Disqualification Motion, para. 284.

<sup>102</sup> Disqualification Motion, para. 298.

**e. Allegations of bias concerning the Trial Chamber's decisions on protective measures<sup>103</sup>**

49. The Defence impugns the decisions of the Trial Chamber pertaining to protective measures to establish different treatment of the Defence and the Prosecution. In particular, the Defence challenges the Trial Chamber's alleged lack of equality of arms on the basis of its decision to not order the Prosecution to provide names and details of persons in the Office of the Prosecutor who would have access to information regarding protected Defence witnesses.<sup>104</sup> It alleges that the Trial Chamber's bias is also demonstrated from the way the Trial Chamber dealt with its motion on protective measures as compared to the decision in the case of another accused at the Tribunal, Callixte Nzabonimana.<sup>105</sup> It further claims bias on the basis of the promptness with which the Trial Chamber allegedly dealt with the Prosecution's motion for protective measure as compared to the delayed disposal of a similar Defence motion.<sup>106</sup>

50. The Bureau has reviewed the Trial Chamber's original decision of 9 February 2010 on the Defence request for protective measures.<sup>107</sup> In that decision, the Trial Chamber relied upon the jurisprudence of this Tribunal in the cases of *Setako* and *Bagosora* to hold that it need not direct the Prosecution to specify the names of persons who would be granted access to the information regarding protected Defence witnesses. The Trial Chamber found that this measure was not necessary as the "Prosecution is bound that confidential information is not disclosed, but the mechanism to prevent such disclosure and the range of persons within the Office of the Prosecutor who have such access rests within its sole discretion."<sup>108</sup> The Bureau has also reviewed the decision of the Trial Chamber of 31 March 2010 upon a request by the Defence to reconsider the original decision of 9 February 2010.<sup>109</sup> The Trial Chamber's decision to refuse reconsideration of its 9 February 2010 decision in the light of a subsequent decision in *Nzabonimana* does not indicate a bias. The Bureau considers this to be a frivolous objection as one Trial Chamber is not bound by the decisions of another. The 31 March 2010 decision was only concerned with whether the Defence had met the conditions under which a request for reconsideration could be granted.<sup>110</sup> In refusing reconsideration, the Trial Chamber noted that equality of arms does not necessarily imply that both parties be treated identically, but

<sup>103</sup> Disqualification Motion, pp. 142-147.

<sup>104</sup> Disqualification Motion, para. 315.

<sup>105</sup> Disqualification Motion, para. 315.

<sup>106</sup> Disqualification Motion, para. 314.

<sup>107</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Urgent Motion for Witness Protective Measures, 9 February 2010 ("Protective Measures Decision of 9 February 2010").

<sup>108</sup> Protective Measures Decision of 9 February 2010, para. 27.

<sup>109</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Witness Protective Measures of 9 February 2010, 31 March 2010 ("Reconsideration Decision of 31 March 2010").

<sup>110</sup> Reconsideration Decision of 31 March 2010, paras 21-22.



that it “obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”<sup>111</sup>

51. The Defence has failed to establish that the Trial Chamber’s decisions of 9 February and 31 March 2010 were driven by bias. It has also failed to establish that any alleged delay in dealing with the Defence motion for protective measure can be attributable to a pre-disposition of the Trial Chamber against Ngirabatware.

**f. Allegations of bias concerning the Trial Chamber’s decisions on the time for preparation for the Defence and the alleged delay of proceedings by the Prosecution**<sup>112</sup>

52. The Defences submits that the Trial Chamber has displayed its bias against it and in favour of the Prosecution by repeatedly denying Defence motions for adjournment of proceedings while permitting additional time to the Prosecution when requested. Consequently, it alleges that this has deprived Ngirabatware adequate time to prepare his defence.

53. In support, the Defence cites the Trial Chamber’s decisions to refuse (1) one day’s adjournment in January 2010, (2) three days’ adjournment for the Defence counsel to visit Belgium, (3) adjournment to examine five new Prosecution witnesses, and (4) adjournment between the close of the Prosecution case and the commencement of the Defence case. The Defence contrasts these instances to occasions when the Prosecution had been granted delays. Finally, it alleges that the Trial Chamber has “acquiesced with the Prosecution’s hesitations and delays” and allowed it to “dictate the scheduling of the proceedings.”<sup>113</sup> This, the Defence claims, “constitutes an obviously prejudicial and clearly discriminatory treatment of the Defence *vis-à-vis* the Prosecution”.<sup>114</sup>

54. The Bureau has considered the chronology of the proceedings of this case since the 13 April 2009 filing of the Amended Indictment until 17 January 2011 when the trial was adjourned *sine die* pending the determination of the Disqualification Motion. It notes that the Prosecution case lasted for 53 trial days from 23 September 2009 until 31 August 2010 during which time the Trial Chamber heard 20 Prosecution witnesses.<sup>115</sup> Since the Pre-Defence Conference on 25 October 2010, the Trial Chamber has heard the Defence case (principally the Accused Ngirabatware’s testimony) for 17 additional trial days. Throughout the pre-trial and trial

<sup>111</sup> Reconsideration Decision of 31 March 2010, para. 24 (citing *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 48).

<sup>112</sup> Disqualification Motion, pp. 147-168.

<sup>113</sup> Disqualification Motion, para. 382.

<sup>114</sup> Disqualification Motion, para. 386.

<sup>115</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Judgement of Acquittal, 14 October 2010 (“98 *bis* Decision”), para. 1.

proceedings, both parties have sought adjournments for various reasons and the Trial Chamber has dealt with these requests by reasoned orders. These are judicial decisions that are subject to appellate review or a possible reconsideration by the Trial Chamber. Upon evaluation, the Bureau does not find that these decisions, individually or cumulatively, indicate an actual or apparent bias or a pre-disposition of the Trial Chamber against the Defence and in favour of the Prosecution.

55. The Bureau has, in particular, examined the Trial Chamber's decisions on requests for adjournments owing to the absence of members of the Defence team. The Defence teams have been endowed with legal, investigative and linguistic resources at considerable expense of the international community and, unless circumstances indicate otherwise, it is up to the Defence team, including the Lead and Co-Counsel, to organise their schedules such that at least one of them is present when the trial proceedings are set to proceed. The Bureau, therefore, considers that the Trial Chamber correctly refused to grant one and three-day adjournment in January and February 2010 on account of absence of members of the Defence team.<sup>116</sup>

56. The Bureau also does not find any actual or apparent bias in the Trial Chamber's decisions to refuse to postpone the testimony of the Prosecution Witness ANAC until the Defence could "obtain full cooperation from the States and institutions targeted, access to requested documents and meet with the requested individuals."<sup>117</sup> The Bureau concludes that the Trial Chamber rightly denied an adjournment noting that there was "no indication as to when the Defence will be able to secure the cooperation that it seeks."<sup>118</sup>

57. The Bureau rejects the Defence contention that the decision of the Trial Chamber to deny the Defence more time to prepare for the cross-examination of the five newly added Prosecution witnesses indicates any bias. The reasoned decision of the Trial Chamber permitting the addition of these new witnesses indicates that the Trial Chamber considered that the addition will not unduly burden the Defence case as "the added witnesses will functionally replace the dropped witnesses."<sup>119</sup> The Trial Chamber, consistent with a previous holding in the *Butare* case, correctly found that any prejudice to the Defence by this inclusion could be cured by

<sup>116</sup> Disqualification Motion, paras 327-330.

<sup>117</sup> Disqualification Motion, para. 331.

<sup>118</sup> Disqualification Motion, para. 332 (citing *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion to Postpone the Testimony of Witness ANAC, 15 March 2010, para. 19).

<sup>119</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Prosecution Motion for Leave to Vary its Witness List, 28 January 2010 ("Witness List Decision of 28 January 2010"), para. 52.

hearing the new witnesses at the end of the Prosecution case to give the Defence sufficient time to prepare and conduct investigations.<sup>120</sup>

58. The Bureau has considered the Defence's contentions regarding the Trial Chamber's actions on its application for an adjournment of the Prosecution case and the commencement of the Defence case. A review of the Minutes of the Proceedings of the trial reveals that there was a substantial adjournment between the close of the Prosecution case on 31 August 2010 and the commencement of the Defence evidence on 15 November 2010.

59. The Bureau, therefore, concludes that the cited decisions of the Trial Chamber on Defence requests for adjournments do not indicate any actual or apparent bias of the Trial Chamber against the Accused Ngirabatware.

60. The Bureau will now assess whether in dealing with the issues raised and requests filed by the Prosecution, the Trial Chamber has displayed any pre-disposition in favour of the Prosecution and against the Defence.

61. The Bureau finds no irregularity indicative of bias in the Trial Chamber's decision of 24 May 2010 by which the Prosecution was permitted to vary its witness list to rebut Ngirabatware's alibi.<sup>121</sup> A review of trial record indicates that alibi has been a contentious issue between the parties to these proceedings. The Defence provided an alibi notice pursuant to Rule 67(A)(ii)(a) at the commencement of trial on 23 September 2009.<sup>122</sup> However, as late as 16 April 2010, the Trial Chamber was not satisfied that the Defence had provided names and addresses of the alibi witnesses to the Prosecution and directed it to do so.<sup>123</sup> In a letter of 3 May 2010, the Defence provided particulars of 15 potential alibi witnesses.<sup>124</sup> Considering this sequence of events, the Bureau considers that the Trial Chamber displayed no bias in favour of the Prosecution by granting more time on 24 May 2010 to vary its witness list to rebut the alibi.<sup>125</sup>

**g. Allegations concerning the Trial Chamber's "assistance" to the Prosecution<sup>126</sup>**

62. The Defence submits that the Trial Chamber displayed bias against the Defence by assisting the Prosecution when on many occasions the Presiding Judge allegedly supplied

<sup>120</sup> Witness List Decision of 28 January 2010, para. 53.

<sup>121</sup> Disqualification Motion, para. 358; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Prosecution Motion to Vacate the Trial Date, 24 May 2010 ("Trial Date Decision of 24 May 2010").

<sup>122</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Transcript, 23 September 2009, pp. 1, 7-8.

<sup>123</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecutor's Supplementary Motion to Compel the Accused to Disclose the Particulars of his Alibi, 16 April 2010, p. 7.

<sup>124</sup> Trial Date Decision of 24 May 2010, para. 32.

<sup>125</sup> Trial Date Decision of 24 May 2010, p. 9.

<sup>126</sup> Disqualification Motion, pp. 168-185.

arguments in favour of the Prosecution even when those arguments had not been advanced by the Prosecution counsel. It submits that, after such assistance, Prosecution motions were allowed. The Defence contends that, in similar situations, its motions were or would have been dismissed.

63. The procedure governing this Tribunal and its Trial Chambers is inspired by the need for a fair determination of a matter before it.<sup>127</sup> While receiving oral and documentary evidence, it is incumbent on the Trial Chamber to make the process “effective for the ascertainment of the truth.”<sup>128</sup> It is accordingly within the discretion of the Trial Chamber to decide an issue even if the moving party has not supplied sufficient legal support. Alternatively, a Trial Chamber may grant a relief albeit by basing itself on reasoning different from that advanced by the moving party. The Bureau considers that these actions of the Trial Chamber do not amount to “assistance” to a party. A Trial Chamber’s decision to grant relief by offering its own legal reasoning is neither irregular nor indicative of bias, unless the context indicates to the contrary.

64. The Bureau has considered the instances cited by the Defence that it submits as demonstrative of the Trial Chamber’s “assistance” to the Prosecution. These instances include the disposal of the (1) the Prosecution motion for the transfer of detainees,<sup>129</sup> (2) the Defence motion to meet with the Witness ANAE’s husband,<sup>130</sup> (3) the Prosecution motion on video-link,<sup>131</sup> (4) request regarding the investigation of Witness ANAL’s signatures on her statements,<sup>132</sup> (5) matters pertaining to identifying information of witnesses,<sup>133</sup> and (6) the Prosecution request for the adjournment of Ngirabatware’s cross-examination.<sup>134</sup> The Defence submits that the Trial Chamber’s “assistance” is additionally exhibited by the Trial Chamber’s management of the schedule of proceedings and deadlines in such a way that it assists the case of the Prosecution.

65. These instances demonstrate a Trial Chamber’s disposal of ongoing issues during or immediately preceding an ongoing trial. A Trial Chamber, as noted above, has to take numerous decisions on an ongoing basis in exercise of its powers to control the proceedings to make them effective for the ascertainment of the truth. In addition, the handling of oral requests during ongoing proceedings where parties argue orally and immediate decisions are rendered are, *ipso*

<sup>127</sup> *The Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October 2004, para. 7.

<sup>128</sup> Rule 90(F)(a).

<sup>129</sup> Disqualification Motion, paras 388-391.

<sup>130</sup> Disqualification Motion, paras 392-400.

<sup>131</sup> Disqualification Motion, paras 401-413.

<sup>132</sup> Disqualification Motion, paras 414-415.

<sup>133</sup> Disqualification Motion, paras 416-429.

<sup>134</sup> Disqualification Motion, paras 430-444.

*facto*, of a different nature than matters that are decided on written pleadings after detailed deliberations over a period of time. Even matters that are decided on written pleadings may be subject of different procedures and timelines depending on their relative importance and urgency.

66. The Bureau has considered the Defence's submissions and the cited portions of the record. Denial of requests, insistence on better particulars from a party that may or may not have been sought from the opposite party, setting of stricter deadlines in certain situations, giving reasoning not put forth by the moving party do not, in and of themselves, indicate bias. This is particularly the case if no material prejudice has demonstrably been caused to the opposite party. This ground for a claim of bias of the Trial Chamber against the Defence is, accordingly, dismissed.

**h. Allegations concerning the Trial Chamber's decisions on certification to appeal, requests for reconsideration of its decisions<sup>135</sup> or its alleged "disregard of the case law"<sup>136</sup>**

67. The Defence alleges that the Trial Chamber has "systematic[ally]"<sup>137</sup> denied its motions to seek certification to appeal the Trial Chamber decisions or motions to reconsider them. It alleges that the Trial Chamber only allowed one request for certification, which led to a reversal by the Appeals Chamber on grounds of "abuse of discretion."<sup>138</sup> It further contends that in numerous decisions the Trial Chamber has given an appearance of bias by rejecting motions based on "discussions that lead to a mischaracterisation of either the case law or the Rules."<sup>139</sup>

68. The Bureau notes that, in the Disqualification Motion, the Defence has essentially sought to re-argue its requests for certification to appeal or for reconsideration of the Trial Chamber's decisions. The Defence does not allege that by not allowing its requests for certification, the Trial Chamber has treated the Defence differently *vis-à-vis* the Prosecution. Its principal contention appears to be that the motions for certification were denied "not because the criteria for certification were not met, but merely because the Trial Chamber did not want to see its decisions reversed on appeal."<sup>140</sup>

69. The Bureau finds this ground as frivolous and abusive of process. There is no allegation in the Disqualification Motion that the Trial Chamber has shown bias by treating Ngirabatware's

<sup>135</sup> Disqualification Motion, pp. 185-201.

<sup>136</sup> Disqualification Motion, pp. 201-215.

<sup>137</sup> Disqualification Motion, Chapter 7, Title (alleging "Systematic Denial of Defence Motions").

<sup>138</sup> Disqualification Motion, para. 445 (citing *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motion to Vary Trial Date, 12 May 2009, para. 30).

<sup>139</sup> Disqualification Motion, para. 489.

<sup>140</sup> Disqualification Motion, para. 445.

requests for certification or reconsideration different from those of the Prosecution. In addition, the judicial decisions where the Trial Chamber allegedly “disregarded” jurisprudence are decisions of the Trial Chamber against which appellate recourse was or is open to the Defence. This ground is, accordingly, dismissed.

**i. Allegations concerning the Trial Chamber placing an “impossible burden on the Defence” and providing “very little means [to] challenge the [Prosecution] allegations”<sup>141</sup>**

70. Under this ground, the Defence principally appears to allege that the Trial Chamber’s erroneous denial of the Defence motion for judgement on acquittal (14 October 2010)<sup>142</sup> and a subsequent denial of a request for certification to appeal it (11 November 2010)<sup>143</sup> has put an “impossible burden” on the Defence to lead evidence on allegations in the Indictment on which, according to the Defence, the Prosecution brought no evidence and yet those allegations have been retained by the Trial Chamber. In addition, the Defence alleges that the non-disposal of two of its motions (of 20 September and 26 October 2010) for exclusion of evidence beyond the scope of Indictment, even after the commencement of the Defence case, has placed the Defence in a situation “where it is impossible to lead a defence adequately.”<sup>144</sup>

71. The Defence has essentially challenged before the Bureau the legality and correctness of the Trial Chamber’s decisions of 14 October and 11 November 2010. The decision of the Trial Chamber on a motion for a judgement for acquittal under Rule 98 *bis* is subject to appellate review. The Defence sought certification but it was denied by the Trial Chamber by a reasoned decision. The Trial Chamber noted the Defence’s concerns in its decision denying certification to appeal. For example, the Trial Chamber considered that the Rule 98 *bis* decision requires the Defence to face the same case it has confronted since the start of the trial, less 15 paragraphs of the Indictment.<sup>145</sup>

72. The Bureau also concludes that the alleged delay in the Trial Chamber’s disposal of the Defence’s two motions for exclusion of evidence does not indicate any pre-disposition of the Trial Chamber against the Defence. The Bureau, therefore, rejects this ground.

<sup>141</sup> Disqualification Motion, pp. 215-233.

<sup>142</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Judgement of Acquittal, 14 October 2010.

<sup>143</sup> *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion on Certification to Appeal the Decision on Defence Motion for Judgement of Acquittal, 11 November 2010 (“TC 11 November Decision”).

<sup>144</sup> Disqualification Motion, paras 586-589.

<sup>145</sup> TC 11 November Decision, para. 15.

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**IV. CONCLUSION AND DISPOSITION**

73. The Bureau finds that the Defence has failed to establish any actual or apparent bias of the Trial Chamber Judges Sekule, Bossa and Rajohnson against the Accused Ngirabatware on the basis of the arguments advanced in the Disqualification Motion, whether viewed individually or cumulatively.

**FOR THESE REASONS THE BUREAU:**

**DENIES** the Disqualification Motion.

Arusha, 25 January, 2011, done in English.

  
Judge Dennis C.M. Byron  
President



[Seal of the Tribunal]

  
Judge Khalida Rachid Khan.