



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

57/H

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ICTR-99-54-AR15B

18<sup>th</sup> April 2011

{61/H - 57/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron  
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 18 April 2011

ICTR Appeals Chamber

Date: 18<sup>th</sup> April 2011

Action: R. Juma

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LOs, LSS

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Augustin NGIRABATWARE

v.

THE PROSECUTOR

Case No. ICTR-99-54-AR15B

**DECISION ON AUGUSTIN NGIRABATWARE'S APPEAL OF THE BUREAU'S DECISION OF 25 JANUARY 2011 ON DISQUALIFICATION**

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM: KOFEL... KUMELIRO... A... AFANDE...

SIGNATURE: *[Handwritten signature]* DATE: 18 APRIL 2011

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal filed by Augustin Ngirabatware ("Ngirabatware") on 1 February 2011 ("Appeal")<sup>1</sup> against the "Decision on the Defence Motion for the Disqualification of the Judges of the Trial Chamber" rendered by the Bureau of the Tribunal on 25 January 2011 ("Bureau" and "Bureau's Decision", respectively).<sup>2</sup> The Prosecution responded on 9 February 2011,<sup>3</sup> and Ngirabatware replied on 14 February 2011.<sup>4</sup>

#### A. Background

2. On 5 January 2011, Ngirabatware filed a motion directly before the Bureau seeking the disqualification of the three Judges of Trial Chamber II of the Tribunal ("Trial Chamber") hearing his case on the basis of actual or reasonable apprehension of bias.<sup>5</sup> The Bureau considered that an application for the disqualification of a judge should be made first to the Presiding Judge of the Trial Chamber seised of the proceedings.<sup>6</sup> Nonetheless, in light of the fact that Judge William Sekule was both a subject of the Motion and the Presiding Judge of the Trial Chamber, the Bureau exercised its discretion to decide the Motion.<sup>7</sup> On 25 January 2011, the Bureau denied the Motion, finding that Ngirabatware had failed to establish any actual or apparent bias on the part of the Trial Chamber judges.<sup>8</sup>

3. Ngirabatware requests the Appeals Chamber to consider the Appeal and to render a *de novo* determination on the merits of the Motion or, in the alternative, to remand it to be determined *de novo* by a new panel of Judges.<sup>9</sup> Ngirabatware submits that the Bureau erred in stating that he was required, under Rule 15(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), to file his Motion before the Presiding Judge of the Trial Chamber and that, by failing to do so, he

<sup>1</sup> Dr. Ngirabatware's Appeal of the Bureau's Decision Denying the Defence Motion for the Disqualification of the Trial Chamber II's Judges Dated 25 January 2011, 1 February 2011. See also Corrigendum to Dr. Ngirabatware's Appeal of the Bureau's Decision Denying the Defence Motion for the Disqualification of the Trial Chamber II's Judges Dated 25 January 2011, 2 February 2011.

<sup>2</sup> *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, 25 January 2011.

<sup>3</sup> Prosecutor's Response to Appellant Ngirabatware's Appeal of the Bureau's Decision Denying the Defence Motion for the Disqualification of the Trial Chamber II's Judges, 9 February 2011 ("Response").

<sup>4</sup> Reply to Prosecutor's Response to Dr. Ngirabatware's Appeal of the Bureau's Decision Denying the Defence Motion for the Disqualification of the Trial Chamber II's Judges Dated 25 January 2011, 14 February 2011 ("Reply").

<sup>5</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 ("Motion"), para. 1, p. 236.

<sup>6</sup> Bureau's Decision, paras. 4, 5.

<sup>7</sup> Bureau's Decision, para. 6.

<sup>8</sup> Bureau's Decision, para. 73, p. 23.

<sup>9</sup> Appeal, paras. 46-48, 107, 108. See also Reply, para. 43.

deprived himself of a second level of review.<sup>10</sup> He asserts that, where the Presiding Judge of the Trial Chamber is the subject of a disqualification motion, the Presiding Judge may not be seised of the motion which should therefore be directly referred to the Bureau.<sup>11</sup> He argues that he is nonetheless entitled to a second stage of review because Rule 15(B) of the Rules envisions a two-stage process for the consideration of an application for the disqualification of a Judge.<sup>12</sup> According to Ngirabatware, the Bureau's Decision was therefore the first level of review and he is entitled to seise the Appeals Chamber for a second level of review.<sup>13</sup> Ngirabatware argues that the *Seromba* Decision, in which the Appeals Chamber found that there was no right of appeal of a decision of the Bureau, is distinguishable because the applicant in that case could have filed the motion for disqualification in the first instance before the Presiding Judge of the Trial Chamber, whereas in his case, he argues, he could not have done so.<sup>14</sup> Ngirabatware refers to a number of national jurisdictions to support his argument that a second level of review is required.<sup>15</sup>

4. With respect to the merits of the Appeal, Ngirabatware submits that the Bureau abused its discretion by making errors of law, by disregarding a substantial part of the Defence submissions in the Motion, and by mischaracterising the evidence and the Defence submissions.<sup>16</sup>

5. The Prosecution responds that the Appeal should be summarily dismissed in its entirety as Ngirabatware has no right of appeal.<sup>17</sup> It submits that, by failing to follow the procedure set out in Rule 15(B) of the Rules of filing the Motion before the Presiding Judge of the Trial Chamber, Ngirabatware forfeited his right to the two-stage process envisioned by the Rule.<sup>18</sup> It asserts that Ngirabatware fails to demonstrate that the Presiding Judge of the Trial Chamber could not be seised of the Motion because he was also a subject of the Motion.<sup>19</sup> The Prosecution further submits that, even if the Appeals Chamber considers the merits of the Appeal, it should be dismissed in its entirety as Ngirabatware has failed to identify any errors of law or of fact warranting appellate intervention.<sup>20</sup>

<sup>10</sup> Appeal, paras. 5, 6, 10. *See also* Reply, paras. 8, 12, 13.

<sup>11</sup> Appeal, para. 15. *See also* Reply, paras. 13-17.

<sup>12</sup> Appeal, paras. 17-26.

<sup>13</sup> Appeal, paras. 27, 28.

<sup>14</sup> Appeal, paras. 29-32, referring to *The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006 ("*Seromba* Decision"), para. 6. *See also* Reply, paras. 10, 11.

<sup>15</sup> Appeal, paras. 33-38.

<sup>16</sup> Appeal, paras. 49-106. *See also* Reply, paras. 19-42. Ngirabatware also submits that the Bureau was not impartial. *See* Appeal, paras. 39, 40.

<sup>17</sup> Response, para. 4. *See also* Response, paras. 8, 29.

<sup>18</sup> Response, para. 5.

<sup>19</sup> Response, para. 6.

<sup>20</sup> Response, para. 9. *See also* Response, paras. 15-28.

## B. Discussion

6. Rule 15(B) of the Rules envisions a specific two-stage process for the consideration of a request to disqualify a Judge. As the Rule clearly states, an application for disqualification is to be made to the Presiding Judge of the Chamber seized of the proceedings.<sup>21</sup> The Presiding Judge is then to confer with the Judge in question. If the party disputes the Presiding Judge's decision, the Bureau shall determine the matter in a *de novo* review.<sup>22</sup>

7. Notwithstanding this procedure, the Appeals Chamber recalls that the same person cannot be both a Judge and the subject of a request for disqualification and that, accordingly, the Presiding Judge of a Chamber cannot rule on a request for recusal if he or she is the subject of that request.<sup>23</sup> In such a situation, the Presiding Judge of the Trial Chamber must refer the issue to the Bureau.<sup>24</sup> Given that, in the present case, Judge Sekule was both a subject of the Motion and the Presiding Judge of the Trial Chamber, the proper procedure would have been for Ngirabatware to file the Motion before the Presiding Judge of the Trial Chamber, who in turn would have been obliged to refer it to the Bureau. However, the Appeals Chamber is of the view that, regardless of whether the Motion was filed directly before the Bureau or through the correct procedure, the Bureau had jurisdiction to rule on the Motion. Accordingly, the Appeals Chamber will examine whether Ngirabatware is entitled to appeal the Bureau's Decision to the Appeals Chamber.

8. The Rules do not provide for an interlocutory appeal to the Appeals Chamber of a decision taken by the Bureau pursuant to Rule 15(B) of the Rules.<sup>25</sup> In this regard, the Appeals Chamber notes the *Blagojević et al.* case in which the Presiding Judge of the Trial Chamber was also the subject of a disqualification motion and in which, accordingly, the matter was referred to the

<sup>21</sup> *Seromba* Decision, para. 5, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification of the Appeals Chamber, 13 December 2004 ("Šešelj Decision"), para. 3, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003 ("Galić Decision of 13 March 2003"), paras. 8, 9. The Appeals Chamber notes that, at the time, Rule 15(B) of the Rules of the International Criminal Tribunal for the former Yugoslavia ("ICTY") was substantively the same as the current Rule 15(B) of the Rules of the Tribunal. See Rule 15(B) of the Rules of the ICTY, IT/32/Rev. 26, as amended on 12 December 2002.

<sup>22</sup> *Seromba* Decision, para. 5, referring to *Šešelj* Decision, para. 3, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003, para. 7; *Galić* Decision of 13 March 2003, paras. 8, 9.

<sup>23</sup> *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("Nahimana et al. Appeal Judgement"), para. 73.

<sup>24</sup> See *Nahimana et al. Appeal Judgement*, para. 73.

<sup>25</sup> *Seromba* Decision, para. 4. The Appeals Chamber notes that the present case differs from the *Seromba* case in which the Presiding Judge of the Trial Chamber could have ruled on the motion for disqualification and therefore *Seromba*, by filing it directly before the Bureau, deprived himself of the review procedure envisioned by the Rule. See *Seromba* Decision, para. 6 (emphasis added). Nonetheless, no interlocutory appeal of the decision of the Bureau has been allowed. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-AR15.1, Decision on Appeal from Decision on Motion to Disqualify Judge Picard, 26 June 2009, para. 7; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("Galić Appeal Judgement"), para. 31; *Prosecutor v. Vidoje Blagojević et al.*, Case No.

Bureau.<sup>26</sup> In that case, the Bureau found “no provision in either the Statute or the Rules for appeals from decisions of the Bureau to the Appeals Chamber”<sup>27</sup> even though, as in the present case, the Bureau had decided the matter in the first instance. The Appeals Chamber finds no reason to depart from this precedent.

9. The Appeals Chamber recalls that its consideration of whether a Trial Judge should have been disqualified is limited to the context of an appeal against a conviction or where the issue properly arises in an interlocutory appeal certified by a Trial Chamber.<sup>28</sup> As this is not the case in this instance, and as there is no right of appeal of the Bureau’s Decision, the Appeals Chamber accordingly finds that it is not properly seised of this Appeal.

### C. Disposition


10. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

Done in English and French, the English version being authoritative.

Done this eighteenth day of April 2011,  
at The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
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Judge Patrick Robinson  
Presiding

IT-02-60-PT, Decision on Blagojević's Motion for Clarification, 27 March 2003 ("*Blagojević et al.* Decision of 27 March 2003"), para. 4.

<sup>26</sup> See *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Blagojević's Application Pursuant to Rule 15(B), 19 March 2003, para. 1; *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Internal Memorandum from Senior Legal Officer of Trial Chamber II, 28 February 2003.

<sup>27</sup> *Blagojević et al.* Decision of 27 March 2003, para. 4.

<sup>28</sup> *Seromba* Decision, para. 4. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 10; *Galić* Appeal Judgement, paras. 31, 32; *Blagojević et al.* Decision of 27 March 2003, paras. 4, 5; *Galić* Decision of 13 March 2003, para. 8.