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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 15 March 2012

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

***PROPRIO MOTU* DECISION ON DEFENCE SUBMISSIONS OF BIAS**

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

Office of the Prosecution:
Kirsten Gray

Defence Counsel for Ildéphonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi
Sébastien Chartrand

INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements from the Office of the Prosecutor ("the Prosecution") and the Defence team of the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused", respectively). The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses, with an additional witness heard on 6 September 2011. The Prosecution completed its rebuttal case on 8 September 2011, after having called three witnesses. The Defence completed its rejoinder case on 21 September 2011, after having called four witnesses. The Prosecution and Defence filed their Closing Briefs on 8 November 2011. The Chamber heard the parties' closing arguments on 7 December 2011.

2. As noted above, on 8 November 2011, the Defence filed its Closing Brief.[1] Contained therein, under the Chapter "Legal Issues", is a section related to the appearance of bias. The Defence "raise[s] the issue of appearance of bias with respect to Presiding Judge Muthoga, and by implication the entire Chamber" (the "Presiding Judge" and the "Bench", respectively).[2] Specifically, the Defence's basis for concern is (1) the excessive quantity of the questions put to the Defence witnesses by the Presiding Judge, (2) the nature of a number of questions posed by the Presiding Judge to the Defence witnesses, and (3) the timing of the questions, which often occurred prior to the commencement of the Prosecution cross-examination.[3]

3. In support of its "concern", the Defence attached as Annex 2 to its Closing Brief a "provisional" list of questions put to the first 20 Prosecution and Defence witnesses.[4] The Defence further provided two examples of questions where the Presiding Judge is alleged to have assumed a series of facts not in evidence and misrepresented evidence.[5] In light of its submissions, the Defence concludes that "the appearance of bias is indeed objectively justified in the instant case, and that a 'reasonable observer', properly informed, would 'reasonably apprehend bias.'"[6] Notwithstanding, the Defence submissions contain no

[1] Nizeyimana Defence Closing Brief ("Closing Brief"), 8 November 2011.
[2] Defence Closing Brief, para. 610.
[3] Defence Closing Brief, para. 613.
[4] The Chamber notes that the Defence makes reference to an "Annex 3" in relation to its provisional list of questions. *See* Defence Closing Brief, para. 614. However, no Annex 3 is appended to the Defence Closing Brief. Instead, the provisional questions are included under "Annex 2 – Questions to the Bench".
[5] Defence Closing Brief, paras. 614-617.
[6] Defence Closing Brief, para. 618.

specified request for relief in light of its arguments concerning bias. It does not, for example, ask for disqualification of the Presiding Judge or the Bench.

4. On 7 December 2011, the Prosecution responded during the Closing Arguments that the Defence allegation of bias is unfounded.[7] Specifically, the Prosecution submits that the questioning of the witnesses was balanced, timely and fair.[8] Moreover, it was natural for the Chamber to pose more questions to the Defence witnesses, as there was a larger body of evidence available to it following the Prosecution case.[9] Lastly, the Prosecution notes that the quality of the questioning and need for clarification will depend largely on the particular witness and the formulation of questions by the counsel.[10]

DELIBERATIONS

Applicable Law

5. The Chamber observes that in the context of requests for disqualification of a Judge, Rule 15(B) of the Rules envisions a specific two-stage process for the consideration of such a request. As the Rule clearly states, an "application for disqualification" is to be made to the Presiding Judge of the Chamber seised of the proceedings.[11] The Presiding Judge is then to confer with the Judge in question and decide on the matter. If the party disputes the Presiding Judge's decision, the Bureau shall determine the matter in a *de novo* review.[12]

6. Notwithstanding this procedure, the Appeals Chamber has determined 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

[7] T. 7 December 2011, p. 29 (Prosecution Closing Arguments).
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *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, *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.
[12] *Seromba* Appeals 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.

is the subject of that request.[13] In such a situation, the presiding judge of the Trial Chamber must refer the issue to the Bureau.[14]

7. As noted above, the Defence has not requested the disqualification of the Presiding Judge or Bench. Instead, it has concluded in its Closing Brief that there is an objectively justified appearance of bias with respect to the Presiding Judge and by implication the Bench.[15] While its submissions are supported by case law related to disqualification litigation, the Defence Closing Brief simply states that it "wishes to raise the issue of appearance of bias" of the Presiding Judge, without requesting any form of relief.[16] The Defence did not clarify the nature of its bias arguments, and, in particular, did not identify the relief it seeks, during its Closing Arguments, nearly a month after it filed its Closing Brief. Accordingly, the Chamber does not consider that the Defence's general submissions and observations regarding bias amount to an application for disqualification as envisaged by Rule 15(B).

8. Given the relevant case law, neither the Presiding Judge nor the Bench would be able to adjudicate a request for disqualification had the Defence sought this relief based on the circumstances that now supports its bias arguments. The logical extension of this case law also prevents the Presiding Judge or this Bench from determining Defence allegations of bias, even if no request for disqualification accompanies such arguments. Furthermore, while the circumstances would require the Presiding Judge to forward to the Bureau a request for disqualification based on allegations of bias by the Presiding Judge, the Defence has requested no such relief. Consequently, the Chamber, *proprio motu*, dismisses the Defence arguments, as set forth in the Defence Closing Brief, paragraphs 610-618, and Defence Closing Brief Annex 2, and will not consider them in its ultimate judgement.

9. The Chamber recommends that the Defence, to the extent that it seeks an adjudication on the issue of bias, follow the proper procedure by either filing a motion for disqualification

[13] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 73.
[14] *See Nahimana et al.* Appeal Judgement, para. 73.
[15] Defence Closing Brief, para. 618.
[16] Defence Closing Brief, para. 610. The cases to which the Defence cite in support of its bias contention all request disqualification as a remedy. *See Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement (AC), 21 July 2000; *Prosecutor v. Karemera et al.*, Case No. ICTR-99-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings, 20 February 2009; *Prosecutor v. Blagojević et al.*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15(B) (TC), 19 March 2003; *Prosecutor v. Brdjanin*, Case No. IT-99-36-R 77, Decision on Application for Disqualification (TC), 11 June 2004.

of the Presiding Judge before the Bureau, or filing a motion for disqualification before the Trial Chamber, which will thereafter refer it to the Bureau.

FOR THESE REASONS, THE CHAMBER

DISMISSES the Defence arguments, as set forth in the Defence Closing Brief, paragraphs 610-618, and Defence Closing Brief Annex 2, and will not consider them in its ultimate judgement.

Arusha, 15 March 2012, done in English.

Lee Gacuiga Muthoga
Presiding Judge

Seon Ki Park
Judge

Robert Fremr
Judge

[Seal of the Tribunal]