



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

131/H

TV

ICTR-99-52B-R

06 June 2012

{131/H - 126/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Registrar: Mr. Adama Dieng
Decision of: 6 June 2012

FERDINAND NAHIMANA

v.

THE PROSECUTOR

Case No. ICTR-99-52B-R

DECISION ON REQUEST FOR DISQUALIFICATION OF JUDGE POCAR

Applicant:

Ferdinand Nahimana, *pro se*

ICTR Appeals Chamber

Date: *06 June 2012*
Action: *R. Juma*
Copied To: *All concerned.*

TV

Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Erica Bussey

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS

NAME / NOM: *NOUHOU DIALLA*
SIGNATURE: *[Signature]* DATE: *6/6/2012*

1. I, **Theodor Meron**, Presiding Judge of 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), am seised of a request for disqualification of Judge Fausto Pocar filed by Ferdinand Nahimana (“Nahimana”) on 30 March 2012 as part of a motion seeking the reconsideration of certain prior rulings of the Appeals Chamber.¹

A. Background

2. On 28 November 2007, the Appeals Chamber affirmed Nahimana’s convictions for direct and public incitement to commit genocide and persecution as a crime against humanity pursuant to Article 6(3) of the Statute of the Tribunal (“Statute”) in respect of *Radio télévision libre des mille collines* (“RTLM”) broadcasts after 6 April 1994, and reduced his sentence to 30 years of imprisonment.² On 22 April 2008 and 30 June 2010, the Appeals Chamber dismissed two successive applications filed by Nahimana to reconsider the Appeal Judgement.³ On 27 September 2011, the Appeals Chamber dismissed Nahimana’s motion to annul the Decisions of 22 April 2008 and 30 June 2010 and to reconsider the Appeal Judgement.⁴

3. On 30 March 2012, Nahimana filed the Motion requesting, *inter alia*, that Judge Pocar be disqualified from ruling on any of his motions, including the instant Motion (“Request for Disqualification”).⁵

4. On 2 April 2012, I issued an order assigning, *inter alia*, Judge Pocar to the bench in this case.⁶

¹ 1. *Demande de reconsidération de la décision du 27 septembre 2011 signée par le seul [J]uge Fausto Pocar [;]*
2. *Récusation de l’Honorable Juge Fausto Pocar [;]* 3. *Demande de reconsidération de la peine prononcée contre moi le 28/11/2007*, 30 March 2012 (“Motion”).

² *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, originally filed in French on 28 November 2007, English translation filed on 16 May 2008 (“Appeal Judgement”), p. 345.

³ Decision on Ferdinand Nahimana’s Motion for Reconsideration of the Appeal Judgement, 30 June 2010 (“Decision of 30 June 2010”), para. 7; Decision on Ferdinand Nahimana’s “Notice of Application for Reconsideration of Appeal Decision Due to Factual Errors Apparent on the Record”, signed on 21 April 2008, filed on 22 April 2008 (“Decision of 22 April 2008”), p. 3.

⁴ Decision on Nahimana’s Motion to Annul the Decisions of 22 April 2008 and 30 June 2010 and for Reconsideration, 27 September 2011 (“Decision of 27 September 2011”), p. 2.

⁵ Motion, paras. 23-27. Nahimana also requests that the Appeals Chamber reconsider the sentence that it imposed on him in the Appeal Judgement and reconsider its Decision of 27 September 2011 (collectively, “Requests for Reconsideration”). See *ibid.*, paras. 11-22, 28-48.

⁶ Order Assigning Judges to a Case before the Appeals Chamber, 2 April 2012, p. 1.

5. On 5 April 2012, the Prosecution responded that the Request for Disqualification should be rejected.⁷ Nahimana filed a reply on 23 May 2012.⁸

B. Applicable Law

6. Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules") 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. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where the Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

7. The Appeals Chamber has held that:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

(i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

(ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁹

8. With respect to the reasonable observer prong of this test, the Appeals Chamber has held that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."¹⁰

9. The Appeals Chamber has also emphasized that there is a presumption of impartiality that attaches to any Judge of the Tribunal.¹¹ Accordingly, the party who seeks the disqualification of a

⁷ Prosecutor's Response to Nahimana's Requests for Reconsideration of the Appeals Chamber Decision of 27 September 2011, Disqualification of Judge Pocar, and Reconsideration of the Sentence Pronounced Against Him in the Appeal Judgement of 28 November 2007, 5 April 2012 ("Prosecution Response"), paras. 3, 8-14, 18.

⁸ *Réplique à la réponse du Procureur à mes requêtes déposées le 19 mars 2012, enregistrées au Greffe du TPIR le 30 mars 2012*, 25 May 2012 ("Reply"), paras. 7-10. Nahimana notes that he was served with the Prosecution Response on 22 May 2012. See *ibid.*, para. 1.

⁹ See, e.g., *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz, 24 February 2011 ("Kanyarukiga Decision of 24 February 2011"), para. 7; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011 ("Ntawukulilyayo Decision of 8 February 2011"), para. 5; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, originally filed in French on 26 May 2003, English translation filed on 9 February 2004 ("Rutaganda Appeal Judgement"), para. 39.

¹⁰ See, e.g., *Kanyarukiga Decision of 24 February 2011*, para. 8; *Ntawukulilyayo Decision of 8 February 2011*, para. 6; *Rutaganda Appeal Judgement*, para. 40.

¹¹ See, e.g., *Kanyarukiga Decision of 24 February 2011*, para. 9; *Ntawukulilyayo Decision of 8 February 2011*, para. 7; *Rutaganda Appeal Judgement*, para. 42.

Judge bears the burden of adducing sufficient evidence that the Judge is not impartial.¹² In this respect, the Appeals Chamber has consistently held that there is a high threshold to reach to rebut the presumption of impartiality.¹³ The party must demonstrate “a reasonable apprehension of bias by reason of prejudgement” that is “firmly established”.¹⁴ The Appeals Chamber has explained that this high threshold is required because “it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias”.¹⁵

10. Furthermore, Rule 15(B) of the Rules provides that:

Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

C. Submissions

11. Nahimana requests that Judge Pocar be disqualified from ruling on any motion filed by him, including the instant Motion.¹⁶ Nahimana submits that Judge Pocar erred in concluding that the journalists of the RTL M were Nahimana’s subordinates and in convicting him based solely on the testimony of an expert witness to which he had objected.¹⁷ Nahimana contends that Judge Pocar subsequently refused to reconsider his position and to reverse Nahimana’s conviction under the “pretext” that “the Appeal Judgement can no longer be altered”.¹⁸ He argues that, the “injustice will remain” as long as Judge Pocar will refuse “to face facts”, and posits that Judge Pocar “will not be willing to acquit him”.¹⁹

12. The Prosecution responds that Nahimana fails to demonstrate that there is any reasonable apprehension of bias on the part of Judge Pocar and that Nahimana’s Request for Disqualification should therefore be dismissed.²⁰

¹² See, e.g., *Kanyarukiga* Decision of 24 February 2011, para. 9; *Ntawukulilyayo* Decision of 8 February 2011, para. 7; *Rutaganda* Appeal Judgement, para. 42.

¹³ See, e.g., *Kanyarukiga* Decision of 24 February 2011, para. 9; *Ntawukulilyayo* Decision of 8 February 2011, para. 7; *Rutaganda* Appeal Judgement, para. 42.

¹⁴ See, e.g., *Kanyarukiga* Decision of 24 February 2011, para. 9; *Ntawukulilyayo* Decision of 8 February 2011, para. 7; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (*Čelebići* Appeal Judgement”), para. 707.

¹⁵ See, e.g., *Kanyarukiga* Decision of 24 February 2011, para. 9; *Ntawukulilyayo* Decision of 8 February 2011, para. 7; *Čelebići* Appeal Judgement, para. 707.

¹⁶ Motion, para. 27.

¹⁷ Motion, paras. 23-25, referring to Appeal Judgement, Partly Dissenting Opinion of Judge Fausto Pocar, para. 3.

¹⁸ Motion, para. 25 (unofficial translation).

¹⁹ Motion, para. 26 (unofficial translation). See also Reply, paras. 8, 9.

²⁰ Prosecution Response, paras. 3, 8-14.

13. Nahimana replies that the arguments of the Prosecution are unfounded and should be rejected.²¹

D. Discussion

14. With the assignment of Judge Pocar to the bench in this case, as Presiding Judge of the Appeals Chamber, I consider myself seised of Nahimana's Request for Disqualification pursuant to Rule 15(B) of the Rules.²²

15. On 29 May 2012, pursuant to Rule 15(B) of the Rules, I conferred with Judge Pocar regarding Nahimana's Request for Disqualification. Judge Pocar considered that there was no merit in this request.

16. I note that, in support of his Request for Disqualification, Nahimana solely relies on the content of the Appeals Chamber's judicial decisions. In particular, Nahimana takes issue with the fact that the Appeals Chamber affirmed the Trial Chamber's reliance on a particular aspect of the testimony of Prosecution Expert Witness Alison Des Forges in support of its finding that he was the superior of RTLM staff after 6 April 1994 and with his ensuing convictions pursuant to Article 6(3) of the Statute.²³ Nahimana also relies on the repeated rejection of prior requests for reconsideration of the Appeal Judgement.²⁴

17. First, while I would not rule out entirely the possibility that decisions rendered by a Judge or a Chamber could suffice to establish actual bias, it would be "a truly extraordinary case" in which they would.²⁵ Further, I note that none of the impugned decisions was attributable solely to Judge Pocar but to a bench of the Appeals Chamber. With respect to the Appeal Judgement, while Nahimana expressly refers to Judge Pocar's partly dissenting opinion, he in fact takes issue with a unanimous decision of the bench of the Appeals Chamber seised of his case.²⁶ Likewise, the decisions rejecting Nahimana's subsequent requests for reconsideration were reached by all of the Judges assigned to the Appeals Chamber's benches seised of those requests.²⁷ In accordance with the consistent practice of the Appeals Chamber, Judge Pocar signed the decisions as the Presiding Judge on behalf of the respective benches.²⁸

²¹ Reply, para. 10.

²² The Appeals Chamber will decide the Requests for Reconsideration in a separate, forthcoming decision.

²³ See Motion, paras. 23-26; Appeal Judgement, paras. 834, 856, 857, 996, 1051, p. 345.

²⁴ Motion, para. 25. See also Reply, paras. 8, 9.

²⁵ 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. 14.

²⁶ Appeal Judgement, paras. 834, 856, 857, 996, 1051, p. 345.

²⁷ See Decision of 27 September 2011; Decision of 30 June 2010; Decision of 22 April 2008.

²⁸ See Decision of 27 September 2011, p. 1.

18. I fail to see how a reasonable observer, properly informed, would reasonably apprehend bias on Judge Pocar's part based on decisions resulting from the proper exercise of the Appeals Chamber's appellate jurisdiction. I also consider that nothing in the impugned decisions may reasonably be perceived as attributable to a pre-disposition against Nahimana. In this regard, I observe that consistency on an issue that is the subject of repetitive motions cannot give rise to a reasonable apprehension of bias.²⁹

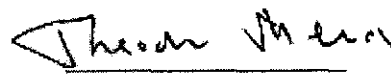
19. I therefore consider that the presumption of impartiality of Judge Pocar has not been rebutted and find that Nahimana's Request for Disqualification is without merit. Because Nahimana has failed to substantiate his claims that Judge Pocar should be disqualified, I do not find it necessary to refer this matter to the Bureau for determination pursuant to Rule 15(B) of the Rules.

E. Disposition

20. For the foregoing reasons, and pursuant to Rule 15 of the Rules, I hereby **DENY** the Request for Disqualification.

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

Done this 6th day of June 2012,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]



²⁹ See, e.g., *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disqualification of Judges, 28 May 2007, paras. 14, 21.