IT-02-54-R77.5
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19 MAY 2009

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-02-54-R77.5
Date: 19 May 2009
Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Mehmet Güney
Judge Liu Daqun

Registrar: **Mr. John Hocking**

Decision of: **19 May 2009**

IN THE CASE

AGAINST

FLORENCE HARTMANN

PUBLIC

DECISION ON DEFENCE MOTION PERTAINING TO THE NULLIFICATION OF TRIAL CHAMBER'S ORDERS AND DECISIONS

***Amicus Curiae* Prosecutor**

Mr. Bruce MacFarlane, QC

Counsel for the Accused

Mr. Karim A. A. Khan, Counsel
Mr. Guénaël Mettraux, Co-Counsel

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THE SPECIALLY APPOINTED CHAMBER ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seized of the Defence "Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions", filed on 21 April 2009, ("Motion") and hereby renders its decision thereon.

I. PROCEDURAL HISTORY

1. On 3 February 2009, the Defence filed a motion for disqualification of two of the Judges on the bench in the Hartmann case as well as the Senior Legal Officer in the case ("Motion for Disqualification").[1]

2. On 18 February 2009, the President issued his decision on the Motion for Disqualification and thereby assigned a panel of three Judges ("Panel") to provide him with a report on the merits of the Defence application.[2] On 25 March 2009, the Panel issued a report whereby it granted the Motion for Disqualification in part—Judge Bonomy dissenting—and invited the President to assign two new Judges to the Chamber.[3]

3. On 2 April 2009, the President assigned, with immediate effect, Judge Mehmet Güney and Judge Liu Daqun to the Chamber, to replace Judge Carmel Agius and Judge Alphons Orie in the present case.[4]

4. The Motion was filed on 21 April 2009. In it, the Defence requests leave for a 6000-word extension of the applicable word limit for motions.[5] Given the apparent significance the Defence has attached to this Motion, the Chamber has decided, as a matter of exception, to allow for this extension. The *Amicus Curiae* Prosecutor ("Prosecution") responded to the Motion on 5 May 2009 ("Response").[6] On 8 May 2009, the Defence filed a request for leave to reply together with a substantive reply ("Reply").[7] The Chamber grants the Defence leave to reply.

[1] Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer in Charge of the Case, 3 February 2009.
[2] Decision on Motion for Disqualification, 28 February 2009, para 2.
[3] Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, filed confidentially on 25 March 2009 and publicly on 27 March 2009 ("Report"), para 55.
[4] Order Replacing Judges in a case before a Specially Appointed Chamber, 2 April 2009, p 2.
[5] Motion, para 9.
[6] Prosecutor's Response to Motion Concerning Nullification of Trial Chamber's Orders and Decisions, 5 May 2009.
[7] Reply *Re* Nullification of Trial Chamber's Orders and Decisions, 8 May 2009.

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II. SUBMISSIONS

5. The Defence submits that in accordance with the Panel's decision of 25 March 2009 which found an apprehension of bias with respect to two of the Judges of the Chamber as previously composed, all their decisions and orders are without effect and must be nullified.[8] The Defence submits that there exists a "general principle of law" in this regard, and cites a number of cases in support, and in particular to a Trial Chamber finding in *Karemera et al.*[9] As a consequence, it submits, there are currently no charges against Ms. Hartmann ("the Accused") as the Order in Lieu of Indictment issued on 27 August 2008 and amended on 27 October 2008 are null and must be set aside.[10] The Defence submits that the Chamber should, under these circumstances, exercise its discretion pursuant to Rule 77 and the Practice Direction on contempt not to re-initiate proceedings to investigate or prosecute this matter, arguing that all circumstances militate against such re-initiation[11] Alternatively, it submits, the Chamber could reconsider the Order in Lieu of Indictment and decide that "in light of all the circumstances that are now known" to the Chamber, the initiation of contempt proceedings against Ms. Hartmann is unnecessary and unjustified.[12]

6. In its Response, the Prosecution submits that neither the Panel's report, inviting the President to assign two new Judges to the case, nor the President's order to this effect has the legal effect of nullifying the proceedings before the Chamber in the present circumstances.[13] It submits that if there is any merit to the Defence position that all previously issued decisions and orders must be set aside as a result of the Panel's Report, the right to affirm, reverse or revise such decision lies exclusively with the Appeals Chamber.[14] Further, the Prosecution argues that the principle of *res judicata, i.e*, the principle of finality, should be balanced against the need to avoid a miscarriage of justice. In the present case, it submits, there is no risk of a miscarriage of justice; as a result, the interests of justice would not be served by easing the principle of finality.[15] Finally, the Prosecution submits that in the event the Chamber does deem it necessary to revisit any of the decisions or orders issued by the previously constituted Chamber, this should exclude the Order in Lieu of Indictment.[16] In this regard, the Prosecution submits that the Panel's conclusion demonstrates that an appearance of bias only arose when the investigation ended and the prosecution began. As a result, in the Prosecution's view, only those decisions and orders issued after the Order in Lieu of

[8] Motion, paras 11, 18, 19.
[9] Motion, *see* paras 11-15.
[10] Motion, para 19.
[11] Motion, paras 21-22.
[12] Motion, paras 22-23.
[13] Response, paras 4-11.
[14] Response, paras 12-13.
[15] Response, paras 14-15.
[16] Response, paras 20-22.

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Indictment could possibly be affected.[17] In light of its submission in this regard, the Prosecution did not deem it necessary to provide submissions on the re-institution of proceedings of this case.[18]

7. In its Reply, the Defence submits, *inter alia,* that it lies within the competence and the authority of the Trial Chamber to set aside the record of decisions and orders in this case, referring again to the previously cited case of *Karemera et al.*[19] It submits further that the test of whether a miscarriage of justice were to occur if the decisions were not nullified has no relevance to the issue in the present case.[20] Further, it submits that the issue of legal certainty and the principle of *res judicata* do not apply to the situation in the current case.[21]

III. DISCUSSION

8. The Rules of the Tribunal do not provide guidance with respect to the legal consequences of the disqualification of judges. While there have been a number of applications for disqualification of Judges of both this Tribunal and of the International Criminal Tribunal for Rwanda, the majority of these requests have been dismissed. In *Karemera et al.,* one of the cases in which disqualification of Judges was granted, the Trial Chamber exercised its discretion to set aside a decision granting a Prosecution Motion, in part, for leave to amend the Indictment, and which the Accused had contented was affected by an appearance of bias, on the basis of the "interests of justice and the rights of the accused."[22] At this stage of the proceedings, thirteen witnesses had already testified for the Prosecution. Although stating that this decision was a consequence of the Appeals Chamber decision which had determined an appearance of bias of all three Judges sitting on the bench, the Trial Chamber held that it had the power to make such a decision independently of the Appeals Chamber ruling, where it concludes that it is required in the interests of justice.[23] In this regard, the Chamber found that it was "endowed with inherent powers to make judicial findings that are

[17] Response, para 21.
[18] Response, para 23.
[19] Reply, paras 6-11, 14.
[20] Reply, paras 12-13.
[21] Reply, para 11.
[22] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004 ("*Karemera* Decision"), paras 22, 23.
[23] A Bureau that had been assigned to review the Accused's claim of the existence of an appearance of bias on behalf of one of the Judges made a finding, in the interests of justice, that the circumstances of the case gave rise to an appearance of bias as a result of the Judge's association with Prosecution counsel in that case. Further, the bureau found that this appearance of bias also extended to the other two Judges on the bench because although aware of these circumstances, they acquiesced in rejection of a motion by one of the accused (*see Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15*bis*.2, Reasons for Decision on Interlocutor Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 ("*Karemera* Appeals Decision"), para 68).

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necessary to achieve the primary obligation to guarantee a fair trial to the accused."[24] In *Pinochet (No. 2),* the House of Lords—the ultimate court of appeal—exercised its discretion to revisit a previous decision it had made as a result of an appearance of bias that arose with respect to Lord Hoffman. Lord Hoffman was the director and chairperson of Amnesty International Charity Ltd, while Amnesty International, having been granted leave to intervene in the appeal by Pinochet, in practice was found to be a party to the appeal. The House of Lords considered that the links between Lord Hoffman and Amnesty International "were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand".[25] While in these two specific examples previous decisions were nullified as a consequence of the disqualification of one or more Judges, the Chamber does not consider that these cases, and the further cases cited by the Defence,[26] represent a "general principle of law", as each case turns on its own facts and the extent and nature of the appearance of bias established varies. Moreover, it is important to note that the Chamber is not bound by national jurisprudence or decisions rendered by trial chambers in other tribunals.[27]

9. It is the position of this Chamber that it lies within its discretion whether or not to nullify a previous decision, in the particular circumstances of disqualification of Judges. The Chamber may decide to nullify such decisions if it is in the interests of justice.[28] In this respect, the Chamber must balance the need to preserve the integrity of the proceedings with the Accused's right to a fair trial. The Chamber has therefore reviewed the nature of the decisions that were challenged, the current stage of the proceedings, the nature of the bias as established by the Panel, and the extent of any prejudice to the Accused.

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[24] *Karemera* Decision, para 22, citing *Prosecutor v. Blaskić,* Case No. IT-95-14-A, Judgement on Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1999, 29 October 1997, para 25, footnote 27. *See* also *Karemera* Appeals Decision, para 68.

[25] *See Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* [2001] 1 AC 119, at 121, 134, 146)

[26] In addition to the *Karemera* Decision and the *Pinochet* No. 2 case as well a number of other decisions from the House of Lords, the Defence refers to other jurisdictions in support of a "general principle of law" regarding nullifications. In the South African case ((S v Dube and Others (523/07) [2009] ZASCA 28 (30 March 2009)), disqualification of a Judge hearing an appeal occurred because of a personal relationship between a Judge and counsel for the State in the case being heard. As a consequence, the appeals proceedings were declared vitiated and the appeal was remitted for a re-hearing before a differently comprised bench. In the Australian case of *Antoun v R* [2006] HCA 2, the appearance of bias arose specifically with regard to the conduct of the (single) Judge sitting in that case, who had rejected a submission by the Accused before hearing arguments in support. For this reason, convictions against the appellants were quashed and a re-trial was ordered. (*see* paras 23, 51, 56, 87 and 88 for details). These cases dealt with situations of an appearance of bias based on the personal link of one or more of the Judges with one of the parties to the case, and none of the situations occurred in pre-trial situations.

[27] *Prosecutor* v. *Karemera et al.*, Case No. ICTR 98-44-AR-73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para 7. *See* also *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para 114.

[28] *Karemera* Decision, paras 22-23.

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10. In respect of decisions and orders relating to non-substantive matters, the Chamber could find no prejudice to the Accused's right to a fair trial.[29] It is therefore not in the interests of justice to nullify them.

11. As regards the Order in Lieu of Indictment,[30] the Chamber has reviewed the underlying supporting material and confirms that there were—and are—sufficient grounds to proceed against the Accused for contempt. With regard to the remaining substantive decisions, the Chamber has fully reviewed them and adopted their reasoning and disposition.[31] In addition, considering the advanced state of the proceedings and the fact that the Panel found implied rather than actual bias, the Chamber finds it not to be in the interests of justice to nullify the Order in Lieu of Indictment and the referenced substantive decisions. As a consequence, it will not therefore consider the Defence submission with respect to "re-initiation" of the proceedings against the Accused.

12. With respect to the alternative Defence submission that the Chamber could exercise its authority to reconsider the Order in Lieu of Indictment,[32] the Chamber notes that the Defence is raising the same arguments as in its previous "Motion for Reconsideration."[33] As stated above, the Chamber adopts the reasoning and disposition of the Decision on the Motion for Reconsideration.[34] Therefore, there is no need for the Chamber to address this alternative submission.

IV. DISPOSITION

13. For the foregoing reasons, and pursuant to Rule 54 of the Rules of Procedure and Evidence, the Chamber

GRANTS leave to the Defence to exceed the word limit in its Motion;

GRANTS leave to the Defence request for leave to Reply to the Response to the Motion; and

DENIES the Motion.

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[29] These include Item numbers 1-4, 6-10, 13-24, 27, 28, and 31 on Annex C to the Motion.
[30] Item numbers 5, 12 and related item 11 of Annex C to the Motion.
[31] These include Item numbers 25, 26, 29 and 30 of Annex C to the Motion. The Chamber notes in this regard, that in paragraph 43 of the Panel's Report, it held that the decisions of the Chamber as previously composed concerning the Defence motions for reconsideration and stay of proceedings were sufficiently reasoned and did not therefore provide a basis suggesting that the Chamber was in fact biased.
[32] The Chamber issued a decision denying the Defence Motion seeking certification to appeal the previously composed Trial Chamber's decision on the Defence Motion for Reconsideration, likewise concerning the Order in Lieu of Indictment. It will nevertheless deal with the question of reconsideration for the purpose of discussion in this decision.
[33] *See* Motion for Reconsideration, 14 January 2009. The Chamber emphasises that repetition of arguments does not make a proposition any more correct in fact or in law.
[34] *See* Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir-Dire Hearing and Termination of Mandate of *Amicus* Prosecutor, 21 January 2009.

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

Judge Bakone Justice Moloto
Presiding

Dated this nineteenth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

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