



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-50-AR-73.8

17 December 2009

IN THE APPEALS CHAMBER

1211/H-1204/H

Before:

Judge Patrick Robinson, Presiding
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar:

Mr. Adama Dieng

Decision of:

17 December 2009

ICTR Appeals Chamber

Date:

17 Dec 2009

Action:

Copied To:

Concerned

THE PROSECUTOR

v.

Casimir BIZIMUNGU
Justin MUGENZI

Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-AR73.8

**DECISION ON APPEALS CONCERNING THE ENGAGEMENT OF A
CHAMBERS CONSULTANT OR LEGAL OFFICER**

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
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Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Andrea Valdivia for Mr. Casimir Bizimungu
Mr. Ben Gumpert and Mr. Jonathan Kirk for Mr. Justin Mugenzi
Mr. Michel Croteau for Mr. Jérôme-Clément Bicamumpaka
Mr. Tom Moran and Ms. Cynthia Cline for Mr. Prosper Mugiraneza

Judges, Parties,
Judicial Archives
LDs, LSS
[Signature]

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 seized of three interlocutory appeals filed by Mr. Justin Mugenzi,¹ Mr. Jérôme-Clément Bicomupaka,² and Mr. Prosper Mugiraneza.³ These appeals concern two decisions rendered by Trial Chamber II of the Tribunal (“Trial Chamber”) on the potential engagement of Mr. Everard O’Donnell as a consultant or a legal officer of the Trial Chamber in this case.⁴

I. BACKGROUND

2. On 28 August 2009, the Trial Chamber rejected objections filed by Mr. Mugiraneza and Mr. Bicomupaka concerning the potential engagement of the former Deputy Registrar of the Tribunal, Mr. Everard O’Donnell, as a consultant or a legal officer.⁵ It held that neither party had shown that Mr. O’Donnell is actually biased or that his engagement as a consultant or a legal officer would lead a reasonable person to perceive bias or that it was otherwise inappropriate or contrary to the interests of justice.⁶ On 2 September 2009, Mr. Mugiraneza filed a request for certification to appeal the First Impugned Decision.⁷ Mr. Mugenzi filed a request for reconsideration of the First Impugned Decision on 9 September 2009,⁸ submitting that it was not until after the First Impugned Decision was rendered that he became aware of statements made by Mr. O’Donnell at an International Symposium in Geneva, Switzerland on 9, 10, and 11 July 2009 (“Symposium”)⁹

¹ Justin Mugenzi’s Appeal Against Decisions on the Engagement of Mr Everard O’Donnell as a Chambers Consultant Dated 28 August and 23 September 2009, 30 September 2009 (“Mugenzi’s Appeal”).

² Bicomupaka’s Interlocutory Appeal of the Decision on the Objections of the Mugiraneza and Bicomupaka Defence Teams to the Engagement of Mr. Everard O’Donnell as a Chambers Consultant, 28 August 2009 and Relevant Parts of the Decision on the Joint Decision Filed 28 August 2009, 30 September 2009 (“Bicomupaka’s Appeal”).

³ Prosper Mugiraneza’s Brief on Appeal of Trial Chamber’s Orders Related to the Engagement of Everard O’Donnell as Chambers Consultant, 5 October 2009 (“Mugiraneza’s Appeal”).

⁴ See Decision on the Objections of the Mugiraneza and Bicomupaka Defence Teams to the Engagement of Mr. Everard O’Donnell as a Chambers Consultant, 28 August 2009 (“First Impugned Decision”); Decision on Mugiraneza’s Request for Certification to Appeal and Mugenzi’s and Bizimungu’s Requests for Reconsideration of the Decision on the Objections of Mugiraneza and Bicomupaka to the Engagement of Mr. Everard O’Donnell as a Chambers [sic] Consultant Dated 28 August 2009, 23 September 2009 (“Second Impugned Decision”).

⁵ Because Mr. O’Donnell has not yet been engaged by the Tribunal, there are no terms of reference for his engagement. See First Impugned Decision, para. 6.

⁶ First Impugned Decision, p. 7.

⁷ Prosper Mugiraneza’s Motion for Certification to File Interlocutory Appeal from the Decision of 28 August 2008 [sic], 2 September 2009 (“Mugiraneza’s Motion of 2 September 2009”).

⁸ Motion for the Trial Chamber to Reconsider the Decision of 28 August 2009 Entitled “Decision on the Objections of the Mugiraneza and Bicomupaka Defence Teams to the Engagement of Mr Everard O’Donnell as a Chambers Consultant”, 9 September 2009 (“Mugenzi’s Motion of 9 September 2009”).

⁹ Second Impugned Decision, para. 4.

which, in Mr. Mugenzi's view, exhibited bias against him and displayed a personal view on legal issues relevant to his trial.¹⁰ Mr. Bizimungu joined Mr. Mugenzi's Motion on 15 September 2009.¹¹

3. On 23 September 2009, the Trial Chamber rendered the Second Impugned Decision wherein it: (1) denied Mr. Mugenzi's Motion of 9 September 2009 and Mr. Bizimungu's Motion of 15 September 2009;¹² (2) granted Mr. Mugiraneza's Motion of 2 September 2009;¹³ (3) and granted leave to all parties to appeal the First Impugned Decision as well as the relevant portions of the Second Impugned Decision concerning the motions of Mr. Mugenzi and Mr. Bizimungu.¹⁴ On 30 September 2009, Mr. Mugenzi and Mr. Bicamumpaka filed their respective appeals. Mr. Mugiraneza filed his appeal on 5 October 2009, having been granted an extension of time.¹⁵ Mr. Bizimungu did not file an appeal. The Prosecution has not filed a response.

II. STANDARD OF REVIEW

4. The Trial Chamber's determination of whether the engagement of Mr. O'Donnell as a consultant or a legal officer would lead to actual bias or the appearance of bias is a discretionary decision to which the Appeals Chamber must accord deference. Where a discretionary decision is appealed, the issue is whether the Trial Chamber correctly exercised its discretion and not whether the decision was correct, in the sense that the Appeals Chamber agrees with it.¹⁶ Consequently, the Appeals Chamber will only reverse an impugned decision where it is demonstrated that a Trial Chamber committed a discernible error, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the impugned decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁷

¹⁰ See Second Impugned Decision, paras. 4-5. See also Mugenzi Motion of 9 September 2009, para. 8.

¹¹ *Réponse et argumentation du Dr Casimir Bizimungu à la requête de Justin Mugenzi intitulée: « Motion to Reconsider the Decision of 28 August 2009... »*, 15 September 2009, para. 3 ("Bizimungu's Motion of 15 September 2009").

¹² Second Impugned Decision, paras. 11, 17, p. 5.

¹³ Second Impugned Decision, para. 16, p. 5.

¹⁴ Second Impugned Decision, para. 16, p. 6.

¹⁵ Decision on Motion for Extension of Time to File an Appeal, 7 October 2009.

¹⁶ *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R75, Decision on Emmanuel Ndindabahizi's Appeal of Decision of 13 November 2008 Concerning Access To Protected Materials, 18 June 2009, para. 15 ("Ndindabahizi Decision"), citing *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 8 ("Rutaganda Decision"); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

¹⁷ Ndindabahizi Decision, para. 15, citing Rutaganda Decision, para. 8; *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatsé and Joseph Nzirorera*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 7 ("Karemera et al. Decision").

III. DISCUSSION

A. First Impugned Decision

5. Mr. Bicamumpaka submits that the Trial Chamber erred in failing to consider his submission that his right to a fair trial includes the right to an unbiased tribunal, which, he argues, includes by implication unbiased judicial and administrative officers.¹⁸ He accepts that Rule 15 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) is applicable only to Judges, but asserts that the Rules are not exhaustive when it comes to fair trial rights.¹⁹ He argues that, pursuant to Article 22 of the Statute of the Tribunal, he is entitled to a judgement free of actual bias or the appearance of bias.²⁰ He claims that “judicial staff” advising Judges on legal issues cannot have an appearance of bias, or actual bias, as the impartiality of a Judge may be prejudiced by virtue of his or her association with such staff.²¹ In this regard, he refers to a portion of the “Code of Conduct for Judicial Employees” from the United States of America which stipulates that a judicial employee should avoid conflicts of interest in the performance of his or her official duties.²²

6. Mr. Mugiraneza submits that legal officers “should be subject to the same standards of impartiality and avoidance of extrajudicial information and influences as [...] the [J]udges”.²³ Mr. Mugiraneza acknowledges that the Trial Chamber correctly noted that Rule 15(A) of the Rules does not, by its express terms, apply to consultants or legal officers, but argues that it does not follow that they are not subject to disqualification irrespective of the circumstances.²⁴ He asserts that the standard for disqualification under federal law from the United States of America is similar to that applied by the Appeals Chamber of the International Tribunal for the former Yugoslavia (“ICTY”) in the *Čelebići* case.²⁵ He argues that Chapter 455(a) of the United States Code²⁶ serves as the test for disqualification of law clerks notwithstanding that they are not expressly mentioned in that law. He submits that, in the same way, Rule 15(A) of the Rules should also serve as the test for disqualification of consultants and legal officers who participate in any manner in the adjudication of a case.²⁷ Mr. Mugiraneza argues that to hold that a consultant or a legal officer could never be

¹⁸ Bicamumpaka’s Appeal, para. 1.

¹⁹ Bicamumpaka’s Appeal, para. 8.

²⁰ Bicamumpaka’s Appeal, para. 8.

²¹ Bicamumpaka’s Appeal, para. 8.

²² Bicamumpaka’s Appeal, para. 9, *citing* Code of Conduct for Judicial Employees 1996 Canon 3(F)(1)-(2).

²³ Mugiraneza’s Appeal, para. 21.

²⁴ Mugiraneza’s Appeal, para. 21.

²⁵ Mugiraneza’s Appeal, para. 24, *citing* *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”); *Byrne v. Nezhad*, 261 F.3d 1075, 1101 (11th Cir. 2001).

²⁶ Mugiraneza’s Appeal, fn. 20, *citing* Title 28 of the United States Code, §455(a).

²⁷ Mugiraneza’s Appeal, para. 25.

disqualified would mean that a clearly biased person could participate in the decision of a case and the drafting of its judgement.²⁸

7. Mr. Mugenzi does not allege any error on the part of the Trial Chamber in its interpretation of Rule 15 of the Rules.²⁹

8. The Appeals Chamber notes that the Trial Chamber reasoned that Rule 15 of the Rules “applies expressly to [J]udges and does not contemplate the disqualification of [C]hamber’s legal officers or consultants”.³⁰ The Trial Chamber further considered that the disqualification of Chambers’ legal officers or consultants finds no support in the jurisprudence of the Tribunal.³¹ In reaching this conclusion, the Trial Chamber also referred to a report from a Panel of the ICTY which had been appointed to provide an opinion on disqualification of Judges and legal staff in connection with a contempt case before the ICTY.³² The Trial Chamber noted that in the *Hartmann* Report, the ICTY Panel stated that a plain reading of Rule 15 of the ICTY Rules of Procedure and Evidence, which is similar to Rule 15 of the Rules, shows that it applies solely to Judges and does not extend to Chambers’ staff, and that the conduct of legal officers is not relevant to determining a Judge’s impartiality.³³ The Trial Chamber concluded that it did “not consider that Rule 15 [of the Rules] may be extended to apply to Chambers legal officers or legal consultants”.³⁴ The Appeals Chamber considers that it was open to the Trial Chamber to rely on the ICTY Panel’s reasoning on this issue and, accordingly, finds no discernible error in the Trial Chamber’s reasoning in this respect.

9. The Appeals Chamber further notes that the submissions of Mr. Bicamumpaka and Mr. Mugiraneza are premised on the erroneous notion that legal officers or consultants play a central role in the Judges’ deliberations. Judicial decision-making is the sole purview of the Judges and legal officers and consultants play no role in it. Rather, they merely provide assistance to the Judges in legal research and preparing draft decisions, judgements, opinions, and orders in conformity with

²⁸ Mugiraneza’s Appeal, para. 25.

²⁹ Mugenzi’s Appeal, para. 9.

³⁰ First Impugned Decision, para. 13.

³¹ First Impugned Decision, para. 13.

³² *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, Public Redacted Version, (“*Hartmann* Report”), 27 March 2009.

³³ First Impugned Decision, para. 12, citing *Hartmann* Report, para. 25. The Appeals Chamber notes that the correct citation is *Hartmann* Report, para. 54. See *contra Prosecutor v. Ieng Sary*, Case No. 002/08-07-2009-ECCC-PTC, Decision on the Charged Person’s Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, para. 15 (wherein the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia relied on paragraph 54 of the *Hartmann* Report to find that “decisions of international tribunals related to court officers indicate that their lack of impartiality may bring cause for the disqualification of the judge with whom they are associated, not of the officer him or herself. Disqualification of a judge in these circumstances may be possible when the ‘objective test for bias’ is met by the applicant” (emphasis added).

the instructions given to them by the Judges.³⁵ Accordingly, there is no merit in Mr. Bicomumpaka's and Mr. Mugiraneza's assertions that legal officers and consultants must be subject to the same standards of impartiality as the Judges of the Tribunal.

10. The Appeals Chamber recalls that in the *Furundžija* case, the ICTY Appeals Chamber held that there is a "presumption of impartiality" which attaches to a Judge,³⁶ and that "... in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal 'can disabuse their minds of any irrelevant personal beliefs or predispositions'".³⁷ Thus, "[t]here is a high threshold to reach in order to rebut the presumption of impartiality".³⁸ The Appeals Chamber considers that it follows from this presumption that mere assertions to the effect that a staff member may influence a Judge during deliberations or the adjudication process are not a sufficient basis, in and of themselves, to warrant disqualification of a legal officer or consultant.

11. The Appeals Chamber is not persuaded that the Trial Chamber committed a discernible error and thereby abused its discretion in finding that Rule 15(A) of the Rules does not apply to legal officers and consultants. The Appeals Chamber further finds that the submissions advanced by Mr. Bicomumpaka and Mr. Mugiraneza on this issue are not capable of rebutting the presumption of impartiality on the part of the Trial Chamber in the instant case. In some cases, a prospective staff member's statements or activities may be so problematic as to either impugn the perceived impartiality of the Judges or the appearance thereof, or, even if this were not the case, the Tribunal's fundamental guarantees of fair trial. However, the present case falls far short of such a situation. Having reached this conclusion, the Appeals Chamber does not consider it necessary to address the remaining submissions with respect to the First Impugned Decision.

B. The Second Impugned Decision

12. The Trial Chamber, having considered the First Statement and the Second Statement, declined to reconsider the First Impugned Decision on the basis of the motions of Mr. Mugenzi and Mr. Bizimungu.³⁹

13. The question before the Appeals Chamber is whether the Trial Chamber abused its discretion in declining to reconsider its First Impugned Decision. A Trial Chamber has an inherent

³⁴ First Impugned Decision, para. 14.

³⁵ See, e.g., Articles 8(3)(B) and 51(3) of the Directive for the Registry of the International Criminal Tribunal for Rwanda Judicial and Legal Services Division Court Management Section, 14 March 2008 ("Directive for the Registry").

³⁶ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 196 ("*Furundžija* Appeal Judgement").

³⁷ *Furundžija* Appeal Judgement, para. 197.

³⁸ *Furundžija* Appeal Judgement, para. 197.

power to reverse or revise a prior decision where: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision and which bears on that decision; (2) a material change in circumstances has taken place since the original decision; or (3) there is reason to believe that the original decision was erroneous, or resulted in an injustice.⁴⁰

14. The Appeals Chamber observes that in the Second Impugned Decision, the Trial Chamber properly recalled this standard⁴¹ and noted Mr. Mugenzi's submission that the statements made by Mr. O'Donnell at the Symposium constituted new material circumstances for the purposes of reconsidering the merits of Mr. Mugenzi's motion.⁴² It is apparent from the Trial Chamber's reasoning that it then addressed whether the submissions raised by Mr. Mugenzi in fact constituted new circumstances in the present case sufficient to warrant reconsideration.⁴³ In particular, the Trial Chamber concluded that the first statement of Mr. O'Donnell to which Mr. Mugenzi referred "concerns the behaviour of detainees at the [United Nations Detention Facility] ("UNDF") and is irrelevant to the matters at issue in this trial."⁴⁴ It further found that this statement did not display any predisposition or bias against the accused.⁴⁵

15. The Trial Chamber stated: (1) that its ultimate findings would be based on the applicable law and the evidence adduced at trial, rather than any post-1994 activities of the accused in the UNDF;⁴⁶ and (2) that there is a presumption that the Judges will disregard the personal beliefs or predispositions of any consultant or legal officer that they become aware of in the course of their working relationship.⁴⁷ The Trial Chamber concluded that in view of these considerations, it was not persuaded that "a reasonable observer would conclude that the opinions or beliefs of a legal officer or consultant concerning such extraneous matters as the alleged activities of detainees in the UNDF may influence the ultimate findings of the Chamber in this case".⁴⁸ It was on the basis of the foregoing reasoning that the Trial Chamber declined to reconsider its First Impugned Decision.⁴⁹

16. The Appeals Chamber finds no discernible error in the approach taken by the Trial Chamber, and accordingly finds that it was properly within its discretion to decline to reconsider the

³⁹ See Second Impugned Decision, para. 11.

⁴⁰ See, e.g., *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-PT, Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009, para. 36 citing *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the Decision of 2 March 2006, 11 June 2007, paras. 9, 10.

⁴¹ Second Impugned Decision, para. 3.

⁴² Second Impugned Decision, para. 4.

⁴³ See Second Impugned Decision, paras. 5-10.

⁴⁴ Second Impugned Decision, para. 7.

⁴⁵ Second Impugned Decision, para. 7.

⁴⁶ Second Impugned Decision, para. 9. See also Second Impugned Decision, para. 7.

⁴⁷ Second Impugned Decision, para. 9.

⁴⁸ Second Impugned Decision, para. 9.

⁴⁹ Second Impugned Decision, para. 11. See also Second Impugned Decision, para. 17, p. 5.

First Impugned Decision on the basis of the foregoing reasoning. The Appeals Chamber considers that in view of this finding, it is not necessary to address the remaining submissions advanced by Mr. Mugenzi and Mr. Bicamumpaka with respect to the Second Impugned Decision.

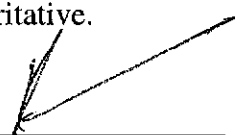
IV. DISPOSITION

For the foregoing reasons, the Appeals Chamber:

DENIES the Appeals of Mr. Mugenzi, Mr. Bicamumpaka, and Mr. Mugiraneza in their entirety.

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

Done the 17th day of December 2009,
At The Hague,
The Netherlands.



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]