



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

APPEALS CHAMBER

Before: Judge Theodor Meron, presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Adama Dieng

Date of filing: 5 April 2012

Ferdinand NAHIMANA

v.

THE PROSECUTOR

Case No. ICTR-99-52B-R

JUDICIAL RECORDS/REGISTRE
ICTR

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**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**

Office of the Prosecutor

Hassan Bubacar Jallow
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Ferdinand Nahimana

Self-represented

100/A

A. —Overview

1. The Appeals Judgement in *Ferdinand Nahimana v. The Prosecutor*, in which the Appeals Chamber affirmed two of Mr. Nahimana's convictions, and sentenced him to 30 years of imprisonment, was filed on 28 November 2007 ("Appeal Judgement").¹ On 22 April 2008 and 30 June 2010, the Appeals Chamber dismissed two successive applications filed by Mr. Nahimana to reconsider the Appeal Judgement.² On 27 September 2011, the Appeals Chamber dismissed a further motion filed by Mr. Nahimana to annul the Appeals Chamber decisions of 22 April 2008 and 30 June 2008 and for reconsideration of the Appeal Judgement ("27 September 2011 Decision").³

2. On 30 March 2012, Mr. Nahimana filed the instant motion⁴ in which he requests that the Appeals Chamber: (i) reconsider its 27 September 2011 Decision, on the basis that it was signed only by Judge Fausto Pocar;⁵ (ii) disqualify Judge Fausto Pocar from the bench adjudicating on any motions filed by Mr. Nahimana, including the instant motion;⁶ and (iii) reconsider the sentence of imprisonment imposed upon Mr. Nahimana in the Appeal Judgement.⁷

3. All of Nahimana's requests should be rejected. In relation to his first request, Mr. Nahimana has not demonstrated that there has been a clear error of reasoning in the 27 September 2011 Decision, or that the reconsideration of this decision is necessary to prevent a miscarriage of justice. With respect to his second request, Mr. Nahimana has not demonstrated that there is a reasonable

¹ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007.

² *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Ferdinand Nahimana's "Notice of Application for Reconsideration of Appeal Decision Due to Factual Errors Apparent on the Record", 22 April 2008 ("22 April 2008 Decision"); *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Ferdinand Nahimana's Motion for Reconsideration of the Appeal Judgement, 30 June 2010 ("30 June 2010 Decision").

³ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Nahimana's Motion to Annul the Decisions of 22 April 2008 and 30 June 2010 and for Reconsideration, 27 September 2011.

⁴ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, "1. Demande de reconsidération de la décision du 27 septembre 2011 signée par le seul juge 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").

⁵ Motion, paras. 11-22.

⁶ Motion, paras. 23-27.

⁷ Motion, paras. 28-48.

apprehension of bias that would warrant Judge Pocar's disqualification. With respect to Mr. Nahimana's final request, the Appeals Chamber has no jurisdiction to entertain any application for reconsideration of a final judgement.

B. — Submissions

Request for Reconsideration of the 27 September 2011 Decision

4. The Appeals Chamber may reconsider a previous decision "pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice".⁸ Mr. Nahimana has not addressed this standard, nor demonstrated how it has been met in this case.

5. The Appeals Chamber has previously found that Mr. Nahimana's arguments that the 22 April 2008 and the 30 June 2010 decisions be annulled on the basis that they were signed exclusively by the Presiding Judge lacked merit, as "in accordance with the consistent practice of the Appeals Chamber, the Presiding Judge signs decisions on behalf of the Bench after the conclusions of deliberations on a motion".⁹ For the same reasons, Mr. Nahimana's request for reconsideration of the 27 September 2011 decision on the basis that it was signed solely by Judge Fausto Pocar also lacks merit.

6. Mr. Nahimana also repeats several arguments from his previous applications for reconsideration of the Appeal Judgement.¹⁰ These arguments are nothing more than an attempt to re-litigate issues finally decided in the Appeal Judgement, or adjudicated by the Appeals Chamber in its decisions dismissing Mr. Nahimana's previous motions for reconsideration.

7. Mr. Nahimana therefore has not demonstrated that there has been a clear error of reasoning in the 27 September 2011 decision, nor that the reconsideration

⁸ *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildephonse Hategekimana's Second Motion for an Extension of Time to File his Appellant's Brief, 20 May 2011, para. 6; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Ngirumpatse's Motion for Reconsideration, 5 October 2007, p. 3.

⁹ 27 September 2011 Decision, p. 1.

¹⁰ Motion, paras. 12, 13, 16.

tion of this decision is necessary to prevent a miscarriage of justice, such that reconsideration of the decision is warranted.

Request for the Disqualification of Judge Pocar

8. Mr. Nahimana's request that Judge Pocar be disqualified from adjudicating on any motions filed by the applicant, including the instant motion, is similarly without merit, as he has not demonstrated that there is any reasonable apprehension of bias.

9. Mr. Nahimana submits that Judge Pocar should be disqualified on the grounds that (i) in his dissenting opinion to the Appeal Judgement, Judge Pocar erroneously found, solely on the basis of the testimony of witness Alison Des Forges, that the journalists of the RTLM were Mr. Nahimana's subordinates, and (ii) Judge Pocar has subsequently refused to reverse his position and to reconsider the Appeal Judgement.¹¹

10. There is a presumption of impartiality that attaches to the Judges of the Tribunal, which cannot be easily rebutted.¹² It is for the party challenging the impartiality of a Judge to adduce reliable and sufficient evidence to rebut this presumption.¹³ What must be considered, in relation to applications for disqualification of judges pursuant to Rule 15(B), is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹⁴

¹¹ Motion, paras. 23-26.

¹² Appeal Judgement, para. 48; *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("Galić Appeal Judgement"), para. 41; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 para. 55; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("Akayesu Appeal Judgement"), para. 91; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeal Judgement"), para. 707; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("Furundžija Appeal Judgement"), paras. 196, 197.

¹³ Appeal Judgement, para. 48; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 13; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 45; *Akayesu Appeal Judgement*, para. 91; *Čelebići Appeal Judgement*, para. 707; *Furundžija Appeal Judgement*, para. 197.

¹⁴ Appeal Judgement, para. 49, citing *Akayesu Appeal Judgement*, para. 203. See also *Furundžija Appeal Judgement*, para. 189; *Galić Appeal Judgement*, paras. 38, 39; *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 39; *Čelebići Appeal Judgement*, para. 682.

11. Judge Pocar's membership of the bench that rendered the Appeal Judgement in Mr. Nahimana's case does not in and of itself disqualify him from adjudicating post-appeal motions for reconsideration filed by Mr. Nahimana. It is in the very nature of applications for reconsideration that a judge who was a member of a bench, which rendered a decision against an accused or issued a dissenting opinion unfavourable to the accused, may form part of the bench that reconsiders such a decision. The judge is not called upon to assess the same factual or legal issues as in the original decision – rather the reconsideration bench is asked to determine whether a clear error of reasoning has been demonstrated or if reconsideration is necessary to prevent an injustice.

12. Judge Pocar's adverse finding against Mr. Nahimana in his dissenting opinion to that judgement also does not give rise to a reasonable apprehension of bias against Mr. Nahimana. In cases in which bias is alleged on the basis of a judge's findings in previous rulings, "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts."¹⁵ Mr. Nahimana has not demonstrated that Judge Pocar's dissenting opinion in the Appeal Judgement was attributable to a predisposition against him, rather than an assessment of the relevant facts.

13. Nor does Judge Pocar's dismissal, on behalf of the Appeals Chamber, of Mr. Nahimana's requests for reconsideration of the Appeal Judgement and the reversal of his convictions, give rise to a reasonable apprehension of bias against Mr. Nahimana, as these decisions were based on the principle firmly established

¹⁵ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam, and Joensen, 7 March 2008, para. 7 ("Karemera Decision"). See also *The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant"); *The Prosecutor v. Arsène Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *The Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15(B) (Bureau), 19 March 2003, para. 14.

in the jurisprudence that the Appeals Chamber does not have the jurisdiction to reconsider final judgements. Finally, the consistency of the Appeals Chamber's dismissal of Mr. Nahimana's requests for reconsideration on this basis does not give rise to a reasonable apprehension of bias.¹⁶

14. Accordingly, Mr. Nahimana's request for Judge Pocar's disqualification should be dismissed.

Request for Reconsideration of Appeal Judgement

15. As the Appeals Chamber has held in its previous decisions dismissing Mr. Nahimana's requests for reconsideration of the Appeal Judgement, it has no power to reconsider its final judgements, as the Statute only provides "for a right of appeal and a right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement."¹⁷

16. Mr. Nahimana submits that he is not seeking reconsideration of the Appeal Judgment, but of the sentence that the Appeals Chamber imposed upon him of 30 years.¹⁸ However, the sentence imposed by the Appeals Chamber forms part of the Appeal Judgement, and accordingly is also not subject to reconsideration.

17. Mr. Nahimana's request for reconsideration of the Appeal Judgement, and the sentence pronounced therein, should accordingly be dismissed.

¹⁶ See *Karemera* Decision, para. 12, where the Bureau held that "a Trial Chamber's consistency on an issue that is the subject of repetitive motions cannot be the basis for a finding of bias and does not give rise to a reasonable apprehension of bias"; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disqualification of Judges (Bureau), 28 May 2007, paras. 14, 21.

¹⁷ 22 April 2008 Decision, p. 2; 30 June 2010 Decision, para. 6. See also *Jean de Dieu Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011, para. 56; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza's Motion for Review and/or Reconsideration of the Appeal Judgement of 28 November 2007, 22 June 2009, paras. 20-21; *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 6.

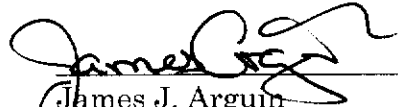
¹⁸ Motion, paras. 28-48.

C.—RELIEF SOUGHT

18. The Prosecution, therefore, respectfully requests the Appeals Chamber to dismiss the motion in its entirety.

Word Count: 1928

Dated and signed this 5th day of April 2012, Arusha, Tanzania.



James J. Arguin
Chief, Appeals & Legal Advisory Division



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Case Name:	The Prosecutor vs. Ferdinand Nahimana		Case Number: ICTR-99-52B-R
Dates:	Transmitted: 5 April 2012		Document's date: 5 April 2012
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