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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy B. Bossa
Registrar: Mr. Adama Dieng
Date: 15 July 2004

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The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

**DECISION ON NTAHOBALI'S EXTREMELY URGENT MOTION FOR
INADMISSIBILITY OF WITNESS TQ's TESTIMONY**

Office of the Prosecutor
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Adelaide Whest
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Manuel Bouwknecht

Defence Counsel
Duncan Mwanyumba
Normand Marquis

[Signature]

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the “*Requête d’extrême urgence de Arsène Ntahobali en déclaration d’inadmissibilité du témoignage du Témoin TQ*” (the “Motion”), filed on 5 April 2004;

CONSIDERING the “Prosecutor’s Response to Ntahobali’s ‘*Requête d’extrême urgence de Arsène Ntahobali en déclaration d’inadmissibilité du témoignage du Témoin TQ*’ ” (the “Prosecution’s Response”), filed on 5 April 2004;

CONSIDERING the “Prosecutor’s Supplemental Response to Ntahobali’s ‘*Requête extrême urgence de Arsène Ntahobali en déclaration d’inadmissibilité du témoignage du Témoin TQ*’ ” (the “Prosecution’s Supplemental Response”), filed on 6 April 2004;

CONSIDERING the “*Réponse de Sylvain Nsabimana à la Requête de Shalom Ntahobali en ‘...déclaration d’inadmissibilité du témoignage du Témoin TQ’* ” (“Nsabimana’s Response”), filed on 13 April 2004;

CONSIDERING the Scheduling Order of 14 April 2004;

CONSIDERING the “Prosecutor’s Clarification on Witness TQ’s Testimony in Response to the Trial Chamber’s Scheduling Order” (the “Prosecution’s Clarification”), filed on 19 April 2004;

CONSIDERING the “Prosecution’s Supplemental Clarification on Witness TQ’s Testimony in Response to the Trial Chamber’s Scheduling Order” (the “Prosecution’s Supplemental Clarification”), filed on 21 April 2004;

CONSIDERING the “*Réponse de Shalom Ntahobali aux ‘Prosecution’s Clarification on Witness TQ’s Testimony in Response to the Trial Chamber’s Scheduling Order’* ” (“Ntahobali’s Response”), filed on 26 April 2004;

CONSIDERING the Scheduling Order of 3 June 2004;

CONSIDERING the “*Conclusions du Comité International de la Croix-Rouge*” (the “ICRC Conclusions”), filed on 25 June 2004;

CONSIDERING the “*Conclusions de la Croix-Rouge de Belgique*” (the “BRCS Conclusions”), filed on 25 June 2004;

CONSIDERING the “*Correctif des conclusions de la Croix-Rouge de Belgique*” (the “Correction to the BRCS Conclusions”), filed on 30 June 2004;

CONSIDERING the “*Réponse de Shalom Ntahobali aux conclusions de la Croix-Rouge de Belgique relativement à l’immunité du témoignage du Témoin TQ*” (“Ntahobali’s Response to the BRCS Conclusions”), filed on 8 July 2004;



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NOW DECIDES the matter, on the basis of the written submissions of the Parties.

Procedural History

1. On 10 April 2001, the Prosecution announced their intention to call Witness TQ as a Prosecution Witness. On 1 February 2002 the Prosecution disclosed Witness TQ's statement to the Defence. On 5 April 2004, the Defence submitted that because of the witness's former relationship with the International Committee of the Red Cross (ICRC), Witness TQ could not testify before the Tribunal without express consent by the ICRC. The Defence urged the Chamber to declare Witness TQ's testimony inadmissible or, alternatively, to invite the ICRC to appear before the Chamber and give its position on the matter.
2. In response, the Prosecution argued that (1) Witness TQ was merely a volunteer to the ICRC and not its employee, therefore was not, *stricto sensu*, bound by any confidentiality clause that may ordinarily be found in an employment contract between the ICRC and its employees; and (2) the information to which Witness TQ would testify were not gathered in the course of the witness's relationship with ICRC, as it is possible to isolate such information from those gathered in the course of the witness's relationship with ICRC. In this connection, the Prosecution requested that Witness TQ be allowed, as a preliminary matter, to testify on the precise nature of Witness TQ's relationship with the ICRC.
3. Alternatively, the Prosecution argued that the ICRC did not, as a matter of law, enjoy any immunity that would enable it to prevent a former employee from willingly testifying before the Tribunal. The Prosecution opposed the application by the Defence to invite the ICRC to appear before the Chamber and prayed the Chamber to dismiss the Defence motion.
4. In its Supplemental Response, the Prosecution asserted that the particular circumstances of the present case against the Accused required the Chamber to hear Witness TQ's testimony.
5. On 6 April 2004 the Chamber received a fax from the ICRC stating that the ICRC "could not allow a former or actual employee or volunteer working for or under the authority of the ICRC to testify and to divulge information that he or she gained in the exercise of his or her functions." The fax stated that the ICRC was "unaware of whether [Witness TQ] was performing functions for or under the authority of the ICRC at the time relevant for this case."
6. In his own Response, the Accused Nsabimana argued that it is necessary for Witness TQ to testify and prayed the Chamber to order said testimony. According to Nsabimana, Witness TQ's testimony has a potential to exculpate Nsabimana, and, above all, it is in the interest of justice and the cause of respect for international humanitarian law to hear the testimony.
7. In the Scheduling Order of 14 April 2004 the Chamber ordered the Prosecution to specify within two days which part of Witness TQ's testimony constituted information gathered in the course of the witness's relationship with the ICRC and which part did not. The



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Chamber postponed a decision on whether it would recognise any special status for the ICRC and/or its staff and volunteers.

8. The Prosecution submitted said Clarification. Ntahobali's Response asserted that Witness TQ continuously served in official capacity for the ICRC, and that ICRC immunity consequently applied to the duration of the witness's service in Rwanda; therefore, Ntahobali argued, the witness's testimony is barred before the Tribunal.
9. By a Scheduling Order of 3 June 2004, the Chamber invited the ICRC and the Belgian Red Cross Society (referred hereto as "BRCS") to make submissions, pursuant to Rule 74 of the Rules. The relevant parts of that Scheduling Order are in the following terms:

- i. Whether Witness TQ was working as an employee or a volunteer of either the ICRC or the Red Cross of Belgium, or both, between 1 January to 2 July 1994, when the witness saw the events described in the written statements;
- ii. If Witness TQ was working for the Red Cross of Belgium only, the nature and legal background of the mission of the Red Cross of Belgium in Rwanda in 1994 and the relationship between this mission and the general mandate of the ICRC pursuant to the Geneva Conventions of 1949 and Additional Protocols;

If Witness TQ was employed by either of the two organizations, specify:

- iii. The exact duration of the witness's employment with the organization;
- iv. The exact terms of the witness's employment and, in particular, whether Witness TQ was bound by an obligation of confidentiality for the events the witness may have seen while working for either organization;

If there was an obligation of confidentiality, specify:

- v. Whether this obligation of confidentiality binds Witness TQ after the witness has left the organization;
- vi. Whether this obligation of confidentiality takes priority over the duty to testify before an International Criminal Tribunal set up under Chapter VII of the UN Charter;
- vii. Whether this obligation of confidentiality is absolute or may have exceptions, i.e. in the case where the witness's testimony is the only evidence of the participation of an accused in the commission of a crime;

Also:

- viii. Address any other specific issues raised by the Parties in their submissions;

10. The BRCS Conclusions, filed in response to the Scheduling Order of 3 June 2004, asserted the invalidity of the Prosecution's attempt to distinguish, in the witness's statements of 28 and 29 July 1998, between actions Witness TQ undertook as a BRCS employee and actions which fell beyond those duties. The BRCS asserted that Witness TQ was acting at all times in official capacity as a BRCS employee. As far as it goes, this is, of course, a contention on the part of the BRCS, and not a statement of fact. The BRCS also asked that Witness TQ be a protected witness, with no revelation of the witness's name or post with the BRCS.

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11. The BRCS Conclusions specified that BRCS staff are *de facto* under ICRC authority and are bound by ICRC rules. As such, Witness TQ, like all ICRC employees, assumed an obligation of discretion and confidentiality. All BRCS employees, including Witness TQ, sign an employment contract that includes a duty to respect the seven fundamental principles, including impartiality and neutrality. The BRCS explained that Witness TQ's employment contract had been destroyed along with other records during the events in Rwanda in 1994. The BRCS indicated, however, that Witness TQ would have signed a standard employment contract, a sample of which the BRCS included in Annex 19 to its Conclusions.
12. The BRCS asserted that, as a matter of principle, the obligation of confidentiality is absolute and prevails over any duty to testify before an international criminal tribunal. In this case, however, the BRCS found that the interests of the victims and international humanitarian law justify allowing Witness TQ to appear to testify before the Tribunal. Consequently BRCS is not opposed to Witness TQ testifying before the Chamber.
13. The ICRC supported the BRCS decision not to oppose the appearance of Witness TQ as a witness before the Tribunal "in the Arsène Shalom Ntahobali and Pauline Nyiramasuhuko case (ICTR-97-21-T)."
14. In their Conclusions both the ICRC and the BRCS reserved the right to assert immunity for their employees in the future.
15. In reply to the BRCS and ICRC submissions, Defence for Ntahobali raised some concerns over the specific mention in the BRCS and ICRC Conclusions of only Ntahobali and Nyiramasuhuko and the use of the Case File Number ICTR-97-21-T, which refers only to Ntahobali and Nyiramasuhuko, rather than the Case File Number ICTR-98-42-T, being the Case File Number for the joint trial of all the six Accused in the *Butare* case. The Ntahobali Defence notes that in the witness's written statements Witness TQ appears to incriminate more than the Accused Ntahobali and Nyiramasuhuko. Ntahobali therefore prays that, if Witness TQ is to testify, the testimony must not be limited to only Ntahobali and Nyiramasuhuko.

DELIBERATIONS

16. The parties and the interveners (the ICRC and the BRCS) have no doubt raised some interesting questions of law and fact in this matter. Considering, however, that the BRCS and the ICRC are not opposed to Witness TQ's testimony, the Chamber finds no need to make any pronouncements, on this occasion, in an attempt to resolve those questions of law and fact.
17. Regarding the reach of Witness TQ's testimony, the Chamber is persuaded by Ntahobali's submissions that Witness TQ's testimony may not be limited to only Ntahobali and Nyiramasuhuko. The Chamber sees no principled basis to suppose that the ICRC and the BRCS intended their cooperation to be so limited;¹ nor, as a practical matter, should there be such a limitation.

¹ In this connection, the Chamber notes that the motion against TQ's testimony was made by Ntahobali and that he is jointly charged in the same indictment with Nyiramasuhuko under the Case File Number ICTR-97-21-T. This might well explain the interveners' limited reference in their written response.

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FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DISMISSES the Ntahobali's Motion objecting to the testimony of Witness TQ, and;

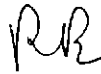
ORDERS as follows:

- a) the Prosecution may proceed with Witness TQ's testimony, and
- b) Witness TQ may testify in relation to any of the Accused in this trial, to the extent permitted by the ordinary course of the Witness's testimony together with the usual practice and procedures of the Tribunal.

Arusha, 15 July 2004



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]