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**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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**Office of the President  
Cabinet du Président**

Before: Judge Erik Møse, President

Original: English

Registrar: Mr. Adama Dieng

Date: 18 April 2005

JUDICIAL RECORDS/ARCHIVES  
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**THE PROSECUTOR**

**VERSUS**

**PAULINE NYIRAMASUHUKO AND ARSÈNE SHALOM NTAHOBALI**

**ICTR-97-21-T**

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**Decision on the Appeal of the Registrar's Decision of 13 April 2005 with regard to Mr  
Edmond Babin**

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For the Applicants:

Nicole Bergevin for Pauline Nyiramasuhuko

Normand Marquis for Arsène Shalom Ntahobali

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)**

**SITTING** in the person of Judge Erik Møse, President;

**CONSIDERING** an appeal of 14 April 2005 from co-accused Pauline Nyiramasuhuko and Arsène Shalom Ntahobali against the Registrar’s decision of 13 April 2005 and the Registrar’s response of 15 April 2005;

**HEREBY DECIDES THE APPEAL**

**INTRODUCTION**

1. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali are currently being tried for genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Both Accused have been found to be indigent and the costs of their defence are funded through the Tribunal’s legal aid system.

2. On 13 April 2005, Trial Chamber II ruled that Mr Edmond Babin, a witness tendered by both Nyiramasuhuko and Ntahobali, did not qualify as an expert in crime scene analysis. He may, however, testify as a factual witness. Following this ruling, the Registry declined to honour the contract between Mr Babin and the Tribunal. Nyiramasuhuko and Ntahobali have now filed an appeal against this decision.

**SUBMISSIONS**

3. Nyiramasuhuko and Ntahobali jointly submit that on 3 December 2004, the Registrar agreed that Mr Babin will be regarded as an expert witness for the purposes of preparation of his report, which was subsequently formalised in a contract signed by both parties on 13 and 14 January 2005. Following the decision of the Trial Chamber, the Registrar took the view that the contract is null and void. According to Nyiramasuhuko and Ntahobali, the decision of the Trial Chamber has no retroactive effect. Payment as specified in the contract for work done in the form of a report and testimony rendered before the Trial Chamber is not conditional on the Chamber’s decision as to the qualification of the witness as an expert.

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4. The Registry submits that, on the basis of representations made by Counsel for Nyiramasuhuko and Ntahobali, Mr Babin had the kind of expertise that was envisaged in these proceedings. On the assumption that such representation was correct, the Victims and Witnesses Support Section made a representation to the Chief of Human Resources to engage Mr Babin as an expert witness. The remuneration of Mr Babin was to be charged to an account specifically intended for expert witnesses' fees. The generic term for short term contracts are fashioned under the style "consultant agreement". This does not detract from the fact that remuneration arising from this agreement will be paid from the account intended for expert witnesses. Paragraph 3 of the consultant agreement mandates the Registry to pay the consultant only upon certification that the services have been satisfactorily performed. These services are those of an expert witness. In the present case, the services purported to be those of an expert, have been rejected by the Trial Chamber, and Mr Babin has only been allowed to testify as a factual witness. The contract offered to Mr Babin was that of an expert witness for the purposes of these proceedings. Since Mr Babin does not qualify as an expert witness, the contract cannot be honoured as the *substratum* on which this contract is founded is no longer there.

5. The Registry concedes that in two other cases expert witnesses were paid for work done even though they were rejected as experts by the Trial Chambers. On reflection, the Registry sees the problem that payments in these circumstances may cause. A wrongful act does not cease to be wrongful by mere repetition. The Registry is under a duty to examine past mistakes and seek corrective measures or guidance from the President.

**DELIBERATION**

6. There are no provisions either in the Statute or the Rules that confer on a party the standing to file an appeal before the President against decisions made by the Registrar. It therefore follows that this appeal is inadmissible. Although Nyiramasuhuko and Ntahobali have not alternatively requested a review of the Registrar's decision, the Tribunal will nevertheless consider whether it could be the subject of review.

7. Rules 19 and 33 (A) of the Rules of Procedure and Evidence confer on the President the authority to review decisions taken by the Registrar, in appropriate cases. While the Registrar has the responsibility of ensuring that all decisions are procedurally and substantially fair, not

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every decision taken by him can be the subject of review. The Registrar must be free to conduct the business of the Registry without undue interference by Presidential review.

8. According to the Tribunal's jurisprudence, an application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible under Rules 19 and 33 (A) of the Rules, if the Applicant has a protective right or interest, or if it is otherwise in the interests of justice in the case of the Applicant.<sup>1</sup>

9. Article 20 (4)(e) of the Statute guarantees an accused the right to obtain the attendance and examination of witnesses on his or her behalf. In the present case, the Trial Chamber has ruled that Mr Babin does not qualify as an expert in crime scene analysis, and he as therefore been precluded from testify as an expert witness. However, the Chamber permitted Mr Babin to testify as a factual witness.

10. The Registrar's decision has not infringed on the rights of Nyiramasuhuko and Ntahobali to call Mr Babin as a factual witness. Furthermore, Mr Babin has not indicated that his desire to testify as a factual witness is dependent on whether or not he is paid for work that he had undertaken in relation to the preparation of his report and anticipated testimony as an expert witness. It should be noted that factual witnesses are not paid by the Tribunal.

11. In light of the above, the Tribunal finds that Nyiramasuhuko and Ntahobali do not have a protective right or interest in the present case that warrant a review of the Registrar's decision. Furthermore, the issues raised by these Applicants do not threaten the interests of justice in their case.

12. This being said, it is apparent from the face of the contract between the Registry and Mr Babin that it is not conditional on Mr Babin being accepted as an expert witness by the Trial Chamber. In two previously similar cases, the Registry honoured those contracts. It may therefore wish to reconsider its position with regard to Mr Babin, in fairness to him. More generally, there is a need for the Registry to clarify its position with regard to proposed expert

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<sup>1</sup> *Prosecutor v. Joseph Nzirorera*; case no. ICTR-98-44-T, The President's Decision on review of the decision of the Registrar withdrawing Mr Andrew McCartan as lead counsel of the accused Joseph Nzirorera, 13 May 2002, page 3; *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, case no. ICTR-97-21-T, The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decisions pertaining to the Assignment of an Investigator, 13 November 2002, page 4 para. 5.

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witnesses who are not accepted as such by a Trial Chamber, in order to avoid similar problems in the future. For instance, this position could be conveyed in future contracts with proposed expert witnesses.

**FOR THE ABOVE MENTIONED REASONS, THE TRIBUNAL DISMISSES:**

(a) The appeal of 14 April 2005 filed by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali against the Registry's decision of 13 April 2005;

(b) A review of the Registry's decision of 13 April 2005;

Arusha, 18 April 2005

  
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