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UNITED NATIONS  
NATIONS UNIES

ICTR-00-55A-T  
15-07-2005  
(2645-2640)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Or: ENG

## TRIAL CHAMBER II

**Before:** Judge Asoka De Silva, Presiding  
Judge Flavia Lattanzi  
Judge Florence Rita Arrey

**Registrar:** Mr Adama Dieng

**Date:** 15 July 2005

**The PROSECUTOR**

**v.**

**Tharcisse Muvunyi**

**Case No. ICTR-2000-55A-T**

2005 JUL 15 P 2:06  
JUDICIAL CHAMBER II  
ICTR  
JUDICIAL CHAMBER II ARCHIVES

## REASONS FOR THE CHAMBER'S DECISION ON THE ACCUSED'S MOTION TO EXCLUDE WITNESS TQ

### Office of the Prosecutor

Mr Charles Adeogun-Phillips  
Ms Adesola Adeboyejo  
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### Defense Counsel

Mr William Taylor  
Mr Jean Flamme  
Ms Cynthia Cline  
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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal"),

**SITTING** as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

**BEING SEIZED** of the "Accused's Motion to exclude Witness TQ" filed on 27 June 2005 (the "Motion");

**CONSIDERING** the Prosecutor's oral response to the Motion given during the oral hearing on 27 June 2005 (the "Response") and the arguments made by both, the Defence and the Prosecution, during that hearing;

**RECALLING** its oral decision rendered on 27 June 2005 denying the Motion (the "Oral Decision");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 89(C) of the Rules;

**NOW PROVIDES** the reasons for its Oral Decision.

## **ARGUMENTS OF THE PARTIES**

### ***The Defence***

1. The Defence requests that Witness TQ's testimony be excluded, or in the alternative, that before admitting TQ's testimony, the International Committee of the Red Cross (the "ICRC") take affirmative action to waive its right to non-disclosure of privileged information - in the form of either a public appearance of appropriate ICRC officials or a written waiver of the privilege - and in the absence of a specific waiver, to exclude TQ's testimony. The Defence makes the same request with regard to any other current or former officials, employees or volunteers of the ICRC.

2. The Defence argues that Witness TQ is a former employee or voluntary worker of the Red Cross and cannot testify on information he acquired while carrying out the ICRC's mandate. The Defence asserts that the ICRC itself had stated that prior to such testimony, the approval of the ICRC was necessary. The Defence also points to a Decision in the *Simic* case, where an ICTY Trial Chamber decided that under customary international law, the Chamber is prohibited from admitting evidence from current or former ICRC staff members and therefore has no discretionary power in this regard.<sup>1</sup> The Defence claims that this approach is also reflected in the Headquarters Agreement of the

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<sup>1</sup> *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the testimony of a witness (T.Ch.), 27 July 1999 (the "*Simic* Decision").



International Criminal Court (the “ICC”) and its Rules of Procedure and Evidence which consider ICRC information to be privileged and only subject to disclosure if the ICRC waived its privilege.

3. The Defence asserts that the ICRC has a special status under international humanitarian law: The four Geneva Conventions and the two Additional Protocols entrust the ICRC with a variety of functions relating to the protection of victims of armed conflicts. In the Defence’s view, the respect of the principles of neutrality, impartiality and confidentiality by ICRC representatives is a precondition for the ICRC to effectively discharge its functions. The ICRC’s work depends on the consent of the parties to a conflict which is likely to be denied if they lose trust and confidence in the ICRC, due to fear that ICRC representatives may appear as witnesses in criminal proceedings against them. The Defence further states that ICRC representatives should therefore not even be allowed to testify if the ICRC waived its right to non-disclosure of information.

4. The Defence, however, contends that ICRC representatives should be allowed or even required to give testimony in support of the Defence. Under these circumstances, the Defence argues that ICRC representatives in conflict situations would be perceived as potential witnesses for the Defence which would encourage compliance with international humanitarian law.

5. The Defence also argues that Witness TQ is not the only witness who can testify on the attacks launched against the Groupe Scolaire and is therefore not indispensable to the Prosecution case.

6. During the oral hearing on the Motion, the Defence argued that the record in the *Butare* case clearly established that TQ was a staff member of the ICRC, and that the Belgian Red Cross Society (the “BRCS”) and the ICRC had only authorized TQ’s appearance as a witness before the Tribunal only for the said case. The Defence submitted that the consent of those two organizations must be sought specifically for TQ’s testimony in the present case. In this regard, the Defence also cited the *Butare* Decision where the Trial Chamber stated that both the ICRC and the BRCS reserved the right to assert immunity for their employees in the future.<sup>2</sup>

### ***The Prosecution***

7. During the oral hearing, the Prosecution submits that Witness TQ was not an employee of the ICRC but a local volunteer for the BRCS. He was neither required to sign a pledge of discretion nor was the obligation to respect principles of neutrality and confidentiality ever raised with him.

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<sup>2</sup> *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntabohali*, Case No. ICTR-97-21-T, Decision on Ntabohali’s extremely urgent Motion for inadmissibility of Witness TQ’s testimony (T.Ch.), 15 July 2004.



8. The Prosecution notes that the Defence substantially relies on the *Simic* Decision, but that the *Simic* case was significantly different from the present case. The Prosecution argues that in the *Simic* case, the ICRC was more concerned about the violation of the principles of international humanitarian law and its concerns mainly related to the discharge of its mandate related to the rights of prisoners and detainees in a situation of armed conflict.

9. The Prosecution submits that the evidence to be adduced by Witness TQ, as shown from the witness statement, is indispensable and invaluable to the Prosecution case so that to exclude this witness's testimony would be tantamount to a gross violation of the Prosecution's rights and obligations to present the best possible evidence at its disposal. The Prosecution further submits that Witness TQ is called to testify in support of allegations of crimes of utmost gravity.

10. The Prosecution argues that the ICRC does not enjoy any privilege as a matter of law that would enable it to unilaterally prevent any of its former employees from testifying. Witness TQ as a Rwandan Hutu male moved around freely in Butare *Préfecture* in the course of these peculiar circumstances and was a first-hand observer of the events on which he seeks to testify during the period April to July 1994.

11. The Prosecution argues that the Defence had the duty to raise any objection that it might have had with regard to the inadmissibility of evidence of a witness at the earliest opportunity and not shortly before the Prosecution presents the said witness. The Defence had received copies of the statements on 15 January 2005 and should have raised its objections before the commencement of trial. The Prosecution assumes that the Defence challenges the admissibility of the witness at the last minute for tactical reasons and acts in an attempt to obstruct the course of justice.

12. The Prosecution further submits that for the purpose of the *Butare* trial, the ICRC and the BRCS had given their authorisation for Witness TQ to testify, and TQ's testimony in the present case would be based on the same witness statement and he would testify on the same events. The Prosecution also emphasizes that while the authorization given by the ICRC and the BRCS explicitly referred to the trial of only two accused, Nyiramasuhuko and Ntabohali, the Trial Chamber considered that it extended to the other four accused persons joined in that trial. The Prosecution explains that it has not filed any letter to the ICRC as no further authorisation is required for Witness TQ to testify in the present trial.

13. The Prosecution requests the Chamber to dismiss the Motion in its entirety.

#### DELIBERATIONS

14. The Chamber takes note of the Decision rendered in the *Butare* case where Trial Chamber II, differently constituted, admitted the testimony of the same Witness TQ only

after having received the authorisation of both the ICRC and the BRCS.<sup>3</sup> The Chamber notes, however, that it is clear from Witness TQ's preliminary statement that during the time Witness TQ observed the events described in his witness statement, he was working for the BRCS in Kigali and *not* for the ICRC.

15. The Chamber emphasizes that the ICRC and national Red Cross societies are entirely different organisations in law and a clear distinction between them needs to be drawn at all times. The BRCS is a *national* organisation with a *national* statute and *national* arrangements. It is governed by means of organs set up by its statute.<sup>4</sup> The ICRC, founded in Geneva in 1863, is a private association governed by a national statute in Switzerland and, by that statute, the Committee is composed only of Swiss nationals.<sup>5</sup> However, the functions attributed to it by the Geneva Conventions have resulted in the acquisition by the ICRC of an international status.

16. While international law grants the ICRC the exceptional privilege of non-disclosure of information which is in the possession of its employees and which relates to the ICRC's activities, and consequently bars the Chamber from admitting such information,<sup>6</sup> it is the Chamber's view that such privilege is *not* granted to national Red Cross societies. The privilege derives from the ICRC's pivotal and unique role in the regime established by the Geneva Conventions and the first Protocol. As stated by an ICTY Chamber in the *Simic* case, such finding "does not 'open the floodgates' in respect of other organizations".<sup>7</sup> The Chamber notes that the ICC's Rules of Procedure and Evidence similarly grant such privilege only to the ICRC, and not to any other organization.<sup>8</sup>

17. The Chamber notes that in times of emergency, national societies often cooperate with other national societies and the ICRC. In some instances, employees of national societies may be integrated into the teams of the ICRC for a limited period of time and only in such cases employees of national Red Cross societies could possibly be assimilated to the ICRC staff.<sup>9</sup> But more often the collaboration between the ICRC and national Red Cross societies is confined to the *general direction* and *coordination* of international relief operations.<sup>10</sup>

18. The Chamber notes that in the instant case, no evidence has been proffered to suggest that the BRCS was acting on behalf of the ICRC, nor that the local volunteer of the BRCS had been integrated into an ICRC team. The Chamber finds that the question

<sup>3</sup> *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntabohali*, Case No. ICTR-97-21-T, Decision on Ntabohali's extremely urgent Motion for inadmissibility of Witness TQ's testimony (T.Ch.), 15 July 2004.

<sup>4</sup> Statutes of the BRCS, 13 October 2003.

<sup>5</sup> Statutes of the ICRC, 20 July 1998.

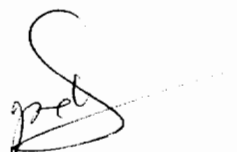
<sup>6</sup> *Simic* Decision, paras. 73 and 74.

<sup>7</sup> *Simic* Decision, footnote 56.

<sup>8</sup> Rule 73 (4) of the ICC Rules of Procedure and Evidence.

<sup>9</sup> Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement, Sevilla, 26 November 1997 ("Seville Agreement").

<sup>10</sup> See Article 6 of the Seville Agreement.



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of the ICRC's right to non-disclosure of information by its employees is consequently not an issue in this case.

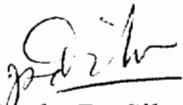
19. The Chamber furthermore considers that no evidence has been proffered by the Defence to suggest that the BRCS has an international testimonial privilege in respect of the information in the possession of its employees.<sup>11</sup> The Chamber consequently finds that international law does not require the Chamber to consult the BRCS in order to hear the witness and admit his testimony.

20. Finally, the Chamber considers that the application made by the Defence with regard to the admissibility of ICRC representatives as potential Defence witnesses is at best hypothetical and therefore premature.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIED** the Motion in its entirety.

Arusha, 15 July 2005

  
Asoka De Silva  
Presiding Judge

  
Flavia Lattanzi  
Judge

  
Florence Rita Arrey  
Judge

(Seal of the Tribunal)



<sup>11</sup> It is noted that the ICRC's Legal Division appears to make no public claim that testimonial privilege attaches to employees of national societies. On the contrary, at least one stated position (a memorandum prepared for ICRC delegates) suggests that it does not. "A word about testimony in relation to the other components of the Movement is also in order. The evidentiary protection accorded to the ICRC does not extend to the International Federation of Red Cross and Red Crescent Societies or to National Societies. Neither the ICC Rules nor any international tribunal have recognized such protection. While the Federation may enjoy such protection by virtue of its headquarters agreements with individual States, National Societies can claim no such benefit." *The ICRC privilege not to testify: confidentiality in action*, Gabor Rona, Legal Adviser at the ICRC's Legal Division.

[<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList109/C3B5CC5CF93CE974C1256E4E00351893>. Visited 13.07.05]

