



OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 14 November 2008

The PROSECUTOR

v.

Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS SECTION
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**DECISION ON NTAHOBALI'S MOTION FOR ADMISSION OF TWO RWANDAN
JUDGEMENTS INVOLVING PROSECUTION WITNESS TQ**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

BEING SEIZED of the confidential "*Requête de Arsène Shalom Ntahobali en autorisation de dépôt de deux jugements rwandais impliquant le témoin TQ*", filed on 1 October 2008 ("Ntahobali's Motion");

CONSIDERING the:

- i. "*Réponse du Procureur à la Requête de Ntahobali en date du 30 septembre 2008 : communication de deux jugements concernant TQ*", filed on 10 October 2008 ("Prosecution Response");
- ii. "*Réponse de Sylvain Nsabimana à la 'Requête de Arsène Shalom Ntahobali en autorisation de dépôt de deux jugements rwandais impliquant le témoin TQ'*", filed on 10 October 2008 ("Nsabimana's Response");
- iii. "Alphonse Nteziryayo's Response to the '*Requête de Arsène Shalom Ntahobali en autorisation de dépôt de deux jugements rwandais impliquant le témoin TQ*'", filed confidentially on 13 October 2008 ("Nteziryayo's Response");
- iv. "*Réplique de Ntahobali à la réponse du Procureur en autorisation de dépôt de deux jugements rwandais impliquant le témoin TQ*", filed confidentially on 14 October 2008 ("Ntahobali's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF THE PARTIES***Ntahobali's Motion***

1. The Defence moves the Chamber to admit into evidence two Rwandan judgements involving Prosecution Witness TQ.
2. The Defence submits that Prosecution Witness TQ testified before the Chamber from 6 to 9 September 2004. Prior to this testimony, Witness TQ was jointly tried with 18 co-accused before the *Conseil de Guerre de la République Rwandaise*, in relation to events which occurred at, and in the vicinity of, the *Groupe Scolaire Officiel* of Butare between April and July 1994. The *Conseil de Guerre de la République Rwandaise* judgement, rendered on 20 January 2003, acquitted Witness TQ. The said judgement was appealed and the judgement on appeal was pending when Witness TQ testified before the Chamber.
3. The Defence recalls that Prosecution Witness TQ testified against Ntahobali in connection with events which occurred during the transfers of orphans from the *Groupe Scolaire* to Burundi, on 5 June 1994. In cross-examination, the Defence confronted Witness

TQ with excerpts of the judgement rendered by the *Conseil de Guerre de la République Rwandaise* on 20 January 2003. At the end of the cross-examination, the Defence stated that related documents would be filed in an appropriate time.¹

4. The Defence argues that the reliability and relevance of the copy of the trial judgement sought to be admitted were demonstrated during the cross-examination of Prosecution Witness TQ.

5. The Defence submits that it has only recently received the appeal judgement, which was issued on 24 August 2006 by the *Haute Cour Militaire du Rwanda*. The Registrar of the *Haute Cour Militaire* certified and stamped each page of the copy of the appeal judgement sought to be admitted. Attached to the copy of the appeal judgement is the transmission sheet, which is signed by Major General Patrick Nyamvumba, President of the *Haute Cour Militaire*, and addressed to Mr. Mamoudou Touré, the person in charge of the administration of the ICTR in Kigali. A stamped envelope containing the aforementioned documents was transmitted to the Co-Counsel of Ntahobali. The chain of custody of the copy of the appeal judgement is sufficiently demonstrated and guarantees its authenticity and reliability, thus justifying its admission into evidence.

6. The Defence alleges that the two judgements are relevant to Ntahobali's case. During his testimony before the Chamber, Prosecution Witness TQ stated that the seven witnesses who testified against him before the *Conseil de Guerre* were telling lies which were fabricated by the Witness' former Director. Witness TQ also testified that a certain individual had given testimony about Ntahobali during the trial before the *Conseil de Guerre*. However, the Defence argues Ntahobali was not implicated in the *Conseil de Guerre* judgement.

7. The Defence further submits that the *Haute Cour Militaire* judgement of 24 August 2006 quashed the judgement of 20 January 2003. Indeed, the appeal judgement convicted Prosecution Witness TQ of incitement to commit genocide and for his role in the murder of Béata and sentenced him to 30 years in prison, to the loss of his civil rights and to pay costs. The Defence further alleges that Ntahobali's name was not mentioned in this appeal judgement.

8. The Defence indicates that Witness TQ failed to appear at his appeal proceedings despite various postponements; the appeal judgement was issued in his absence.

9. Finally, the Defence alleges that the admission of the two judgements might affect the credibility of Prosecution Witness TQ who purposely fled his trial on appeal.

Prosecution Response

10. The Prosecution submits that during its cross-examination of Witness TQ, the Defence for Ntahobali could have confronted Witness TQ with extracts of the *Conseil de Guerre* judgement of 20 January 2003. According to the Prosecution, the Defence had the said judgement at that time. To request its production at a later stage is inopportune.

11. The Prosecution argues that the Defence did not mention that it intended to produce into evidence the judgement of 20 January 2003 during the 26 June 2006 and 28 April 2008 proceedings.



¹ T. 8 September 2004, p. 21 (ICS)

12. The Prosecution submits that Ntahobali was not mentioned in the judgement of 20 January 2003 because he was not an accused before the *Conseil de Guerre*. During his testimony before the Chamber, Witness TQ underscored that the fact that a certain individual accused Shalom could be confirmed by consulting the *Conseil de Guerre* Registry's files. The Prosecution argues that the Defence failed to prove that this individual actually appeared during the *Conseil de Guerre* trial that led to the judgement of 20 January 2003, or that she contradicted Witness TQ's allegations. Therefore, the Prosecution requests that the judgement of 20 January 2003 not be admitted.

13. The Prosecution also objects to the request for admission of the *Haute Cour Militaire* judgement of 24 August 2006 and submits that on 28 April 2008 when Ntahobali's case was declared closed, the concerned judgement was already available; the Defence has not demonstrated why it could not get the copy of the said judgement before that date.

14. The Prosecution alleges that the *Haute Cour Militaire* judgement was rendered in the absence of Witness TQ and that the circumstances under which he left Rwanda are unknown. As such, Witness TQ did not have an opportunity to defend himself on appeal, as was the case before the *Conseil de Guerre*, where he was acquitted despite the fact that seven witnesses testified against him. Notwithstanding its objection to it, if the Chamber grants the motion for admission of the judgement of 24 August 2006, the Prosecution moves the Chamber to declare that the said appeal judgement is not yet enforceable.

Nsabimana's Response

15. The Defence for Nsabimana does not oppose the Motion and submits that the admission of the two judgements should be limited to demonstrate that Ntahobali's name was not mentioned therein and that the *Conseil de Guerre* judgement of 23 January 2003 was reversed on appeal.

Nteziryayo's Response

16. The Defence for Nteziryayo supports the Motion and submits that the documents sought to be admitted raise serious credibility issues.

Ntahobali's Reply

17. The Defence for Ntahobali submits that in cross-examination Witness TQ stated that he had not read the *Conseil de Guerre* judgement in its entirety and that it was therefore impossible to introduce the said judgement into evidence through him at that time. The Defence points out that at the end of its cross-examination, it indicated that it would check Witness TQ's testimony before the Chamber and would file the relevant documents accordingly. According to the Defence, the production of the *Conseil de Guerre* judgement would be unnecessary if the subsequent appeal judgement confirmed the acquittal of Witness TQ.

18. The Defence submits that the Motion was filed immediately upon receipt of the *Haute Cour Militaire* judgement. Contrary to the Prosecution submission, the Defence alleges that the judgement issued by the *Haute Cour Militaire* is of a definitive nature at this stage even if it was rendered *in absentia*, following Witness TQ's flight.

DELIBERATIONS

19. The Chamber notes that the documents sought to be admitted in the instant Motion comprise two judgements: the *Conseil de Guerre de la République Rwandaise* judgement of 20 January 2003 and the *Haute Cour Militaire* appeal judgement of 24 August 2006, in which Prosecution Witness TQ was a co-accused.

20. The Chamber notes the Defence submission that it was impossible to introduce the *Conseil de Guerre* judgement of 20 January 2003 into evidence through Witness TQ at the time he testified. The Chamber further notes that during its cross-examination of Prosecution Witness TQ on 7 September 2004, the Defence confronted the Witness with extracts of the said judgement. During these proceedings, Witness TQ testified that he had not read the *Conseil de Guerre* judgement very well as he did not have a copy of it.²

21. The Chamber observes that at the end of its cross-examination on 8 September 2004,³ the Defence did not seek to introduce the said judgement and did not follow up on this issue until the filing of this Motion, four years later.

22. The Chamber recalls that on 28 April 2008 the Defence case for Ntahobali was declared closed save for the disclosure of certain unspecified documents from Rwanda.⁴ The Chamber notes that the *Haute Cour Militaire* judgement was actually issued almost two years before that date, on 24 August 2006 and there was no clear indication that the judgements now sought to be admitted were part of the documents referred to by the Defence when its case was closed.

23. In addition, the Chamber observes that the Defence has not indicated the steps it had taken to obtain the *Haute Cour Militaire* judgement at an earlier date. The only information provided by the Defence is that the ICTR representative in Kigali received the copy of the said judgement from the President of the *Haute Cour Militaire* on 16 September 2008 in response to a letter allegedly dated 11 September 2008.⁵

24. In the Chamber's view, the Defence has not demonstrated diligence in obtaining the 24 August 2006 judgement, which was available before 28 April 2008 when Ntahobali's case was declared closed.

25. Despite this delay, the Chamber will determine if the *Conseil de Guerre de la République Rwandaise* judgement of 20 January 2003 and the *Haute Cour Militaire* appeal judgement of 24 August 2006 meet the legal requirements for admission into evidence.

26. Under Rule 89 (C), the Chamber has broad discretion to admit any evidence that it deems to be relevant and of probative value.⁶ Documents need not be produced through a witness but may be directly introduced into evidence.⁷ A distinction must be drawn between

² T. 7 September 2004, p. 32 (ICS).

³ T. 8 September 2004, p. 14.

⁴ T. 28 April 2008, p. 81. Mr. Marquis: "So, Mr. President, this was the last witness in our case. We only stand with documents to be filed. As you may recall, there were, at the time we closed our Defence also, the same mention by us. We still waiting to obtain documents from Rwanda and as soon as we get them, or as soon as we get the other ones, we will file the appropriate motion to file them, with your leave. Otherwise, our defence is closed."

⁵ See Annex to the Motion bearing Registry number 8196bis.

⁶ *The Prosecutor v Nyiramasuhuko et al*, Case No. ICTR-98-42-A, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 04 October 2004, paras. 5, 7.

⁷ *Prosecutor v Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, 25 January 2008, para. 7.

admissibility of evidence and the exact probative weight to be attached to it, which is to be assessed by the Trial Chamber at a later stage.⁸

27. At the admissibility stage, the moving party needs to show *prima facie* that the document is relevant and has probative value.⁹ It must also show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment to be relevant.¹⁰ The probative value of a document depends on the authenticity of a document. For the document to be considered authentic, the Chamber must be satisfied that there are "sufficient indicia of reliability" to warrant its admission.¹¹ The requirements for reliability are low at the initial stage of admissibility and the moving party need only demonstrate the beginning of proof that the evidence is reliable.¹² Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.¹³

28. The Chamber recalls that the Defence challenges the credibility of Prosecution Witness TQ on two points: firstly, Witness TQ alleged before the Chamber that a certain individual testified about Ntahobali in his trial before the *Conseil de Guerre* whereas Ntahobali's name is not mentioned in the two judgements sought to be admitted; secondly, Prosecution Witness TQ's acquittal was reversed on appeal by the *Haute Cour Militaire*, which convicted him of incitement to commit genocide and for his role in the murder of Béata.

29. With regard to the first point, the Chamber considers that there is no apparent contradiction between Witness TQ's testimony before this Tribunal and the *Conseil de Guerre* judgement with respect to the mentioning of Ntahobali's name. The Defence simply indicates that Ntahobali's name is not mentioned in either the *Conseil de Guerre* or in the *Haute Cour Militaire* judgements, which neither proves nor disproves Witness TQ's testimony before the Chamber.

30. Regarding the second point, the Chamber considers that the *Haute Cour Militaire* judgement does not hold any probative value, of itself, with respect to an evaluation of the witness' credibility.

31. For these reasons the Chamber considers that the *Conseil de Guerre de la République Rwandaise* judgement of 20 January 2003 and the *Haute Cour Militaire* appeal judgement of 24 August 2006 are not admissible under Rule 89 (C).

⁸ *The Prosecutor v Nyiramasuhuko et al*, Appeal Decision, Case No. ICTR-98-42-A, 04 October 2004, paras. 6, 7.

⁹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents, 19 March 2007, paras. 2,3.

¹⁰ *The Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, paras. 7, 8.

¹¹ *Bagosora et al.*, Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 4; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents, 19 March 2007, paras. 2,3.

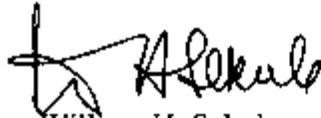
¹² *The Prosecutor v. Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 04 October 2004 para. 7.

¹³ *The Prosecutor v Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, 25 January 2008, para. 5.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 14 November 2008



William H. Sekule
Presiding Judge



Arlette Ramaroson



[Seal of the Tribunal]



Solomy Balungi Bossa
Judge