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MURONGI

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 Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 9 December 2008

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The PROSECUTOR v. Arsène Shalom NTAHOBALI  
Case No. ICTR-97-21-T

*Joint Case No. ICTR-98-42-T*

DECISION ON NTAHOBALI'S MOTION FOR RECONSIDERATION OF  
THE DECISION CONCERNING PROSECUTION WITNESS QCB OF  
20 NOVEMBER 2008

**Office of the Prosecutor**

Ms. Holo Makwaia  
Ms. Adelaide Whest  
Mr. Cheikh Tidiane Mara  
Ms. Althea Alexis Windsor  
Ms. Madeleine Schwarz  
Ms. Astou Mbow, *Case Manager*  
Mr. Lansana Dumbuya, *Case Manager*

**Counsel for Ntahobali**

Mr. Normand Marquis  
Mr. Bernard St. Arnaud

**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 "*Requête de Arsène Shalom Ntahobali en reconsidération de la décision du 20 Novembre 2008 concernant le témoin QCB*," filed on 25 November 2008 ("Ntahobali's Motion");

**CONSIDERING** the:

- i. "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali asking the Trial Chamber to reconsider its decision of 20 November 2008 concerning the recall of Witness QCB," filed confidentially on 1 December 2008 ("Prosecution's Response");
- ii. "*Réplique de Ntahobali à la réponse du procureur à sa requête en reconsidération de la décision sur le rappel du témoin QCB*," filed on 2 December 2008 ("Ntahobali's Reply");

**RECALLING** the "Decision on Defence Motions for Recall and Further Cross-Examination of Witness QCB" of 20 November 2008 (the "Impugned Decision");

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

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

### INTRODUCTION

1. Prosecution Witness QCB testified before the Chamber from 20 March to 3 April 2002. Witness QCB also gave tape-recorded statements to Royal Canadian Mounted Police (RCMP) investigators on 16 October 2000, 22 September 2003 and 27 February 2004 and testified before a rogatory commission of the Canadian court in the trial against Désiré Munyaneza on 5, 6 and 7 February 2007. Copies of the trial transcripts and the RCMP statements were provided to the Parties through the Office of the Prosecutor.

2. On 20 November 2008, the Chamber issued its Decision on Defence Motions for Recall and Further Cross-Examination of Witness QCB, which, in part, denied Ntahobali's request to further cross-examine Witness QCB on issues raised during the Witness's various testimonies and statements.

3. On 25 November 2008, the Defence for Ntahobali filed a Motion for reconsideration of the Chamber's Decision dated 20 November 2008 concerning Witness QCB. Annexes are attached to the Motion: copies of the Prosecutor's observation on the final version of the Munyaneza transcripts received from Canada, dated 19 November 2008; a letter from the Canadian authorities to the Office of the Prosecutor, dated 31 October 2008, to which a CD containing the final versions of the transcripts of the RCMP interviews and the audio recordings of these interviews were attached; a CD containing the audio recordings and transcripts of the RCMP interviews.

## SUBMISSIONS OF THE PARTIES

### *Ntahobali's Motion*

4. The Defence notes that the Chamber has the power to reconsider its decisions when a new fact has been discovered or a material change in circumstances has occurred since the original decision; or where the original decision was erroneous or constituted an abuse of power on the part of the Chamber.

5. The Defence notes that at Paragraphs 34, 35 and 36 of the 20 November 2008 Decision, the Chamber stated that, in its opinion, the transcripts of Witness QCB's statements made to the RCMP on 16 October 2000, 22 September 2003 and 27 February 2004 did not contain sufficient indicia of reliability to prove their authenticity. According to the Defence, the Chamber expressed its doubts because of the fact that the documents were in Word format and contained "track changes".

6. The Defence submits that as "track changes" is a function of the Word software, it is possible to simply make them invisible. The Defence reproduces an excerpt of an email sent by a representative of the Canadian authorities to the Office of the Prosecutor confirming that the documents sent were the final versions and recommending that the "track changes" function in Word be turned off to see a cleaner version of the statements.

7. The Defence notes that no party has cast the validity and authenticity of these transcripts into doubt, including the Prosecution, as indicated in the Observations submitted by the Prosecutor on 19 November 2008. The Defence therefore submits that the Chamber therefore made its decision in this regard *proprio motu* and *ultra petita*, in that the authenticity of the written transcripts of the interviews was not contested before this Chamber, and especially when admission into evidence of these transcripts was not being sought.

8. Notwithstanding this, the Defence submits that the final versions of these written transcripts of Witness QCB's RCMP interviews conform with the audio recordings sent by the Canadian authorities, which were attached to a letter to the Office of the Prosecutor dated 31 October 2008 and received by all Parties on 11 November 2008.

9. The Defence notes that while the audio recordings were delivered to the Defence along with the written transcripts, they were not provided to the Chamber because of the assurances received from the Canadian authorities to the effect that these transcripts accurately represented the content of the interviews carried out by the RCMP. The Defence notes that the Chamber could have, in the interests of justice, requested the audio recordings of the interviews, pursuant to Rule 98. The audio recordings of the RCMP statements are annexed to the Motion so that the Chamber can verify their authenticity.

10. The Defence submits that at Paragraph 37, the Chamber recognised that Witness QCB's 16 October 2000 statement to the RCMP contradicts his testimony before this Chamber about the location where Ruvurajabo was allegedly killed.

11. The Defence recalls that this is an important question for Ntahobali as it directly relates to the specific allegation against him that he ordered Ruvurajabo's death at a different

roadblock from the one alleged by Witness QCB before this Chamber. Even if Witness QCB returned to the assertion presented to this Chamber in his subsequent testimony before the Canadian court in February 2007, it remains that during this interview, held prior to his testimony before this Chamber, Witness QCB's version of the facts was different; it should have been possible to present this to the Chamber during Witness QCB's testimony in 2004, in order to establish this contradiction.

12. The Defence requests the reconsideration of the 20 November 2008 Decision and the recall of Witness QCB to allow Ntahobali to cross-examine him about the death of Ruvurajabo.

#### *Prosecution's Response*

13. The Prosecution opposes the Motion and submits that the jurisprudence of the ICTR on the criteria for a Trial Chamber to reconsider its own decision is clear; it also cites case law that defines the criteria for reconsideration as being when a new fact has been discovered or a material change in circumstances has occurred since the original decision; or where the original decision was erroneous or constituted an abuse of power on the part of the Chamber.

14. The Prosecution submits that the Defence has not put forward any new material circumstances that amount to special or particular circumstances warranting reconsideration. Further, the Prosecution submits that this Motion is an attempt to relitigate the Motion filed on 30 September 2008.

15. Noting the Defence's reference to "track changes" contained in the RCMP interview transcripts, the Prosecution notes that in its 19 October 2008 Observations, attached to the Motion as an annex, it was stating only that the state of the final version of the transcripts did not make any difference to its Response to the Motion. The Prosecution submits that it was not confirming the reliability or authenticity of the RCMP statements and recalls that in its 10 October 2008 Response it referred to the disclosures as "unedited transcripts of recorded interviews and testimonies of witnesses (including QCB)."

16. The Prosecution further submits that even if the transcriptions of the recorded interview of 16 October 2000 were accurate, they do not represent a clear and accurate account of what Witness QCB actually said. In support of this submission, the Prosecution cites an apparent discrepancy between what was said by Witness QCB in Kinyarwanda and what was translated by the Kinyarwanda interpreter into French. The Prosecution submits that the Chamber was quite right to assess the content of the RCMP statements with caution and in the context of Witness QCB's testimony before the Canadian court.

17. Finally, the Prosecution submits that the apparent inconsistency with respect to where Witness QCB allegedly saw Ruvurajabo killed does not amount to a material inconsistency warranting a recall. It notes that at Page 37 of the transcript of the 16 October 2000 RCMP statement, the words "killed" ("*tue*") and "identity card" ("*carte d'identité*") are not in Kinyarwanda while they do appear in the French translation. Further, the Prosecution submits that Witness QCB did not state that Ruvurajabo was killed at the roadblock in front of Amandin Rugira's residence, but only that "they went down with [Ruvurajabo]." Lastly, the Prosecution notes that the evidence indicates that the distance between the roadblock at Rugira's house and that at Ntahobali's house is not great and, even if there were a

discrepancy between his statements on this point, they would not warrant the recall of Witness QCB.

#### *Ntahobali's Reply*

18. The Defence notes that nowhere in its previous submissions has the Prosecution questioned the reliability of Witness QCB's statements to the RCMP. It is only now, following the Chamber's Decision, that the Prosecution has presented arguments in this regard; the Defence submits that this position certainly lacks credibility at this stage.

19. The Defence recalls that the Chamber is in search of the truth. It submits that it is in the interests of justice that the contradiction found in Witness QCB's statement to the RCMP, and recognised by the Chamber, with respect to the location where Ruvurajabo was allegedly killed be illuminated. The Defence notes that the Chamber is now in possession of the audio recording of the Witness's statements, which contains the incontestable content of what he said.

20. The Defence submits that if the Chamber, in its first impression of the content of the 16 October 2000 RCMP statement, detected a serious contradiction with Witness QCB's testimony before the Chamber, the interests of justice and ensuring that Ntahobali benefits from a fair trial require that it reconsider its previous Decision; the Chamber should use the audio recording of the Witness's words to determine whether an apparent contradiction on a major point relevant to Ntahobali's case exists.

### DELIBERATIONS

21. The Chamber notes that reconsideration of a decision is an exceptional measure that is available only in particular circumstances.<sup>1</sup> Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.<sup>2</sup> The Chamber recalls that the burden rests with the party seeking reconsideration to demonstrate that sufficiently special circumstances exist.<sup>3</sup>

22. The Chamber notes that the Defence seeks reconsideration of the Impugned Decision only insofar as it denied the recall and further cross-examination of Witness QCB on the issue of the exact location where the Witness allegedly saw a certain Ruvurajabo killed.

<sup>1</sup> *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-41-T, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 14 July 2004, para. 7; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004, para. 7.

<sup>2</sup> *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzitorera's Motion for Inspection: Michel Bagaragaza, 29 September 2008, para. 4; See also *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004, para. 9.

<sup>3</sup> *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzitorera's Motion for Inspection: Michel Bagaragaza, 29 September 2008, para. 4.

23. The Chamber observes that the Defence has not specifically or clearly identified a new fact, a material change, or how the Impugned Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.

24. The Chamber considers that the annexation of the audio recording of the 16 October 2000 RCMP statement does not constitute a new fact or a material change warranting the reconsideration of the Impugned Decision, as it does not impact on the Chamber's reasoning behind its assessment of the RCMP statements using "caution and in the context of Witness QCB's testimony before the Canadian court."<sup>4</sup> In addition, the Defence has not demonstrated that the denial of Ntahobali's request to recall and further cross-examine Witness QCB on the location of Ruvurajabo's alleged killing was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.<sup>5</sup>

25. The Chamber is therefore of the view that the requirements for reconsideration have not been met and dismisses the Motion.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DENIES** the Motion in its entirety.

Arusha, 9 December 2008



William H. Sekule  
Presiding Judge



Arlerte Ramaroson  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]

<sup>4</sup> *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Recall and Further Cross-Examination of Witness QCB, 20 November 2008, para. 36.

<sup>5</sup> *Id.*, para. 37.