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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: 24 April 2008

The PROSECUTOR v. Joseph KANYABASHI

Case No. ICTR-96-15-T

Joint Case No. ICTR-98-42-T

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**DECISION ON KANYABASHI'S THREE MOTIONS TO VARY HIS LIST OF
WITNESSES AND TO ADMIT WRITTEN STATEMENTS UNDER RULE 92 BIS**

Office of the Prosecutor

Ms. Holo Makwaia
Ms. Adelaide Whest
Ms. Althea Alexis Windsor
Mr. Fergal Gaynor
Ms. Madeleine Schwarz
Mr. Cheikh Tidiane Mara
Ms. Astou Mbow, *Case Manager*
Ms. Alison McFarlane, *Case Manager*

Counsel for Kanyabashi

Mr. Michel Marchand
Ms. Simone Santerre

M. A. S.

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:

- i. "*Requête de Joseph Kanyabashi aux fins de réintégrer à sa liste les témoins D-22-A et D-30-S et de demander l'admission de leurs déclarations écrites*", filed by the Defence for Joseph Kanyabashi on 14 March 2008 ("Kanyabashi's First Motion");
- ii. "*Requête de Joseph Kanyabashi aux fins d'obtenir l'autorisation de modifier sa liste de témoins*", filed by the Defence for Kanyabashi on 26 March 2008 ("Kanyabashi's Second Motion");
- iii. "*Requête de Joseph Kanyabashi aux fins d'obtenir l'autorisation d'inclure D-2-21-T, D-2-14-M et D-1-4-0 à sa liste de témoins*", filed by the Defence for Kanyabashi on 10 April 2008 ("Kanyabashi's Third Motion");

CONSIDERING the:

- i. "Prosecutor's Response to Kanyabashi's Motion Filed on 14 March 2008 to tender Statements Under Rule 92bis", filed on 18 March 2008 ("Prosecution's Response to Kanyabashi's First Motion");
- ii. "*Réplique de Joseph Kanyabashi à la Prosecutor's Response to Kanyabashi's Motion Filed on 14 March 2008 to tender Statements Under Rule 92bis*", filed on 26 March 2008 ("Kanyabashi's Reply");
- iii. "Prosecutor's Response to the "*Requête de Joseph Kanyabashi aux fins d'obtenir l'autorisation de modifier sa liste de témoins*", filed on 28 March 2008 ("Prosecution's Response to Kanyabashi's Second Motion");
- iv. "*Réponse de Ntahobali à la Requête de Joseph Kanyabashi aux fins d'obtenir l'autorisation d'inclure D-2-21-T, D-2-14-M et D-1-4-0 à sa liste de témoins*", filed on 11 April 2008 ("Ntahobali's Response to Kanyabashi's Third Motion");
- v. "Prosecutor's Response to the "*Requête de Joseph Kanyabashi aux fins d'obtenir l'autorisation d'inclure D-2-21-T, D-2-14-M et D-1-4-0 à sa liste de témoins*", filed on 11 April 2008 ("Prosecution Response to Kanyabashi's Third Motion");
- vi. "*Réponse de Pauline Nyiramasuhuko à la Requête de Joseph Kanyabashi aux fins d'obtenir l'autorisation d'inclure D-2-21-T, D-2-14-M et D-1-4-0 à sa liste de témoins*", filed on 14 April 2008 ("Nyiramasuhuko's Response to Kanyabashi's Third Motion");
- vii. "*Réplique de Joseph Kanyabashi aux réponses du procureur et de Ntahobali relativement à sa requête aux fins d'obtenir l'autorisation d'inclure D-2-21-T, D-2-*

14-M et D-1-4-0 à sa liste de témoins", filed on 14 April 2008 ("Kanyabashi's Reply to Prosecution and Ntahobali's Responses");

RECALLING the Decision on Kanyabashi's Motion to Vary His List of Witnesses Pursuant to Rule 73ter of 15 February 2008;¹

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 73 ter and 92 bis;

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. The Chamber will consider Kanyabashi's three Motions jointly as they address issues related to variation of his witness list.
2. On 15 February 2008, the Chamber granted Kanyabashi's request to remove Witnesses D-22-A, D-30-S and Expert Witness Munyarugerero from his list of witnesses. In the same Decision, the Chamber denied Kanyabashi's request to replace Witness D-2-13-K with Witness D-2-19-F.

SUBMISSIONS OF THE PARTIES

First Motion

3. The Defence for Kanyabashi moves the Chamber to reinstate Witnesses D-22-A and D-30-S on Kanyabashi's list of witnesses pursuant to Rule 73 ter (E). It further requests that the written statements of those two witnesses be admitted as evidence in lieu of their oral testimony pursuant to Rule 92 bis.
4. The Defence submits that Witness D-30-S' statement relates to the character of the Accused and the prevailing political context.² It further argues that despite the relevance of the said statement, it does not contain any evidence of crucial importance to warrant the appearance of the Witness nor cross-examination before the Chamber.³
5. The Defence alleges that Witness D-30-S' statement addresses similar facts which were testified to by Witness Bernadette Kamanzi, notably the fact that Kanyabashi had children born out of wedlock and that those children regarded Bernadette Kamanzi as their second mother, the relationship between Kanyabashi and Félicien Gatabazi and the letters of 25 May 1994 which are admitted in evidence under D-610 and D-611.⁴
6. The Defence relies on *Galić*⁵ and argues that the admission of Witness D-30-S' statement as well as the annexed documents will bring supplementary details and assist in

¹ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His List of Witnesses Pursuant to Rule 73ter, 15 February 2008.

² Paragraph 18 of the first Motion.

³ Paragraph 19 of the first Motion.

⁴ Paragraph 21 of the first Motion.

⁵ *Galić*, Decision on Interlocutory Appeal Concerning Rule 92 bis(C) (AC), 7 June 2002, para. 16.

better understanding the evidence already adduced before the Chamber.⁶ The admission of the envelope which contained the letters admitted in evidence under D-610 and D-611 will assist the Chamber in assessing their chain of custody.⁷

7. The Defence submits that Witness D-22-A's statement and the attached copy of the letter of 25 May 1994 are admissible under Rule 92 *bis*.⁸ It relates to the character and reputation of the Accused and the prevailing political context.⁹ The Defence further argues that the evidence adduced by Witness D-22-A is not of crucial importance to warrant his appearance or cross-examination.¹⁰

8. The Defence relies on *Serugendo*¹¹ and asserts that Witness D-22-A's statement is admissible under Rule 92 *bis* because it addresses the character of the Accused, his management of Ngoma *commune* before 1994, his relationship with Queen Gicanda, Félicien Gatabazi, Paul Gakuba and the regime at the time.¹² The witness further addresses Kanyabashi's relationship with Tutsis, his involvement in the creation and management of CEFOTEC and Kanyabashi's nickname *Kanyabatutsi*.¹³

9. The Defence particularly points to paragraphs 3 to 6 of Witness D-22-A's statement and submits that they are relevant to demonstrate Kanyabashi's integrity regarding his financial management of Ngoma *commune*.¹⁴ Prosecution Expert Witness Guichaoua also testified to this issue.

10. The Defence submits that Witness D-22-A addresses evidence of a cumulative nature under Rule 92 *bis*.¹⁵ Indeed, Bernadette Kamanzi and Expert Reyntjens have already testified to Kanyabashi's relationship with Queen Gicanda and Félicien Gatabazi.¹⁶ Similarly, Kanyabashi's involvement in the creation of CEFOTEC has been testified upon by Witnesses D-2-5-W and D-2-14-W whereas Kanyabashi's reputation, his relationship with Tutsis and his nickname *Kanyabatutsi* have been touched upon by most of his previous witnesses.¹⁷ Finally, another witness for Kanyabashi during his testimony referred to a handwritten letter by Kanyabashi which is not yet admitted in evidence but which could be admitted through Witness D-22-A's statement.¹⁸

11. The Prosecution does not oppose the request for variation of the witness list. However, the Prosecution points out that the letters by Kanyabashi and Bernadette Kamanzi, which are attached to the statements of Witnesses D-30-S and D-22-A, are not accompanied by declarations in the form required under Rule 92 *bis*(B).¹⁹

⁶ Paragraph 22 of the first Motion.

⁷ Paragraph 23 of the first Motion.

⁸ Paragraph 25 of the first Motion.

⁹ Paragraph 26 of the first Motion.

¹⁰ Paragraph 27 of the first Motion.

¹¹ *The Prosecutor v. Serugendo*, Case Number ICTR-2005-84-I, "Decision on Defence Motion for Admission of Written Statement Under Rule 92 *bis*", 1 June 2006, paras. 4 and 6.

¹² Paragraph 28 of the first Motion.

¹³ Paragraph 28 of the first Motion.

¹⁴ Paragraph 30 of the first Motion.

¹⁵ Paragraph 31 of the first Motion.

¹⁶ Paragraph 32 of the first Motion.

¹⁷ Paragraph 32 of the first Motion.

¹⁸ Paragraph 33 of the first Motion.

¹⁹ Paragraph 5 of the Prosecution Response.

12. The Prosecution indicates that Witness D-30-S' statement addresses the acts and conduct of the Accused Kanyabashi and the letter attached goes to prove his state of mind which is inadmissible according to the *Bagosora* Decision.²⁰

13. The Prosecution alleges that Witness D-30-S' statement and the letters attached to it contain issues which require cross-examination of the Witness.²¹ Besides, the statements and annexes are not of cumulative nature because they touch on issues that are contentious and unique to each witness.²²

14. The Prosecution submits that the content of Witness D-22-A's statement goes to prove the acts and conduct of the Accused Kanyabashi.²³ The Prosecution argues that it intends to cross-examine the Witness to test the veracity and reliability of the letter annexed to the statement.²⁴ The Prosecution further alleges that the Accused' relationship with Queen Gicanda and his involvement with CEFOTEC constitute contentious issues which have a bearing on the acts and conduct of the Accused prior to and during the events between April and July 1994 warranting cross-examination.²⁵ Furthermore, the Prosecution submits that Witness D-22-A's statement is aimed *inter alia* at contradicting Expert Witness Guichaoua.²⁶ The Defence had the opportunity to cross-examine the said Expert, and the Prosecution will be prejudiced if it cannot cross-examine Witness D-22-A.²⁷

15. Therefore, the Prosecution requests that the Motion seeking the admission of Witnesses D-22-A and D-30-S' statements be rejected and that both witnesses be heard *viva voce* or alternatively, that the Prosecution be given the opportunity to cross-examine them.

16. The Defence for Kanyabashi replies that, contrary to the Prosecution's allegations, Kanyabashi's and Kamanzi's letters attached to the statements meet the requirements of Rule 92 *bis*(B).²⁸ The statements and certifications actually refer to the letters.²⁹

17. The Defence argues that issues regarding CEFOTEC and Queen Gicanda are not even pleaded in the indictment against the Accused.³⁰

Second Motion

18. The Defence for Kanyabashi requests the removal of Witness D-2-13-K from its list, and the substitution of Witness D-2-14-V by Witness D-2-18-0. He also seeks to add Expert Witness Mpiranya as a replacement of Expert Witness Munyarugerero.

19. The Defence alleges that Witness D-2-14-V is no longer willing to testify and that Witness D-2-18-0, a Tutsi, who is sought to replace him, is expected to testify about the

²⁰ Paragraph 8 of the Prosecution Response.
²¹ Paragraph 9 of the Prosecution Response.
²² Paragraph 10 of the Prosecution Response.
²³ Paragraph 12 of the Prosecution Response.
²⁴ Paragraph 11 of the Prosecution Response.
²⁵ Paragraph 15 of the Prosecution Response.
²⁶ Paragraph 13 of the Prosecution Response.
²⁷ Paragraph 14 of the Prosecution Response.
²⁸ Paragraph 5 of the Reply.
²⁹ Paragraph 5 of the Reply.
³⁰ Paragraph 12 of the Reply.

massacres at Matyazo Primary School and Dispensary in April 1994.³¹ This Witness could also testify about the arrival of refugees, the Matyazo roadblock, the landing of an aircraft at Butare, the beginning of the unrest, the *conseiller* evacuating several children, the *Ibuka* association, his evacuation and his knowledge of Prosecution Witnesses QJ and RL.³²

20. The Defence submits that following the withdrawal of proposed expert witness Munyarugerero, it is necessary to call another expert who has full command of the Rwandan language, to testify about the speeches of Sindikubwabo, Kambanda and Kanyabashi, made during *préfet* Nsabimana's swearing-in ceremony on 19 April 1994.³³

21. The Prosecution does not oppose the Motion.

Third Motion

22. The Defence moves the Chamber to add Witnesses D-2-21-T, D-2-14-M and D-1-4-0 to its list pursuant to Rule 73 *ter* (E). The Defence submits that if all motions are granted, the Defence will not exceed 30 witnesses.³⁴

23. The Defence submits that it met and interviewed Witness D-2-21-T for the first time on 26 March 2008 and that the Witness accepted to testify at the beginning of April 2008.³⁵ Witness D-2-21-T has personal knowledge of the *Ibuka* association.³⁶ Witness D-2-21-T attended various meetings during which many people, including some Prosecution witnesses [Prosecution Witnesses QJ, TK, QI, QA, QY, QAM, QP, QG, SU, SS and RL] discussed how to fabricate false accusation against Kanyabashi.³⁷ Witness D-2-21-T will provide relevant evidence relating to the refugees at Rango and to the fact that Kanyabashi issued fake identity cards during the events.³⁸

24. The Defence submits that it has not attached Witness D-2-21-T's personal particulars to the Motion for fear of being identified and suffering prejudice if investigations are carried out.³⁹

25. The Defence submits that Witness D-2-14-M is expected to replace Witness D-2-UUU who was withdrawn from its list following the Decision of 15 February 2008.⁴⁰ Witness D-2-14-M was met in January 2008 and interviewed on 28 March 2008.⁴¹ It argues that Witness D-2-14-M is called to complete Defence Witness D-2-5-1's testimony regarding Prosecution Witness QA's allegations. Witness D-2-14-M knew Prosecution Witness QA and will relate discussions with Prosecution Witness QA.⁴² Witness D-2-14-M will also

³¹ Paragraph 12 of the second Motion.

³² Paragraph 12 of the second Motion.

³³ Paragraph 15 of the second Motion.

³⁴ Paragraph 7 of the third Motion.

³⁵ Paragraph 9 of the third Motion.

³⁶ Paragraph 10 of the third Motion.

³⁷ Paragraphs 10-11 of the third Motion.

³⁸ Paragraph 12 of the third Motion.

³⁹ Paragraph 14 of the third Motion.

⁴⁰ Paragraph 16 of the third Motion.

⁴¹ Paragraph 21 of the third Motion.

⁴² Paragraph 19 of the third Motion.

testify about the fact that Kanyabashi was searched at the *Rectorat* roadblock and about the megaphone incident.⁴³

26. The Defence alleges that Witness D-1-4-0 was met in July 2007 and interviewed on 1 April 2008.⁴⁴ He underscores that it could not seek his addition before the delivery of the Chamber's Decision of 15 February 2008, being restricted to call no more than 30 witnesses.⁴⁵ Witness D-1-4-0 is expected to testify about the living conditions of refugees at Rango.⁴⁶ As such, he will support Witness D-2-10-Y's expected evidence.⁴⁷ Besides, Witness D-1-4-0 could testify about comments made by Cyiza against Kanyabashi.⁴⁸

27. The Defence for Ntahobali does not oppose the request for addition of Witness D-2-21-T subject to the immediate disclosure of this witness' personal particulars.⁴⁹ The Defence submits that such disclosure will allow adequate preparation.⁵⁰

28. The Defence for Ntahobali submits that the living conditions of refugees at Rango and the fact that Kanyabashi issued fake identity cards to Tutsis have been covered by previous witnesses for Kanyabashi and should be excluded from Witness D-2-21-T's expected testimony.⁵¹ At this stage of the proceedings, Witness D-2-21-T's expected testimony should be limited to his knowledge of the *Ibuka* association and the fact that some Prosecution Witnesses falsely accused Kanyabashi.⁵² The Defence alleges that if the request for the addition of Witness D-2-21-T is granted, this Witness should testify towards the end of Kanyabashi's case.⁵³

29. The Defence for Ntahobali objects to the request for addition of Witness D-1-4-0 on the grounds that the portion of his expected testimony dealing with the beginning of unrest at Gishamvu, refugees at Rango and Kanyabashi called an accomplice, has already been covered by other witnesses for Kanyabashi.⁵⁴ As for the medical attention purportedly provided by this witness to Tutsi, the Defence contends that this account is simply irrelevant.⁵⁵

30. The Defence for Ntahobali does not oppose the request for addition of Witness D-2-14-M. However, it alleges that D-2-14-M's expected testimony should be limited to relevant points pertaining to Prosecution Witness QA's testimony and any related issue.⁵⁶ The remaining aspects of Witness D-2-14-M's expected testimony have been covered by other witnesses for Kanyabashi and should be excluded.⁵⁷ Finally, Ntahobali submits that Witness D-2-14-M should be called at the end of Kanyabashi's case.⁵⁸

⁴³ Paragraph 20 of the third Motion.
⁴⁴ Paragraph 23 of the third Motion.
⁴⁵ Paragraph 23 of the third Motion.
⁴⁶ Paragraph 26 of the third Motion.
⁴⁷ Paragraph 26 of the third Motion.
⁴⁸ Paragraph 27 of the third Motion.
⁴⁹ Paragraph 7 of Ntahobali's Response.
⁵⁰ Paragraph 7 of Ntahobali's Response.
⁵¹ Paragraph 10 of Ntahobali's Response.
⁵² Paragraph 9 of Ntahobali's Response.
⁵³ Paragraph 7 of Ntahobali's Response.
⁵⁴ Paragraph 16 of Ntahobali's Response.
⁵⁵ Paragraph 15 of Ntahobali's Response.
⁵⁶ Paragraph 20 of Ntahobali's Response.
⁵⁷ Paragraph 22 of Ntahobali's Response.
⁵⁸ Paragraph 22 of Ntahobali's Response.

31. The Prosecution does not oppose the Motion.⁵⁹ However, it argues that the Chamber's ability to conduct the Trial in a manner which is expeditious and fair to all Parties is impeded by the filing of successive motions for variation of witness list.⁶⁰ The filing of such motions consumes a considerable quantity of the limited resources available to the Chamber and the Parties.⁶¹ In addition, the ability of the other Parties to efficiently prepare for the cross-examination of upcoming witnesses is frustrated by a list of witnesses to be cross-examined which is in a state of constant flux.⁶²

32. The Prosecution alleges that the issue of non disclosure of Witness D-2-21-T's personal particulars raised by the Defence for Konyabashi seems to be ambiguous.⁶³ In any event, the Prosecution does not oppose the motion for addition of the concerned witness as long as it receives the identity and any previous statements of this witness at least 21 days before he is expected to testify.⁶⁴

33. The Defence for Nyiramasuhuko does not object to the request for addition of Witnesses D-2-21-T and D-2-14-M but it requests that their respective testimony be limited to the issues mentioned in Ntahobali's response, that those witnesses be called towards the end of Konyabashi's case and that Witness D-2-21-T's personal particulars be disclosed immediately. The Defence for Nyiramasuhuko adopts Ntahobali's response and also objects to the addition of Witness D-1-4-0.

34. The Defence for Konyabashi submits that it does not have any prior statement for Witness D-2-21-T and that it intends to file a motion seeking further protective measures for this witness soon.⁶⁵

35. The Defence for Konyabashi argues that the factual issues Ntahobali seeks to be excluded from Witnesses D-2-21-T, D-2-14-M and D-1-4-0's respective expected testimony, are not part of Ntahobali's Indictment.⁶⁶ It further points out that the Prosecution called at least 11 witnesses on refugees at Rango and 13 witnesses regarding the *préfecture* office.⁶⁷ Konyabashi alleges that three proposed witnesses should be allowed to address all issues listed in their respective will-say given that the other Parties are not prevented from putting the nature of their case in cross-examination.⁶⁸

DELIBERATIONS

36. As a preliminary matter, the Chamber expects the Defence to better organize its work and avoid the filing of separate and successive motions dealing with related matters. In the Chamber's view, a consolidated approach would be more efficient and save time and resources, especially at this advanced stage of the proceedings. Moreover, the Chamber

⁵⁹ Paragraph 2 of the Prosecution Response.

⁶⁰ Paragraph 4 of the Prosecution Response.

⁶¹ Paragraph 4 of the Prosecution Response.

⁶² Paragraph 4 of the Prosecution Response.

⁶³ Paragraph 5 of the Prosecution Response.

⁶⁴ Paragraph 8 of the Prosecution Response.

⁶⁵ Paragraph 7 of the Reply.

⁶⁶ Paragraph 12 of the Reply.

⁶⁷ Paragraph 13 of the Reply.

⁶⁸ Paragraph 15 of the Reply.

reminds the Defence of Kanyabashi that it is expected to finish the presentation of its case in May 2008.

37. After recalling the applicable law to requests for variation of witness list, the Chamber will address the three Motions chronologically.

Request for Variation of the Witness List

38. Rule 73 *ter* (E) provides that “[a]fter commencement of [its] case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called”.

39. The Chamber recalls its jurisprudence concerning Rule 73 *ter* requests. It is usual practice to evaluate such requests in terms of: the materiality of the testimony; the complexity of the case; the prejudice to the Parties, including elements of surprise, on-going investigations, replacements and corroboration of evidence; and the presentation of the best available evidence. This must be balanced against the right of the accused to have adequate time and facilities to prepare their defence and their right to be tried without undue delay.⁶⁹

40. Further, the Chamber recalls the need to closely analyse each proposed witness, including the sufficiency and time of disclosure of witness information; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; and the justification offered for the addition of the witnesses.⁷⁰ Other factors to be considered include the stage the proceedings have reached, and the reasons for the late discovery of the witnesses.⁷¹

41. Recalling its Decisions of 30 March 2004, 26 August 2006 and 15 February 2008, the Chamber reiterates that it is vested with the ultimate authority to rule on the modification of witnesses and that the final decision as to whether it is in the interests of justice to allow the Defence to vary its list of witnesses rests with the Chamber.⁷² The Chamber further recalls that at this stage of the proceedings, a variation may only be justified if the Defence has shown good cause for its request and if there is no material prejudice to the other Parties.⁷³

⁶⁹ *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on the defence motion to modify the list of defence witnesses for Arsène Shalom Ntahobali, 26 August 2005, para. 31, citing *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 14-22; *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Alphonse Nteziryayo's motion to modify his witness list, 14 July 2006 para 27; *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses (TC), 24 July 2001.

⁷⁰ *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on the defence motion to modify the list of defence witnesses for Arsène Shalom Ntahobali, 26 August 2005, para. 32, citing *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 14-22.

⁷¹ *Idem.*

⁷² *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's motion to drop and add witnesses, 30 March 2004, para. 28; *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on the defence motion to modify the list of defence witnesses for Arsène Shalom Ntahobali, 26 August 2005, para. 33; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His List of Witnesses Pursuant to Rule 73 *ter*, 15 February 2008, para. 32.

⁷³ *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His List of Witnesses Pursuant to Rule 73 *ter*, 15 February 2008, para. 34.

I) The First Motion: Reinstatement of Witnesses D-22-A and D-30-S

• Reinstatement of Witnesses D-22-A and D-30-S

42. The Chamber recalls that Witnesses D-22-A and D-30-S are amongst the witnesses who had been withdrawn from Konyabashi's witness list on 15 February 2008 pursuant to the Defence request. The Chamber further takes note of the Defence submissions that Witnesses D-22-A and D-30-S address secondary issues which are not of crucial importance and that other witnesses have testified to similar issues.

43. The Chamber observes that the Defence has not put forward any specific reason to justify the reinstatement of Witnesses D-22-A and D-30-S just a month after the Chamber granted their withdrawal upon the Defence request. Moreover, having reviewed the statements in question and the testimonies of other witnesses for Konyabashi such as Bernadette Kamanzi, Expert Philip Reyntjens, Witness D-2-5-W and Witness D-2-14-W, the Chamber is of the view that it would be unnecessarily repetitious and contrary to the interests of justice to hear Witnesses D-22-A and D-30-S.

44. Therefore, the Chamber denies the Motion to reinstate Witnesses D-22-A and D-30-S on the list of witnesses at this stage of the proceedings. As a result, the subsequent request for admission of their statements under Rule 92 bis also fails. In any event, the Chamber considers that had the Witnesses been reinstated, the scope of their testimony would have required that they appear in person as their evidence may relate to the acts and conduct of the Accused or deal with matters in contention.

II) The Second Motion: Removal of Witness D-2-13-K, Substitution of Witness D-2-14-V with Witness D-2-18-0, Addition of Expert Witness Fidèle Mpiranya

• Removal of Witness D-2-13-K

45. The Defence has not put forward any reason for withdrawing this Witness. The Chamber considers however that this variation is unlikely to prejudice any Party and could expedite the proceedings and enhance judicial economy. Therefore, the Chamber grants the request to remove D-2-13-K from the witness list.

• Substitution of Witness D-2-14-V with Witness D-2-18-0

46. Witness D-2-14-V appears unwilling to testify. The Chamber considers that a witness' refusal to come to testify may be a valid reason to justify a variation of the witness list in the interests of justice.

47. However, the Chamber recalls that in a motion filed on 22 December 2006, the Defence for Konyabashi had already requested the addition of various witnesses including Witness D-2-18-0. This indicates that the Defence for Konyabashi was in a position to seek the addition of Witness D-2-18-0 at an earlier stage. There is no adequate explanation for this belated action.

48. Having compared D-2-14-V's and D-2-18-0's will-says, the Chamber considers that D-2-18-0's expected testimony appears to match that of D-2-14-V on the following points:

the Matyazo roadblock,⁷⁴ the events at Matyazo Primary School,⁷⁵ and the events at the Matyazo Dispensary.⁷⁶ Furthermore, Witness D-2-18-0 is expected to testify to additional elements: an alleged meeting attended by Witness D-2-18-0 and during which Prosecution Witness QI falsely accused Kanyabashi of having triggered the massacre at Matyazo dispensary,⁷⁷ Witness D-2-18-0's knowledge of the *Ibuka* association and the involvement of Prosecution Witness QI with this association,⁷⁸ another meeting allegedly held by the *Ibuka* association and during which the issue of how to falsely accuse Kanyabashi was raised.⁷⁹ Furthermore, Witness D-2-18-0 is expected to testify about his encounter with Prosecution Witness RL who said that he saw Cyriaque Habyarabatura supervise the killers during the Ngoma Church massacre.⁸⁰ Finally, Witness D-2-18-0 is expected to contradict Prosecution Witness QI on the alleged evacuation of children by the *conseiller* of Matyazo.⁸¹

49. The Chamber finds that hearing evidence on the aforesaid issues might be relevant to Kanyabashi's case and might have probative value and that despite this belated application, it is unlikely to materially prejudice any of the other Parties who will have time to conduct investigations.

50. With respect to the landing of an aircraft in Butare and the beginning of the killings in Butare town, the Chamber notes that several witnesses have been heard on these issues and that hearing Witness D-2-18-0's testimony on these elements would be unnecessarily repetitious and contrary to the interests of justice.⁸²

51. For these reasons and pursuant to Rule 73 *ter* (E), the Chamber grants the request to call Witness D-2-18-0 instead of Witness D-2-14-V to testify on all items mentioned in his will-say, save for the landing of an aircraft in Butare and the beginning of the killings in Butare town (paragraphs 8 and 9 of the will-say). The Chamber further orders the Defence to file a revised will-say for Witness D-2-18-0 indicating the reduced duration of his examination-in-chief which is not expected to exceed the five hours set formerly for Witness D-2-14-V.

• **Addition of Proposed Expert Witness Fidèle Mpiranya**

52. The Chamber notes the Defence submissions that Fidèle Mpiranya is called to replace François-Xavier Munyarugerero. The Chamber observes that the request for substitution is inappropriate, in view of the fact that François-Xavier Munyarugerero had been removed from the witness list following the Decision of 15 February 2008 and that he is no longer a witness. In the Chamber's view, the Defence request is rather for addition of Fidèle Mpiranya as a new witness.

53. The Chamber notes that proposed Expert Witness Fidèle Mpiranya is expected to testify and to give his opinion on Sindikubwabo, Kambanda and Kanyabashi's speeches

⁷⁴ Paragraphs 3, 4, 5, 6 and 7 of Witness D-2-18-0's will-say.

⁷⁵ Paragraphs 8, 9, 10, 11, 12 and 13 of Witness D-2-18-0's will-say.

⁷⁶ Paragraphs 14, 15, 16, 17, 18, 19, 20, 21 and 22 of Witness D-2-18-0's will-say.

⁷⁷ Paragraph 29 of Witness D-2-18-0's will-say.

⁷⁸ Paragraphs 24, 25, 27 and 28 of Witness D-2-18-0's will-say.

⁷⁹ Paragraph 26 of Witness D-2-18-0's will-say.

⁸⁰ Paragraph 30 of Witness D-2-18-0's will-say.

⁸¹ Paragraph 23 of Witness D-2-18-0's will-say.

⁸² Paragraphs 8 and 9 of Witness D-2-18-0's will-say. For instance, Witnesses D-2-5-W, D-2-5-I and D-9-U have testified about an airplane landing in Butare shortly before the killing started.

made during the swearing-in ceremony of Nsabimana as new *préfet* on 19 April 1994. The Chamber recalls that ample expert and factual evidence has been heard on the speeches made during the swearing in ceremony of 19 April 1994.⁸³ The Chamber recalls that an expert's testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field.⁸⁴ The Chamber considers that it does not need the assistance of another expert on this matter.

54. Therefore, the Chamber denies the Motion to add Mr. Mpiranya to the witness list.

III) The Third Motion: Addition of Witnesses D-2-21-T, D-2-14-M and D-1-4-0

• Addition of Witness D-2-21-T

55. As a preliminary matter, the Chamber notes the Defence for Ntahobali and Nyiramasuhuko's requests for immediate disclosure of proposed Witness D-2-21-T's personal particulars. The Chamber observes that Witness D-2-21-T's will-say is sufficient to address the Motion. The Chamber recalls that if this witness is to be added to the list, requisite disclosure will have to be made in a timely manner, in conformity with the Chamber's Order of 18 October 2004.⁸⁵

56. According to the will-say attached to the Motion, Witness D-2-21-T is expected to testify about his knowledge of the *Ibuka* association⁸⁶ and about various meetings during which false accusations against Kanyabashi were allegedly fabricated.⁸⁷ Witness D-2-21-T is further expected to testify about the involvement of Prosecution Witnesses QI, TK, QJ, QAM, QP, QG, SU, SS, QY and RL in the aforesaid meetings.

57. The Chamber recalls that so far, Witness D-13-D has testified on the *Ibuka* association and Witness D-2-18-0 is also expected to do so. In the Chamber's view, hearing Witness D-2-21-T on those issues might be relevant to Kanyabashi's case and might have probative value as Witness D-2-21-T appears to challenge ten Prosecution witnesses in connection with specific facts alleged against Kanyabashi. Furthermore, it is unlikely to prejudice any of the other Parties.

58. The Chamber further recalls that if a Party intends to call a witness to contradict allegation made by the other Party, it must indicate in specific terms the challenged issue in the concerned witness' will-say so that the adverse Party could conduct investigation and lead efficient cross-examination.⁸⁸ In this respect, the Chamber takes note of sub-paragraph 7 f)⁸⁹ of Witness D-2-21-T's will-say and observes that the allegation contained therein is

⁸³ Those witnesses include but are not limited to Defence Witness Maurice Ntahobali, Defence Expert Witness Eugène Shimamungu, Defence Witness WBUC, Defence Witness Charles Karemano, Prosecution Witness RV, Defence Expert Witness Ntakirutimana, the Accused Sylvain Nsabimana, Defence Expert Witness Philip Reyntjens, Prosecution Expert Witness Guichaoua and Prosecution Expert Witness Alison des Forges.

⁸⁴ *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, paras. 303-304.

⁸⁵ T. 18 October 2004, p. 20.

⁸⁶ Paragraphs 2, 3 and 4 of Witness D-2-21-T's will-say.

⁸⁷ Paragraphs 5 and 6 of Witness D-2-21-T's will-say.

⁸⁸ *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Sylvain Nsabimana's Extremely Urgent Motion To Drop And Add Witnesses, 17 August 2006, para. 18.

⁸⁹ Paragraph 7 f) of Witness D-2-21-T's will-say: "Some witnesses were to testify that communal graves had been dug in Rango with the aim of burying the refugees there. They were also to falsely testify that refugees had been beaten in Rango."

vague as no Prosecution Witness is named, contrary to the other sub-paragraphs. Therefore, hearing Witness D-2-21-T on this item is denied.

59. Witness D-2-21-T is further expected to testify about refugees at Rango.⁹⁰ The Chamber notes that Witnesses D-2-YYYY and D-2-16-P have testified about the living and security conditions of refugees at Rango and Witness D-2-10-Y is also expected to testify on this issue, following the Chamber's Decision of 15 February 2008. The Chamber considers that it will have had sufficient evidence on these issues following these testimonies. Moreover, the Chamber considers that the Defence has failed to demonstrate the probative value of Witness D-2-21-T's expected testimony regarding what he allegedly heard from unknown sources about the living and security conditions of refugees at Rango as set forth in paragraph 8 of his will-say. Therefore, the Chamber denies the calling of Witness D-2-21-T on this point.

60. As to Witness D-2-21-T's expected testimony that Kanyabashi issued fake identity cards to Tutsi during the events,⁹¹ the Chamber notes that at least three witnesses⁹² have testified about it. Moreover, the Chamber considers that the Defence has failed to demonstrate its probative value given that no specific name of any person who might have benefited from the alleged assistance by the Accused, has been provided. Therefore, the Chamber denies the calling of Witness D-2-21-T on this point.

61. As to the last issue covered by Witness D-2-21-T's expected testimony notably the potential risks incurred by this Witness after his appearance before the Chamber as a Defence Witness,⁹³ the Chamber finds that this matter should be submitted to WVSS and addressed by this Section in the first place.

62. For these reasons and pursuant to Rule 73 *ter* (E), the Chamber grants the request to add Witness D-2-21-T to testify only on items listed in paragraphs 1, 2, 3, 4, 5, 6 and 7 [excluding 7 f)] of his will-say. The Chamber further orders the Defence to file a revised will-say for Witness D-2-21-T and to limit the duration of his examination-in-chief to a maximum of five hours.

• **Addition of Witness D-2-14-M**

63. The Chamber notes the Defence submissions that Witness D-2-14-M is called as a substitute to Witness D-2-UUU. The Chamber observes that the request for substitution is inappropriate, in view of the fact that D-2-UUU had been removed from the witness list following the Decision of 15 February 2008 and that he is no longer a witness. In the Chamber's view, the Defence request is rather for addition of Witness D-2-14-M as a new witness.

64. Having reviewed Witness D-2-14-M's will-say, the Chamber notes that this witness is expected to testify about his relationship with Prosecution Witness QA who allegedly came to Arusha to falsely accuse Kanyabashi.⁹⁴ Witness D-2-14-M is further expected to challenge Prosecution Witness QA on specific issues such as: Prosecution Witness QA's involvement

⁹⁰ Paragraph 8 of Witness D-2-21-T's will-say.

⁹¹ Paragraph 9 of Witness D-2-21-T's will-say.

⁹² Witnesses D-2-13-0, D-2-YYYY and Bernadette Kamanzi.

⁹³ Paragraph 10 of Witness D-2-21-T's will-say.

⁹⁴ Paragraphs 1, 2, 3, 5 and 7 of Witness D-2-14-M's will-say.

in the manning of a roadblock in Ngoma *secteur*,⁹⁵ Kanyabashi's speech during a meeting held before the beginning of the killings,⁹⁶ authorities' speeches made during a meeting which took place in Ngoma *secteur*, at the end of April 1994,⁹⁷ the circumstances of the death of *conseiller* Said,⁹⁸ and about the fact that Kanyabashi was searched at the *Rectorat* roadblock.⁹⁹ The Chamber notes that hearing Witness D-2-14-M on those issues might be relevant to Kanyabashi's case and might have probative value; furthermore it is unlikely to materially prejudice any of the other Parties.

65. Finally, Witness D-2-14-M's will-say addresses the landing of an aircraft in Ngoma and the killings of Tutsis which ensued,¹⁰⁰ and the megaphone incident.¹⁰¹ The Chamber notes that it has already heard several witnesses on those particular issues and it therefore denies the calling of Witness D-2-14-M to testify on these elements.¹⁰²

66. For these reasons and pursuant to Rule 73 *ter* (E), the Chamber grants the request to add Witness D-2-14-M to testify only on items set out in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 of his will-say. The Chamber further orders the Defence to file a revised will-say for Witness D-2-14-M and to limit the duration of his examination-in-chief to a maximum of five hours.

• **Addition of Witness D-1-4-0**

67. Witness D-1-4-0 is expected, among others, to testify about the living and security conditions of refugees at Rango in order to contradict Prosecution Witnesses FAP, QBP, QBQ, QY, RE, SD, SJ, SS, SU, TA and TK.¹⁰³ The Chamber notes that Witnesses D-2-YYYY and D-2-16-P have testified about this issue and that Witness D-2-10-Y is also expected to do so, following the Chamber's Decision of 15 February 2008. In the Chamber's view, hearing Witness D-1-4-0 on those issues might be relevant to Kanyabashi's case and might have probative value as Witness D-1-4-0 is expected to adduce specific evidence to directly contradict Prosecution Witnesses on this issue and is expected to testify to having provided services to refugees at the alleged request of Joseph Kanyabashi. Furthermore, it is unlikely to materially prejudice any of the other Parties.

68. As for the remaining points contained in Witness D-1-4-0's will-say pertaining to his occupation during the events,¹⁰⁴ the beginning of the unrest in Gishamvu,¹⁰⁵ the Chamber notes that those elements are specific and might be relevant to Kanyabashi's case and might have probative value. Furthermore, it is unlikely to materially prejudice any of the other Parties.

⁹⁵ Paragraph 6 of Witness D-2-14-M's will-say.

⁹⁶ Paragraph 8 of Witness D-2-14-M's will-say.

⁹⁷ Paragraph 11 of Witness D-2-14-M's will-say.

⁹⁸ Paragraphs 13 and 14 of Witness D-2-14-M's will-say.

⁹⁹ Paragraph 15 of Witness D-2-14-M's will-say.

¹⁰⁰ Paragraphs 9 and 10 of Witness D-2-14-M's will-say.

¹⁰¹ Paragraph 16 of Witness D-2-14-M's will-say.

¹⁰² Witnesses D-2-5-W, D-2-5-I and D-9-U have testified about an airplane landing in Butare shortly before the killing started; Witnesses D-2-YYYY, D-2-5-I, D-2-13-D, D-2-13-O, D-2-14-D, D-9-U and D-2-14-W have already testified on the megaphone incident.

¹⁰³ Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Witness D-1-4-0's will-say.

¹⁰⁴ Paragraph 1 of Witness D-1-4-0's will-say.

¹⁰⁵ Paragraph 2 of Witness D-1-4-0's will-say.

69. With regard to the fact that Kanyabashi was called an accomplice and was against the killings,¹⁰⁶ the Chamber notes that it has already heard several witnesses on this particular issue¹⁰⁷ and it therefore denies the calling of Witness D-1-4-0 to testify on this point.

70. Regarding the assistance provided by the Witness to Tutsis, the Chamber observes that it is not convinced of the relevance of this testimony to Kanyabashi's Defence as set out in paragraph 3 of Witness D-1-4-0's will-say. The Chamber denies the calling of Witness D-1-4-0 on this aspect, accordingly.

71. For these reasons and pursuant to Rule 73 *ter* (E), the Chamber grants the requests to call D-1-4-0 to testify on the elements currently listed in the will-say save for paragraphs 3, 14 and 15. The Chamber further orders the Defence to file a revised will-say for Witness D-1-4-0 and to limit the duration of his examination-in-chief to a maximum of five hours.

Conclusion Regarding the Defence Requests under Rule 73 *ter* (E)

72. Accordingly, the revised witness list will be composed of the following seven witnesses: D-2-10-Y, D-21-B (partly heard), D-2-17-A, D-2-18-0, D-2-21-T, D-2-14-M and D-1-4-0.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion to reinstate Witnesses D-22-A and D-30-S on the witness list;

GRANTS the Motion to remove Witness D-2-13-K from the witness list;

GRANTS the Motion to substitute Witness D-2-14-V with Witness D-2-18-0 and to call D-2-18-0 to testify on items 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of his will-say. Paragraphs 8 and 9 of the will-say are therefore excluded;

DENIES the Motion to call proposed Expert Witness Fidèle Mpiranya;

GRANTS the Motion to call Witness D-2-21-T to testify on items 1, 2, 3, 4, 5, 6, 7a), 7b), 7c), 7d), 7e) and 7g) of his will-say. Paragraphs 8, 9, 10 and sub-paragraph 7f) of the will-say are therefore excluded;

GRANTS the Motion to call Witness D-2-14-M to testify on items 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 of his will-say. Paragraphs 9, 10 and 16 of the will-say are therefore excluded;

GRANTS the Motion to call Witness D-1-4-0 to testify on items 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of his will-say. Paragraphs 3, 14 and 15 of the will-say are therefore excluded;

DIRECTS the Defence to file a new list of witnesses indicating their order of appearance and revised will-says and to limit the duration of the examination-in-chief as stated above, immediately.

¹⁰⁶ Paragraphs 14 and 15 of Witness D-1-4-0's will-say.

¹⁰⁷ Witnesses D-1-0, D-2-5-W, D-2-13-0, D-2-YYYY, Bernadette Kamanzi and Philip Reyntjens have testified on this point.

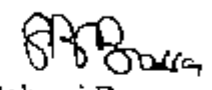
Arusha, 24 April 2008



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]