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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: 2 July 2008

The PROSECUTOR v. Joseph KANYABASHI

Case No. ICTR-96-15-T

Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON KANYABASHI'S MOTION TO RE-OPEN HIS CASE AND
TO RECALL PROSECUTION WITNESS QA**

Office of the Prosecutor

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WAP

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

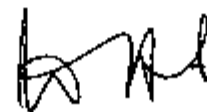
SITTING as Trial Chamber II composed of Judges William H. Sckule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the *Requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*, filed confidentially on 2 June 2008 ("Kanyabashi's Motion")

CONSIDERING the:

- i. "*Réponse de Arsène Shalom Ntahobali à la requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*", filed confidentially on 5 June 2008 ("Ntahobali's Response");
- ii. "Prosecutor's Response to the *requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*", filed confidentially on 6 June 2008 ("Prosecution's Response");
- iii. "*Réponse de Sylvain Nsabimana à la requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA déposée le 02 juin 2008*", filed confidentially on 6 June 2008 ("Nsabimana's Response");
- iv. "*Réponse de Pauline Nyiramasuhuko à la requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*", filed confidentially on 9 June 2008 ("Nyiramasuhuko's Response");
- v. "*Réplique de Joseph Kanyabashi aux réponses du Procureur, de Ntahobali et de Nsabimana à sa requête en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*", filed confidentially on 9 June 2008; ("Kanyabashi's First Reply")
- vi. "*Duplique Sylvain Nsabimana (sic) la réplique de Joseph Kanyabashi à la réponse de Sylvain Nsabimana déposée le 6 juin 2008*", filed confidentially on 12 June 2008 (Nsabimana's Rejoinder);
- vii. "*Réplique de Joseph Kanyabashi à la réponse de Nyiramasuhuko à sa requête en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et de produire le dossier Gacaca du témoin à charge QA et à la duplique de Sylvain Nsabimana* ", filed confidentially on 12 June 2008 ("Kanyabashi's Second Reply");

BEING ALSO SEIZED of the *Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-23-C*, filed confidentially on 3 June 2008 ("Kanyabashi's Motion for Protective Measures");



CONSIDERING the:

- i. "Prosecutor's Response to the '*Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-23-C*'", filed confidentially on 6 June 2008;
- ii. "*Réponse de Sylvain Nsubimana à la Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-23-C déposée le 03 juin 2008*", filed confidentially on 6 June 2008;
- iii. "*Réponse de Arsène Shalom Ntahobali à la Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-23-C*", filed confidentially on 9 June 2008;

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. As a preliminary matter, the Chamber observes that the Parties should exercise their right to file responses and replies to a motion in a concise manner and refrain from filing numerous and repetitive documents. For instance, the Chamber notes that Nsabimana's Rejoinder does not contain any new element but appears to be a mere repetition of his Response. Therefore, the Chamber will not consider the Rejoinder while adjudicating the Motion.
2. On 20 May 2008, the Chamber declared Kanyabashi's Defence case closed but for one remaining witness not yet available to testify.¹
3. On 2 June 2008, the Defence for Kanyabashi filed a motion requesting the re-opening of Kanyabashi's case and the admission of new evidence. Five Annexes are attached to the Motion.
4. On 3 June 2008, the Defence for Kanyabashi filed a motion requesting special protective measures for Witness D-2-23-C if that Witness was to be added to Kanyabashi's list of witnesses pursuant to the first motion. Seven Annexes are attached to the Motion.

SUBMISSIONS OF THE PARTIES

Kanyabashi's Motion

5. The Defence for Kanyabashi requests the re-opening of Kanyabashi's case to add Witness D-2-23-C to its witness list and introduce the *Gacaca* file of Prosecution Witness QA and two documents from the President of the *Gacaca* Court, dated 11 April and 22 May 2008 (Annex II). Alternatively, the Defence requests the Chamber to order that Prosecution Witness QA be recalled for further cross-examination.

¹ As of 20 May 2008, the Defence for Kanyabashi was expected to call two more witnesses. On 19 June 2008, the Chamber granted the Defence's request to remove one of the witnesses from Kanyabashi's witness list.



6. Regarding the request to call Witness D-2-23-C, the Defence states that it first met that witness in February 2008. At that time, the witness did not agree to testify. In April 2008, the Defence approached Witness D-2-23-C again, who agreed to meet the Defence away from his country of residence. As soon as the Defence had organised the necessary travel papers, it met Witness D-2-23-C on 24 May 2008, after the close of Kanyabashi's Defence case. At that time, Witness D-2-23-C accepted to testify before the Chamber.

7. The Defence submits that Witness D-2-23-C is expected to testify about the EER, about the alleged fabrication of evidence by several Prosecution witnesses members of Ibuka; to contradict Prosecution Witnesses SS and SU's allegation that Kanyabashi regularly attended meetings at the *préfecture* office;² to testify about the transfer of refugees to Nyange thereby being the only witness challenging Prosecution Witnesses QBQ, QY and SY's testimony and to give evidence about the beginning of the killings in Rango and corroborate several Defence witnesses' testimony that Kanyabashi was not present at Rango market on Thursday 21 April 1994.

8. Regarding the request to introduce into evidence the *Gacaca* record of Prosecution Witness QA, the Defence contends that Prosecution Witness QA was convicted by the *Gacaca* Court in 2006, that is after his testimony in March 2004. The executive secretary of the national service of the *Gacaca* jurisdiction authorized the Defence to access the *Gacaca* record of Witness QA on 3 and 8 May 2008. (Annexes III, IV) and the Defence for Kanyabashi received a copy of the *Gacaca* report together with a confirmation of the President of the Ngoma *Gacaca* court, dated 11 April 2008. The Defence received a second confirmation that Witness QA's judgement had not been appealed on 22 May 2008. On each page of the *Gacaca* record, stamps are affixed verifying the authenticity of the document (Annex II).

9. The Defence submits that the content of Prosecution Witness QA's *Gacaca* record contradicts his testimony in these proceedings on the following elements: Witness QA testified before this Chamber that after Kanyabashi held a meeting at Ngoma between 18 and 21 April 1994, the massacres intensified. In the *Gacaca* record, Witness QA stated that after the said meeting, the population erected roadblocks to ensure the security and that no one was killed. Furthermore, Witness QA testified that he was never present at a roadblock or participated in lootings between April and July 1994 and that accusations alleging his participation in the genocide were not true whereas according to the *Gacaca* record, Witness QA admitted to have been present at roadblocks and was convicted and sentenced to 25 years imprisonment for having participated in attacks, looted, killed and been present at roadblocks. Finally, the conviction of Witness QA contradicts his assertion during his testimony that that Muslims did not participate in the killings in Ngoma.

10. Alternatively, the Defence requests to recall Witness QA for cross-examination considering the inconsistencies of Witness QA's testimony and the content of the *Gacaca* report.

² According to the Defence, Witness D-2-10-Y also testified on that matter, but was not constantly present at the *préfecture* office.

Prosecution's Response

11. The Prosecution opposes the Motion. It submits that the Defence has failed to show any exceptional circumstances to re-open its case. The proposed evidence of Witness D-2-23-C is of limited probative value; it is neither new nor crucial, and several Kanyabashi witnesses have already testified about similar elements.

12. The Prosecution contends that the re-opening of the Defence case would cause a delay in the proceedings, lead to the waste of judicial time and therefore prejudice the other parties.

13. The Prosecution submits that the Defence has failed to discharge its burden to show that the proposed evidence could not have been previously obtained or presented. The fact that the Defence identified D-2-23-C as a potential witness only in February 2008 showed the Defence's lack of diligence considering that the Defence had years to prepare its case.

14. The Prosecution further objects to the admission of Witness QA's *Gacaca* record into evidence. It submits that notwithstanding Rule 89, the Trial Chamber has a duty to ensure the fairness of the proceedings to all the Parties and that it would be manifestly unfair to Witness QA to have the *Gacaca* records admitted into evidence without giving the witness an opportunity to explain his participation in the *Gacaca* proceedings.

15. Regarding the Defence's alternative request to recall Witness QA, the Prosecutor submits that the discretion to recall a witness must be exercised sparingly. Witness QA testified over four years ago and the Defence failed to explain when they first applied for the authorisation to obtain the *Gacaca* records, which was granted to them on 3 April 2008.

Ntahobali's Response

16. The Defence for Ntahobali opposes the Motion. The Defence states that Witness D-2-23-C's expected testimony is covered by Kanyabashi's previous witnesses. Furthermore, the addition of a witness at this late stage of the proceedings would breach Ntahobali's right to an expeditious trial.

17. Regarding the request to introduce Witness QA's *Gacaca* record into evidence or to recall the witness for further cross-examination, the Defence submits that the Defence for Kanyabashi has been in possession of the documents sought to be admitted since 11 April 2008, more than a month before the closure of Kanyabashi's case. The Defence for Kanyabashi could therefore have informed the Chamber of its potential intent to adduce further documents before the closure of its case.

Nsabimana's Response

18. The Defence for Nsabimana opposes the Motion regarding the request to re-open Kanyabashi's case and call Witness D-2-23-C. The Defence submits that Kanyabashi lacked diligence in obtaining the new evidence and that the re-opening of the case at this late stage of the proceedings jeopardizes Nsabimana's right to an expeditious trial.

19. The Defence does not oppose the admission of Witness QA's *Gacaca* record but requests to further cross-examine Witness QA if recalled.

Nyiramasuhuko's Response

20. The Defence for Nyiramasuhuko opposes the Motion, submitting that late confirmation of a witness to testify does not amount to "exceptional circumstances" warranting the re-opening of a case. This would allow any Party to call potential witness who, at the time of the presentation of its case, refused to testify because of fear. The Defence asserts that all items indicated in Witness D-2-23-C's will-say have been covered by other witnesses of Kanyabashi.

21. As for the production of Witness QA's *Gacaca* records, the Defence submits that Kanyabashi failed to file a request while his case was still on going. On 6 May 2008, Kanyabashi withdrew Witness D-2-14-M who was expected to testify about Witness QA's *Gacaca* conviction and Kanyabashi could have filed his request for the production of QA's *Gacaca* records since then.

Kanyabashi's Consolidated Reply

22. The Defence for Kanyabashi replies that when Kanyabashi's case was closed on 20 May 2008, it was not in a position to inform the Chamber about its intention to call Witness D-2-23-C because the Witness had not yet agreed to testify and the Defence did not know the actual content of his expected testimony. The Defence states that Witness D-2-23-C's will-say is relevant in its entirety and that failure to hear him might affect the fairness of the trial because Witness D-2-23-C will testify on fabrication of Prosecution evidence. However the Chamber may chose to limit his testimony to paragraphs 1 to 3, 9 to 12 and 27 to 36 of the witness' will-say if it considers that hearing the witness on all items indicated in the will-say will lengthen the proceedings unnecessarily.

DELIBERATIONS

Re-opening of the Case: Addition of Witness D-2-23-C to Kanyabashi's Witness List and Introduction into Evidence of Prosecution Witness QA's *Gacaca* Record

Addition of Witness D-2-23-C

23. The Chamber recalls that according to ICTR jurisprudence, a Chamber may allow the re-opening of a case for the introduction of new evidence under exceptional circumstances.³ The moving party must show that, with reasonable diligence, the evidence could not have been identified and presented during its case in chief.⁴ In addition, the Trial Chamber exercises its discretion as to whether to admit the evidence, taking into account the probative value of the evidence and the need to ensure a fair trial. The probative value of the new evidence needs to outweigh the prejudice caused by delaying the fair and expeditious

³ *The Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001 para. 288; *The Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para.10; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Disclosure of Documents under Rule 68 and for Re-opening of her Case, 29 April 2008, para. 49.

⁴ *The Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001 para. 283; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion to Reopen Its Case and on the Defence Motion to File Another Rule 98bis Motion, 19 April 2008, para. 10.

conduct of the proceedings.⁵ Factors to be considered include the advanced stage of the trial at which the evidence is sought to be adduced, the potential delay in the trial and the effect of bringing new evidence against one accused in a multi-defendant case.⁶

24. The Chamber recalls the Defence submission that it met Witness D-2-23-C for the first time in February 2008, that the Defence attempted to persuade D-2-23-C to testify but only succeeded on 24 May 2008 after Kanyabashi's case was closed, due to the witness' fear for his life.

25. The Chamber considers that while the Defence indicates why it was not able to request the addition of Witness D-2-23-C before 24 May 2008, it does not provide any reasons for having identified Witness D-2-23-C at such a late stage almost three and a half years after the filing of its Pre-Defence Brief in December 2004. In addition, the reluctance of a witness to testify before the Chamber during the presentation of a Party's evidence, does not of and by itself justify the re-opening of a case. Otherwise any party would arguably move for the re-opening of its case as and when a potential witness who, at the time of the presentation of its case, refused to testify but later on, accepts to testify. The Chamber also recalls that the Defence for Kanyabashi had sufficient opportunities to review Kanyabashi's case in its many requests to vary Kanyabashi's witness list since the filing of its Pre-Defence Brief.⁷ For these reasons, the Chamber finds that the Defence has failed to demonstrate that with reasonable diligence, the evidence could not have been identified and presented during its case in chief.

26. In addition to the Defence's failure to demonstrate due diligence in identifying and presenting the evidence in a timely manner, the Chamber notes that Witness D-2-23-C is expected to testify about the beginning of the killings at Rango and Kanyabashi's absence at Rango market on 21 April 1994; about events at the EER; about Kanyabashi's presence at the *préfecture* office contrary to Prosecution Witnesses SS and SU's testimony; about the refugees at Nyange and Rango; and finally about the alleged fabrication of false evidence by Prosecution Witnesses QG, QI, QY, QJ, SU, SS and RL. The Chamber considers that even if these elements might be relevant to Kanyabashi's case and might have some probative value, the Chamber has already heard many witnesses on these matters.⁸ Furthermore, the Chamber

⁵ *The Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001 para. 283; *The Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses, 14 August 2007, para. 7.

⁶ *The Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 290; *The Prosecutor v. Zigranyiraza*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 16.

⁷ See for example: *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T Decision on Kanyabashi's Motions for Modification of his Witness List, 21 March 2007; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Three Motions to Vary His List of Witnesses and to Admit Written Statements under Rule 92 bis, 12 April 2008; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His Witness List Pursuant to Rule 73ter, 15 February 2008.

⁸ Witnesses D-2-10-Y, D-1-4-O, D-2-YYYY, D-2-16-P, D-2-5-I, D-2-13-D and D-2-14-D testified about the beginning of the killings at Rango; Witnesses D-2-YYYY, D-2-5-I, D-2-13-D, D-2-16-P and D-2-10-Y testified about Kanyabashi's absence at Rango market on 21 April 1994. On EER events: Kanyabashi Witnesses Bernadette Kamanzi and D-2-10-Y; Ntahobali Witnesses WTHSA, WCMNA, Ralph Lake, and NMBNP. Witness D-2-10-Y testified about Kanyabashi's presence at the *préfecture* office Witness D-2-11-D has challenged Witness SU's testimony regarding SU's presence at the *préfectural* office. Witness D-2-10-Y testified on the refugees at Nyange; Witnesses D-2-YYYY, D-2-10-Y, D-2-14-W, D-1-4-O testified about the refugees at Rango. Witness D-13-D testified Witness SU's alleged fabrication of evidence; D-2-18-O testified

recalls that Kanyabashi's case lasted ten month and is closed since 20 May 2008; that Kanyabashi is tried in a multiple-accused case; that the Chamber is hearing the evidence for the last accused; and that the re-opening of the case would further delay the trial proceedings thereby causing prejudice to the other parties.

27. Therefore, the Chamber concludes that the Defence failed to exercise due diligence in obtaining the evidence in a timely manner and that the probative value of the evidence does not outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings. The Chamber denies the request for re-opening of Kanyabashi's case and the addition of Witness D-2-23-C to Kanyabashi's witness list.

28. Accordingly, the Chamber considers that Kanyabashi's motion for special protective measures for Witness D-2-23-C is moot. In addition, the Chamber observes that the Motion for protective measures contains five annexes of over 80 pages. The Chamber directs the Parties to refrain from filing lengthy annexes that may not be necessary for deciding a motion and impede the expediency of the trial.

Admission into evidence of Prosecution Witness QA's Gacaca Report

29. Under Rule 89 (B) and (C) a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the Rules and to admit any relevant evidence which it deems to have probative value. At the admissibility stage, the moving party needs to show *prima facie* that the document is relevant and has probative value.⁹ The probative value of a document also 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.¹⁰

30. The Chamber notes that the Defence requests to introduce the entire alleged Gacaca record of Prosecution Witness QA. The Chamber considers that even if portions of the alleged Gacaca judgement could be relevant to the case of Kanyabashi, these records as a whole, lack *prima facie* probative value. The Chamber considers that to introduce a contested judgement to challenge the credibility of a witness, without hearing that witness on these issues would run contrary to the spirit of the Statute and in particular, to the principle of fair trial as provided for in Articles 19 and 20 of the Statute.¹¹ For these reasons the Chamber finds the Gacaca record to be inadmissible under Rule 89 (C).

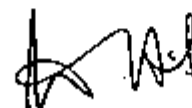
about Witnesses QI, RL's alleged fabrication of evidence; D-2-21-T is expected to testify about Witnesses QG, QI, QY, QJ, SU, SS, and RL's alleged fabrication of evidence.

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 *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.

¹¹ See *The Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses, 14 August 2007, para. 7. "Rule 89 (B) and (C) of the Rules of Procedure and Evidence ("Rules") allows the Chamber to apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the Rules and to admit any relevant evidence which it deems to have probative value. The consistent jurisprudence of the tribunal is that prior inconsistent statements of the witness may be put in cross examination and if relied upon can be admitted into evidence."

See also the principles applied for deciding similar situation whether to require a witness to appear for cross-examination under Rule 92bis (E): *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on



31. In addition, the Chamber considers that, contrary to the Defence submissions, a request to introduce documents into evidence may not be a matter for re-opening of the case.

32. The Chamber will now deal with the alternative request to recall Witness QA on the content of his alleged *Gacaca* Proceedings.

Recall of Witness QA for Further Cross-Examination

33. According to the jurisprudence, a Chamber may recall a witness where good cause is demonstrated by the moving party. Factors to be taken into account are the purpose for which the witness will testify and the party's justification for not offering such evidence when the witness originally testified.¹² The recall of a witness should be granted only in the most compelling of circumstances where further evidence is of significant probative value and not of a cumulative nature, such as to explore inconsistencies between a witness' testimony and a declaration obtained subsequently. In that case, the Defence may request the recall of a witness if prejudice can be shown from its inability to put these inconsistencies to that witness. If there is no need for the witness' explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witness will not be recalled.¹³

34. Contrary to the Defence submission, the Chamber considers that Witness QA's testimony before this Chamber and his alleged statement before the *Gacaca* court as reflected in the document annexed to the Motion may not refer to the same alleged meetings held by Kanyabashi. While Witness QA testified before this Chamber about two meetings held by Kanyabashi around 18 and 21 April 1994 after the killings had already started, the statement in the *Gacaca* record refers to one meeting convened before the start of the genocide, without mentioning a specific date.¹⁴ Therefore, the Chamber does not consider that there exists a contradiction between Witness QA's testimony and his alleged statement before the *Gacaca* court regarding a security meeting convened by Kanyabashi and the events that followed.

35. However, the Chamber considers that Witness QA's testimony and his alleged statements in the *Gacaca* record are inconsistent regarding Witness QA's presence at

Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony, 1 May 2008, para. 19 citing further case law: "The principal criterion for determining whether a witness should appear for cross-examination under Rule 92 bis (E) is the overriding obligation of a Chamber to ensure a fair trial under Articles 20 and 21 of the Statute."

¹² *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY For Additional Cross-examination, 3 March 2006, para. 32.

¹³ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY For Additional Cross-examination, 3 March 2006, para. 33; *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Emergency Motion to Recall Witnesses for Further Testimony, 5 June 2008 paras. 9,10.

¹⁴ See testimony of Witness QA, T. 18 March 2004 pp. 80-83; T. 22 March 2004, pp. 6, 40-42; *Gacaca* record, p. 13 English Translation: QA stated: "Before the genocide started, Joseph Kanyabashi convened a meeting intended for all the population which was held at the secteur office. He told us that the situation was critical, and that, because of the prevailing insecurity we had to defend ourselves, protect our area against outside attacks, and remain vigilant. We immediately armed ourselves and started manning roadblocks. This was shortly before the killings started. I never took part in any attack during which people were killed. As for roadblocks, we manned them just to ensure security but nobody was ever killed there."

roadblocks¹⁵ and Witness QA's participation in lootings.¹⁶ The Chamber considers that the discrepancies relate to Witness QA's credibility and reach the threshold for a recall for further cross-examination which shall be strictly limited to these elements.

36. For these reasons, the Chamber allows Witness QA to be recalled and cross-examined by all Parties exclusively on the specific contradictions as found in the *Gacaca* record, namely whether Witness QA was present at roadblocks and participated in lootings between April and July 1994. The Chamber also allows the Prosecution to further re-examine Witness QA on those matters if it so wishes.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion to re-open the case;

GRANTS the alternative request to recall Witness QA;

ORDERS the recall of Prosecution Witness QA so that the Defence may cross-examine and the Prosecution may re-examine him exclusively on specific contradictions as found in the *Gacaca* record, namely whether Witness QA was present at roadblocks and participated in lootings between April and July 1994;

DENIES the Motion for protective measures.

Arusha, 2 July 2008

William H. Sekule
Presiding Judge



Ariette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

¹⁵ Witness QA's testimony T. 22 March 2004 pp. 49-50 (ICS): "Q: Witness, if I put it to you, that Jean Pierre Bizimungu says in a transcript that you yourself were at a roadblock to verify the identity of people; what would you say? A: I think that concerns him, I do not feel concerned by that allegation."

Annex I, *Gacaca* record p. 13 English Translation: QA stated: "We immediately armed ourselves and started manning roadblocks. [...] As for roadblocks, we manned them just to ensure security."

¹⁶ Witness QA's testimony T. 23 March, pp. 6, 7 (ICS): "THE WITNESS: Did I participate in the looting? I think you are insulting me, Counsel. Please don't insult me, Counsel, please don't insult me before this Chamber. Q: Perhaps we didn't understand each other. I said, Witness, did you see looting going on, or did you see, even from a distance, killings going on. I did not say that you yourself participated? THE WITNESS: Please don't change what you said. You asked if I participated in the looting. I'm an adult, Counsel. You can look me up to Rwanda and see how I behaved there."

Annex I, *Gacaca* record p. 13 English Translation: QA stated: "I never took part in any attack during which people were killed. [...] As for looting, everyone was doing it. [...] Any Hutu who was not among those being hunted down was free to take part in the looting of property."