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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: 9 December 2008

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The PROSECUTOR  
 v.  
 Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

(Joint Case No. ICTR-98-42-T)

DECISION ON NYIRAMASUHUKO'S MOTION FOR EXCLUSION OF  
 EVIDENCE, OR ADMISSION OF THE TESTIMONY OF WITNESS QBQ IN THE  
 TRIAL OF DÉSIRÉ MUNYANEZA, OR RECALL OF WITNESS QBQ

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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 "*Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed confidentially on 30 October 2008 ("Nyiramasuhuko's Motion");

**CONSIDERING:**

- i. Alphonse Nteziryayo's Response to the "*Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed confidentially on 3 November 2008 ("Nteziryayo's Response");
- ii. *Réponse de Ntahobali à la "Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin"*, filed on 3 November 2008 ("Ntahobali's Response");
- iii. *Réponse de Joseph Kanyabashi à la "Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin"*, filed confidentially on 3 November 2008 ("Kanyabashi's Response");
- iv. *Réponse de Sylvain Nsabimana à la "Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin"*, filed on 3 November 2008 ("Nsabimana's Response");
- v. Prosecutor's Response to the "*Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed on 3 November 2008 ("Prosecution Response");
- vi. *Réplique de Pauline Nyiramasuhuko à la "Prosecutor's Response to the "Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage du témoin QBQ, rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin"*, filed on 7 November 2008 ("Nyiramasuhuko'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.

### INTRODUCTION

1. Prosecution Witness QBQ testified before this Chamber on 3 and 4 February 2004. Witness QBQ later testified in the trial of Désiré Munyaneza, held in Montreal, Canada, on 25, 26, 30 April and 1 May 2007 under pseudonym C-19.<sup>1</sup> Nyiramasuhuko's instant Motion is for exclusion of Witness QBQ's testimony before this Chamber, or for the admission of her testimony in the Munyaneza trial in Canada, or for the recall of Witness QBQ for further cross-examination on the basis of the contradictions arising between her evidence in the Munyaneza trial in Canada and before this Chamber. Copies of the transcripts of Witness QBQ's testimony in the Canadian trial are attached to the Motion.

### SUBMISSIONS OF THE PARTIES

#### *Nyiramasuhuko's Motion*

2. The Defence for Nyiramasuhuko submits that during the Munyaneza trial, Witness QBQ contradicted certain parts of her statements made to OTP investigators, as well as parts of her testimony before this Chamber. These contradictions should be considered so that Nyiramasuhuko shall not suffer any prejudice when the Judges consider the probative weight of Witness QBQ's testimony. The Defence alleges the following contradictions:

#### *a) Meetings at the Préfecture Office*

3. The Defence submits that during her testimony before this Chamber, Witness QBQ testified that she stayed at the *préfecture* office for approximately one month and that she was not aware of any meetings being held there during her stay. However, during the Munyaneza trial, the witness testified that meetings were often held during the mornings and were attended by Nyiramasuhuko, the *préfet* and the employees of the *préfecture*. According to the Defence, these two accounts are completely contradictory and irreconcilable.

4. The Defence further notes that during her cross-examination in the Munyaneza trial, Witness QBQ confirmed that several meetings were held at the *préfecture* office. When confronted with her testimony before this Chamber, she stated that perhaps she had not been well understood before this Chamber.

#### *b) The Transfer of Refugees from the Préfecture Office to Nyaruhengeri*

5. The Defence submits that during the Munyaneza trial, Witness QBQ stated that after one meeting held by Nyiramasuhuko, the *préfet* and the employees of the *préfecture*, the *préfet* addressed the refugees at the office. The witness alleged that the *préfet* then told the refugees that they would be transferred to Nyaruhengeri. On the other hand, during her testimony before this Chamber, in response to a question about what the *préfet* had stated to the refugees when they were to be transferred to Nyaruhengeri, Witness QBQ stated that the *préfet* told the refugees that the authorities would shelter them and provide them with what they needed to survive.

<sup>1</sup> Copies of the transcripts of her testimony from that trial were obtained by the Defence from the Office of the Prosecutor after an agreement to this effect between Counsel for Ntahobaho and the relevant authorities in the Munyaneza trial.



6. The Defence submits that these two statements are contradictory and irreconcilable because, in this trial, Witness QBQ denied having any knowledge of any meetings at the *préfecture* office. It is impossible, according to the Defence, to reconcile the narration of this specific event with the assertion that the *préfet's* words were spoken in the presence of Nyiramasuhuko, following a meeting held by these two persons.

*c) Witness QBQ's Knowledge About the Presence of Employees at the Préfecture Office*

7. The Defence recalls that before this Chamber, Witness QBQ stated several times that she did not know if employees were present at the *préfecture* office site while she was there. The Defence submits that it is impossible to reconcile these statements with the fact that she repeated several times during the Munyaneza trial that employees attended meetings with Nyiramasuhuko. Worse, the Defence asserts, is the fact that Witness QBQ stated before this Chamber that she only saw the *préfet* twice during her time at the *préfecture* office, and never when a meeting was taking place in her presence. These assertions are completely contradictory and the Chamber cannot possibly evaluate Witness QBQ's credibility in the absence of the evidence of these contradictions.

*d) The Number of Times Witness QBQ saw Ntahobali at the Préfecture Office*

8. According to the Defence, in this trial, Witness QBQ testified that the only time she saw Ntahobali was the night he came to the *préfecture* office when he was driving a vehicle transporting members of the *Interahamwe* and Nyiramasuhuko. During the Munyaneza trial, Witness QBQ testified that she and other refugees at the *préfecture* who made the trip to Nyaruhengeri in the third bus resisted before boarding and were beaten by Munyaneza, Ntahobali and someone named Ntakugengeka or Ntugengeke. This, too, constitutes irreconcilable testimonies by Witness QBQ, which should be considered when evaluating her credibility.

*e) Whether Witness QBQ saw Nyiramasuhuko in her Storeyed House Opposite the EER*

9. Before this Chamber, Witness QBQ stated that the first time she saw Nyiramasuhuko was one morning at the *préfecture* office, three days following the witness' arrival there as a refugee, at the end of April 1994. She testified to having seen Nyiramasuhuko twice more during the evening of that same day as well as the following evening. Witness QBQ testified that she did not see Nyiramasuhuko again.

10. The Defence submits that following her stay of approximately one month at the *préfecture* office, Witness QBQ was transferred to Nyaruhengeri and then to the EER with the other refugees. During her examination-in-chief, the Prosecutor asked the witness to describe what happened while she was at the EER. In addition, she was cross-examined lengthily on this subject. Not once did Witness QBQ mention Nyiramasuhuko in this context, nor did she state that Nyiramasuhuko's residence was in the vicinity of the EER.

11. However, during the Munyaneza trial, Witness QBQ testified to having seen Nyiramasuhuko on the second floor of her residence, to having heard her commenting on the lot of the refugees, including herself, at the EER, and to having heard her giving instructions to the *Interahamwe* to clear the bush along the road.

12. The Defence notes that the witness, who according to her own statements came to Arusha to testify about Nyiramasuhuko, seems to have kept silent about having seen Nyiramasuhuko making extremely threatening comments about refugees, including herself,

when the opportunity to speak about it was presented to her. Witness QBQ testified before this Chamber that she saw Nyiramasuhuko for the last time the evening before her departure for Nyaruhengeri, which was well before her stay at the EER. This too, according to the Defence, constitutes an irreconcilable contradiction and should be brought into evidence for a full evaluation of Witness QBQ's credibility.

**f) Men Removed From the Préfecture Office up Until Witness QBQ's Departure for Rango**

13. During her testimony before this Chamber, Witness QBQ said that men were continuously being removed from the *préfecture* office from the time of her arrival there until her departure for Rango. When she was interviewed by the Royal Canadian Mounted Police (RCMP), Witness QBQ stated that members of the *Interuhungwe* removed all of the male refugees, including children, from the *préfecture*.

**g) Presence of a Fence at the Préfecture Office**

14. The Defence submits that during her testimony before this Chamber, Witness QBQ testified that she did not remember whether there was a fence surrounding the *préfecture* office. At the Munyaneza trial, Witness QBQ testified on two occasions that she had to go through a fence going to or from the *préfecture* office. It is strange that Witness QBQ was incapable of remembering whether or not there was a fence during this trial, but three years later recounted having to cross through this same fence. The Chamber should have the evidence of this contradiction when evaluating the credibility of Witness QBQ.

**The Law, Argumentation and Remedies**

15. The Defence cites Articles 19 and 20 of the Statute concerning the rights of the accused to a fair trial. It also cites Rule 98 of the Rules, highlighting the Chamber's power to call witnesses to appear on its own initiative, and this Chamber's decision on Kanyabashi's Motion to recall Witness QA dated 2 July 2008.

16. The Defence submits that it has shown that Witness QBQ made several assertions in the Munyaneza trial that contradict portions of her testimony before this Chamber in an irreconcilable way, and that they concern important elements and not mere details.

17. Further, all the enumerated contradictions involve events that took place in Nyiramasuhuko's presence or that impact on such events and that, in these circumstances, they go to the heart of the acts Nyiramasuhuko is alleged to have committed, most notably while at the Butare *préfecture* office.

18. The Defence submits that there are three possible remedies available: i) excluding the testimony of Witness QBQ altogether, ii) taking Witness QBQ's statements as they are reproduced in this Motion into account and admitting them into evidence, iii) ordering the recall of Witness QBQ so that the Defence can conduct further cross-examination on the specific subjects raised by the contradictions that have come out in her testimony at the Munyaneza trial.

19. The Defence argues that the first two solutions are applicable to these circumstances and that either one would save precious time for the concerned parties. With respect to the third possible remedy, the Defence argues that the requirements necessary for the recall of a witness have been met, citing the recently discovered irreconcilable contradictions with

testimony given during this trial. In addition, these are contradictions about which no questions could have been asked before now since they were unknown until the OTP made Witness QBQ's testimony at the Munyaneza trial available to the Defence. These contradictions put the witness' credibility into doubt with regard to her account of the events between 6 April and the beginning of July 1994.

20. In case of an order for recall, the Defence also requests that the Chamber prevent anyone from informing the witness of the reasons for her recall or from providing her with the transcripts of her testimony and statements given both before this Chamber and in the Munyaneza trial; prevent Witness QBQ from bringing with her any transcripts of these testimonies and statements that may be in her possession; and order that Witness QBQ be brought to and kept in Arusha in a way that prevents any possibility that she could discuss her testimonies, past and future, with anyone.

#### *Ntahobali's Response*

21. The Defence notes that the Motion is fundamentally of the same nature as Kanyabashi's Motion to recall and cross-examine Witness QA following his testimony in the Munyaneza trial. The Motion is based on the same elements as Ntahobali's motions to recall Witnesses QY, SJ and QCB and Nyiramasuhuko's motion to recall Witness TK.

22. The Defence further notes that there appears to be a distressing tendency of ICTR witnesses to give contradictory testimonies at other proceedings. More and more, the situation appears to illustrate a concerted fabrication of testimony and puts into question the probative value of all of the evidence presented by the Prosecution in this trial. The Defence expresses outrage at this set of circumstances and fully supports the Motion.

#### *Nsabimana's Response*

23. The Defence supports the arguments of fact and law made in the Motion in their entirety. The Defence notes that Witness QBQ testified against Nsabimana before this Chamber on 4 February 2004. Although the Defence cross-examined the Witness, any issues arising in relation to her credibility also affect Nsabimana's Defence. The numerous and important contradictions identified seriously affect the credibility of Witness QBQ and the Defence prays that the Chamber grant the requests made in the Motion. The Defence submits that any orders made in respect of the requests in the Motion should also benefit Nsabimana.

24. The Defence notes that as this request does not foresee cross-examining the witness on additional subjects, a new motion is not warranted. The Defence requests that it be allowed to cross-examine Witness QBQ on any issue the Chamber authorises, as it did in its Decision of 2 July 2008 with regard to Kanyabashi's motion to recall Witness QA.

#### *Nteziryayo's Response*

25. The Defence submits that apparent contradictions in the testimony of Witness QBQ as set out in the Motion raise serious issues of credibility. The issues relating to the fate of the refugees at the *préfecture* office at various points in time and their eventual transfer and treatment at Rango have been the subject matter of various testimonies before the Chamber. Certain allegations in this regard touch on Nteziryayo's Defence either directly or peripherally. The Defence thus has an interest in the overall evaluation of these issues and the consistency and credibility of witnesses on the subject including that of QCB [sic-QBQ].



26. The Defence at this stage supports the Motion and reserves its right to seek leave to cross-examine Witness QBQ if there is any relevant issue that arises concerning Nieziryayo during QBQ's further cross-examination on recall?

**Kanyabashi's Response**

27. The Defence submits that it did not cross-examine Witness QBQ when she testified before the Chamber. The recall of the witness at this advanced stage of the proceedings may cause prejudice to Kanyabashi's case in that some contentious issues affecting Kanyabashi's Defence strategy might be raised.

28. The topics described at paragraph 65 of the Motion on which the Nyiramashuko Defence intends to further cross-examine Witness QBQ if recalled are too broad in light of the nature of the alleged contradictions.

29. The Defence submits that if the Chamber grants the Motion and orders the recall of Witness QBQ, it only requests the right to cross-examine the said witness in the event that issues that might prejudice Kanyabashi's interests are raised.

**Prosecution Response**

30. The Prosecution objects to the Motion in its entirety. It argues that the witness faced vigorous cross-examination and that the Chamber had ample opportunity to listen to and assess her during her appearance.

**a) Meetings at the Préfecture Office, b) Transfer of Refugees and c) Presence of Préfectural Employees**

31. Before this Chamber, Witness QBQ was not asked in examination-in-chief about her knowledge of meetings at the *préfecture* office. In cross-examination by Me Kadji (Nsabimana Defence) Witness QBQ said that she did not know about any meetings. The issue was not pursued in any other cross-examination or in re-examination. In Canada, when asked about meetings, the Witness gave details about various meetings involving Pauline Nyiramashuko, the *prefet* and other *préfectural* staff.

32. When confronted with this alleged contradiction in the Mnyamaneza trial, the Witness explained that perhaps she had not been understood before this Chamber. The fact that the Witness gave details about meetings in her testimony in the Mnyamaneza trial in Canada, but was not asked in any detail about meetings before this Chamber does not mean that the Witness has contradicted herself or that her credibility should be brought into issue. Witnesses respond to questions put to them and the court hearing their testimony can assess them accordingly.

1 Paragraphs 6 and 7, Nieziryayo's Response;  
2 Paragraphs 4 and 18, Prosecution Response;  
3 Paragraph 4 Prosecution Response;  
4 Paragraph 2004 p.17;  
5 The Queen v. Mnyamaneza, 26 April 2007, P.K038-5486;  
6 The Queen v. Mnyamaneza, 26 April 2007, P.K038-6327 to K038-6328;  
7 Paragraphs 9-10 Prosecution Response.

33. The Prosecution submits that the issues raised in the Motion do not involve credibility, rather, it appears that Witness QHQ has much more detailed evidence about a number of the Accused, which she could provide to the Chamber.<sup>9</sup>

34. The Prosecution also submits that if Witness QDQ is recalled, her testimony should not be limited to the alleged omission. Rather, if Witness QHQ is given a chance to explain her testimony about meetings in the Munganya trial in Canada, the Prosecution should be entitled to re-examine the witness about any and all meetings at the *prefecture* office that she is aware of, about anyone who may have attended the meetings and about what they said during the meetings.<sup>10</sup>

*d) Witness QHQ Seeing Nishobah Once at the Prefecture Office*

35. The Witness testified before this Chamber that she saw Nishobah once at the *prefecture* office when he arrived there with Nyiramasuhuko and *Interahamwe* at night. The Witness never saw Nishobah again.<sup>11</sup> In the Munganya trial in Canada, Witness QHQ mentioned that Nishobah, among others, beat and loaded refugees onto the bus destined for Nyaruhengeri.<sup>12</sup>

36. The Prosecution submits that the Defence for Nyiramasuhuko has not demonstrated how this alleged contradiction is prejudicial to her case. It concerns the number of times the witness remembers seeing not Nyiramasuhuko, but one of her co-accused. The trial Chamber had ample opportunity to assess Witness QHQ, making her recall unwarranted.

*e) Witness QHQ Seeing Nyiramasuhuko in Nyiramasuhuko's Storeyed House Opposite the FER*

37. The Witness testified before this Chamber that she did not see Nyiramasuhuko again after the night at the *prefecture* office.<sup>13</sup> In the Munganya trial in Canada, the Witness described seeing Nyiramasuhuko on her balcony over-looking the refugees at FER.<sup>14</sup>

38. The Prosecution submits that the Defence for Nyiramasuhuko has not demonstrated how omitting to place Nyiramasuhuko at her house overlooking the FER during this trial is prejudicial to her case. The Chamber had ample opportunity to assess QHQ and her recall is not warranted by any compelling circumstances.<sup>15</sup>

*f) Male Refugees at the Prefecture Office*

39. The Prosecution submits that there is no contradiction with respect to Witness QHQ's testimony regarding the presence or not of male refugees at the *prefecture* office. In her interview with the RCMP in 2002, Witness QHQ said that there were no longer any male refugees at the office at the specific time she was being questioned about. This does not exclude the possibility of the subsequent arrival and abduction of other male refugees. This alleged contradiction does not warrant the recall of Witness QHQ.<sup>16</sup>

<sup>9</sup> Paragraph 11, Prosecution Response.

<sup>10</sup> Paragraph 12, Prosecution Response.

<sup>11</sup> 1, 3 February 2004 p.94.

<sup>12</sup> Paragraph 13, Prosecution Response.

<sup>13</sup> 1, 3 February 2004 p.21.

<sup>14</sup> The Queen v. Munganya P.K.038-5489.

<sup>15</sup> Paragraph 15, Prosecution Response.

<sup>16</sup> Paragraph 16, Prosecution Response.



*g) Whether the Préfecture Office was Fenced*

40. The Prosecution submits that whether or not the *préfecture* office was fenced is not of consequence for the Nyiramasuhuko Defence. No prejudice has been demonstrated by the Defence.

*Nyiramasuhuko's Reply*

41. The Defence for Nyiramasuhuko submits that it is not aware that the criteria for determining recall include whether or not the Chamber has had ample time to hear and evaluate the witness or whether or not the witness has faced vigorous cross-examination, as has been submitted by the Prosecution.<sup>17</sup>

42. The Defence insists that when the witness was asked by Me. Kadji about meetings at the *préfecture* office, she said "No, I was not aware of any meetings," which contradicts her testimony in the Mfunyaneza trial where she gave details of meetings at the *préfecture* office.<sup>18</sup>

43. The Defence also objects to the Prosecution's request to cross-examine the witness broadly about all of the meetings that were allegedly held at the *préfecture* office, and about who may have been present and what may have been said during the meetings there. The Defence further submits that the Chamber should admit these contradictions into evidence and allow the witness to explain them; this should not be an opportunity for the Prosecution to add to its evidence.

44. On the issue of the number of times Witness QBQ saw Ntahobali, the Defence, recalls first that in her testimony before this Chamber, Witness QBQ testified to having seen Ntahobali only once when he was driving Nyiramasuhuko to the *préfecture* office and that this clearly makes Nyiramasuhuko a party to this contradiction.

45. However, the Defence submits, even if Nyiramasuhuko were not a direct party, this constitutes a serious contradiction that goes to the credibility of the witness. The Defence reiterates that Nyiramasuhuko would suffer prejudice if the Chamber were to evaluate Witness QBQ's credibility without considering this contradiction.

46. The Defence notes the Prosecution response concerning the last time that Witness QBQ saw Nyiramasuhuko, and submits that this is not an omission, explaining that the Prosecution seems not to understand the prejudice that would result from the Chamber's failure to take note of this contradiction in its evaluation of Witness QBQ's testimony.

47. The Defence also notes the Prosecution response that there is no contradiction between Witness QBQ's respective testimonies regarding the very precise question of whether there was a time during her stay at the *préfecture* office when no men remained there. The Prosecution is denying the evidence given on 3 February 2004 when the witness was asked whether it was true that at one time or another during her stay at the *préfecture* office, there were no men remaining and the witness responded, "No, that is not true."

48. The Defence also observes that the Prosecution returns to its argument that Nyiramasuhuko suffers no prejudice with regard to the question of whether or not there was a fence surrounding the *préfecture* office. The Defence reiterates its earlier submission that

<sup>17</sup> Referring to Paragraph 4 of the Prosecution Response.

<sup>18</sup> Referring to Paragraphs 8 & 12 of the Prosecution Response.



prejudice for Nyiramasuhuko flows from an evaluation of the credibility of this witness who contradicted herself on the presence of the fence in testimony before this trial in 2004 and in the Munyaneza trial in 2007.

49. With respect to Kanyabashi's Response, the Defence submits that it appears at a minimum incongruous for a co-accused to invoke the advanced stage of the proceedings to object to a motion for recall of a witness who is not relevant to his trial after previously asking for and obtaining the recall of a witness who was relevant to his trial. The Defence submits that Kanyabashi would not suffer any prejudice from the recall of Witness QA [sic; it should read QBQ].

50. The Defence reiterates that it has met any and all of the criteria necessary to justify the recall of Witness QBQ on the specific issues enumerated in the conclusion of its Motion and invokes once more the prejudice Nyiramasuhuko would suffer if the Motion is not granted.

#### DELIBERATIONS

51. As a preliminary matter, the Chamber is satisfied that because Witness QBQ's testimony in the Munyaneza trial was heard in 2007, three years after the Witness testified before this Chamber in 2004, it was impossible for the Defence to present the alleged contradictions to the Witness during her testimony in this trial. However the Chamber notes that the Motion is filed over a year since the witness testified in Canada. The Chamber notes that although no specific deadline applies to the filing of such motions, it is in the interests of judicial economy not to wait until the end of the case for their filing if the documents relied upon have been available to the Defence for a substantial amount of time.

##### *A. Exclusion of Evidence*

52. Exclusion of evidence is a remedy at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused.<sup>19</sup> An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witness' testimony.<sup>20</sup> In the Chamber's view, the alleged contradictions, even if established, do not warrant the exclusion of the witness' testimony under the circumstances of this Motion. The Chamber therefore denies the request for exclusion of the evidence of Witness QBQ and shall now address the alternative requests in the Motion.

##### *B. Admission of the Testimony of Witness QBQ in the Munyaneza Trial in Canada.*

53. 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 which are consonant with the spirit of the Statute and general principles of law; the Chamber may admit any relevant evidence which it deems to have probative value. At the admissibility stage, the moving party needs to

<sup>19</sup> *Karemera et al.*, Case No ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Case No ICTR-98-44-T, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8; *Karemera et al.*, Case No ICTR-98-44-T, Decision on the Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6.

<sup>20</sup> *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion to Exclude the Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness, 4 March 2008, para. 19.

show *prima facie* that the document is relevant and has probative value.<sup>21</sup> The proposed evidence must be relevant to the charges against the accused and serve to prove (or disprove) an element of a crime with which the Accused is charged.<sup>22</sup> Documents need not be recognised by a witness in order to have probative value.<sup>23</sup>

54. However, as a preliminary matter, the moving party must explain what the document is, and further, there must be indications that the document is authentic -- that is, that the document is actually what the moving party purports it to be.<sup>24</sup> In order for a document to be considered authentic, the Chamber must be satisfied that there are "sufficient indicia of reliability" to warrant its admission.<sup>25</sup> There are no formal requirements for establishing authenticity, but a number of factors have been considered important in previous decisions. Such factors have included the extent to which the document's content is corroborated by other evidence; the place where it was obtained; whether it is an original or a copy; if it is a copy, whether it is registered or filed with an institutional authority; whether it is signed, sealed, stamped, or certified in any way.<sup>26</sup>

55. The Chamber recalls that copies of the transcripts of Witness QBQ's testimony of 25, 26, 30 April and 1 May 2007 under pseudonym C-19 in the Canadian trial of Désiré Munyaneza are attached to the Motion and may be authentic. However, the Chamber considers that the admission of this testimony to challenge the credibility of the witness without hearing her on these issues would run contrary to the spirit of the Statute, in particular, to the principle of fair trial under Articles 19 and 20 of the Statute.<sup>27</sup> The Chamber therefore denies this option in the Motion.

### C. Recall of Witness QIQ

56. 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.<sup>28</sup> 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 case of inconsistencies, 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 it is minor or its nature

<sup>21</sup> *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Decision on Ntabakye Motion to Deposit Certain United Nations Documents, 19 March 2007, paras. 2,3.

<sup>22</sup> *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4.

<sup>23</sup> *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 4.

<sup>24</sup> *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Admission of Feb 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7.

<sup>25</sup> *Id.*, para. 8.

<sup>26</sup> *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 4.

<sup>27</sup> *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-13-T, Decision on Kanyabashi's Motion to Re-Open his Case and to Recall Prosecution Witness QA, 2 July 2008, para. 30. See also *The Prosecutor v. Nshamihigo*, 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.

<sup>28</sup> *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Mahabali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY For Additional Cross-examination, 3 March 2006, para. 32.

is self-evident, the witness will not be recalled.<sup>29</sup> The Chamber shall now analyse the contradictions alleged in the Motion to determine whether a recall is necessary.

*i) Meetings at the Préfecture Office*

57. The Chamber considers that there may be inconsistency between the witness' respective testimonies about meetings at the *préfecture* office before this Chamber and in the Munyaneza trial. While Witness QBQ testified before this Chamber that she did not know of any meetings at the *préfecture* office<sup>30</sup>, she testified before the Canadian court that she remembered that during the time she spent at the *préfecture*, Nyiramasuhuko and the *préfet* normally held meetings in the mornings with the staff of the *préfecture*.<sup>31</sup> The Chamber also notes that when asked about this alleged contradiction in the Canadian court, Witness QBQ explained that perhaps this Chamber did not fully understand what she had said.<sup>32</sup>

58. The Chamber considers that the failure to put this alleged inconsistency to the witness may be prejudicial to Nyiramasuhuko and Nsabimana – who was the *préfet* at the time: the alleged contradiction may have a bearing on Witness QBQ's credibility and may have probative value. The Chamber therefore allows the request to recall Witness QBQ for further cross-examination and re-examination on this issue.

*ii) Nyiramasuhuko's Presence and Involvement During the Transfer of Refugees from the Préfecture Office to Nyaruhengeri*

59. The Chamber does not consider that Witness QBQ's testimony on this issue is contradictory. The witness testified before the Canadian court that Nyiramasuhuko was present when the *préfet* addressed the refugees immediately before their transfer to Nyaruhengeri<sup>33</sup> whereas before this Chamber, the witness did not specifically mention Nyiramasuhuko's presence during this event.

60. The Chamber considers that the omission to mention Nyiramasuhuko's alleged presence during this event, without having been specifically asked about it, does not amount to a contradiction. The request for recall on this issue is therefore denied.

*iii) Presence of Préfectoral Employees at the Préfecture Office During Witness QBQ's Stay There*

61. The Chamber considers that Witness QBQ's respective testimonies on this issue before this Chamber and the Canadian court may be contradictory. Before this Chamber, Witness QBQ testified that she did not know if employees of the *préfecture* regularly came to work during her stay there and that she did not concern herself with that aspect of things as she was not at peace and had death in her soul.<sup>34</sup> In the Canadian court, Witness QBQ testified that *préfectoral* staff were involved in meetings at the *préfecture* offices (see (i) above).

<sup>29</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-F, Decision on Kanyabashi's motion to re-open his case and to re-call Prosecution Witness QA, 2 July 2008, para. 33.

<sup>30</sup> T. 4 February 2004 p.15.

<sup>31</sup> *The Queen v. Munyaneza* on 26 April 2007, p. K038-5486.

<sup>32</sup> *The Queen v. Munyaneza* on 26 April 2007, pp. K038-6327 - K038-6328.

<sup>33</sup> *The Queen v. Munyaneza* on 26 April 2007, p. K038-5496.

<sup>34</sup> T. 3 February 2004 pp.50-51.

62. However, the Chamber considers that the apparent contradiction is minor and does not cause prejudice to any of the Accused. Therefore, the Chamber denies the request to recall Witness QBQ for further cross-examination on this issue.

*iv) The Number of Times Witness QBQ saw Ntahobali at the Préfecture Office*

63. The Chamber does not consider that the witness' testimony on this issue is contradictory. Before this Chamber, Witness QBQ testified that the only time she saw Ntahobali was when he was allegedly transporting the *Interahamwe* and Nyiramasuhuko the very evening when they killed people and that she did not see him again because of the circumstances she was living under. The Witness stated that, "you must understand that we were afraid, we were not concentrating on what we were looking at. We just expected to die at any minute without knowing when."<sup>35</sup> Before the Canadian court, Witness QBQ testified that before they boarded the bus to Nyaruhengeri, Désiré [Munyaneza], other *Interahamwe*, Shalom [Ntahobali] and Ntakugengeka beat them.<sup>36</sup>

64. The Chamber considers that in the context of the questions put to the witness, it cannot be concluded that in her response before this Chamber, the witness said that she saw Ntahobali only once, that is, on the night Ntahobali allegedly transported Nyiramasuhuko and *Interahamwe* to the *préfecture* office. Witness QBQ was not specifically led or cross-examined on Ntahobali's presence at the time of boarding the refugees onto the buses to Nyaruhengeri. The request to cross-examine Witness QBQ on this issue is therefore denied.

*v) Whether or Not Witness QBQ saw Nyiramasuhuko in her Storeyed House Opposite the EER*

65. The Chamber does not consider that Witness QBQ's testimony on this issue is contradictory. Before this Chamber, in response to questions regarding taking of refugees from the *préfecture* office, the witness explained that she did not see Nyiramasuhuko again after the last time she saw her at the *préfecture* office.<sup>37</sup> In the Canadian court, Witness QBQ testified that she ended up at the EER, where she saw Nyiramasuhuko on the top part of her nearby storeyed house.<sup>38</sup>

66. In the Chamber's view, the context of the witness' testimony appears to have been different in that one testimony may relate to the *préfecture* office and the other to the EER. Therefore, it can not be concluded that in her response before this Chamber, the witness excluded any possibility of having seen Nyiramasuhuko again in another place after the last time she saw her at the *préfecture* office. The Chamber therefore denies the request to recall the witness on this issue.

*vi) Removal of Mule Refugees from the Préfecture Office During Witness QBQ's Stay There*

67. The Chamber notes that the Nyiramasuhuko Defence has relied on RCMP interview statements which were not attached to the Motion for this issue. The Chamber observes that due diligence would have required the Defence to file copies of these RCMP interview statements.

<sup>35</sup> T. 3 February 2004 p.10-11.

<sup>36</sup> The Queen v. Munyaneza on 26 April 2007. P. K038-5496 - K038-5497.

<sup>37</sup> T. 3 February 2004 pp.21-23.

<sup>38</sup> The Queen v. Munyaneza on 26 April 2007. P. K038-5488.

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68. Nonetheless and on the basis of the quoted excerpts of the RCMP interview in the Motion, the Chamber considers that there may be an apparent contradiction between the witness' testimony before this Chamber and her RCMP interview. Before this Chamber, the witness testified that male refugees were continuously being taken away from the *préfecture* office up until her departure for Rango<sup>39</sup>, while in the RCMP interview, she is alleged to have said that there were no male refugees at the *préfecture* office at the time Nyiramasuhuko allegedly made comments about the refugees.<sup>40</sup> However, the Chamber considers that the apparent contradiction is minor as the context of the witness' testimony before this Chamber and the RCMP interview statement may be different. The request to recall the witness on this issue is therefore denied.

*vii) Presence of a Fence Around the Préfecture Office in 1994*

69. The Chamber does not consider that Witness QBQ's respective testimonies on this issue before the Chamber and the Canadian court are contradictory. Before the Chamber, Witness QBQ testified that she did not remember if there was a perimeter fence around the *préfecture* office, explaining that it was some time ago, and that she was not at ease or at peace in those days.<sup>41</sup> In the Canadian court, the witness said that she and other refugees were chased away from the *préfecture* and they went to the EER, passing behind the *préfecture* where there was an old wire fence. They went through that wire fence, reached the tarmac road and then went to the EER schools. The situation was getting bad and the refugees returned to the *préfecture* office, going through the wire fence again.<sup>42</sup> The request to recall the witness on this issue is therefore denied.

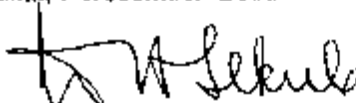
**FOR THE ABOVE REASONS, THE TRIBUNAL**

**GRANTS** the Motion in part;

**ORDERS** the recall of Prosecution Witness QBQ so that the Defence may cross-examine and the Prosecution may re-examine her exclusively on the specific contradictions concerning meetings at the *préfecture* office.

**DENIES** the Motion in all other respects.

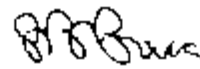
Arusha, 9 December 2008



William H. Sekulc  
Presiding Judge



Arlette Ramaroson  
Judge



Solomy Balungi Dossa  
Judge

[Seal of the Tribunal]

<sup>39</sup> T. 3 February 2004 p.41

<sup>40</sup> As quoted in para 38 of the Motion

<sup>41</sup> T. 3 February 2004 p. 50.

<sup>42</sup> The Queen v. Munyaneza on 26 April 2007, P. K038-5487.