



ICTR-98-42-T  
10-12-2008  
(13156-13144)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

13156  
Mump

OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Mr. Adama Dieng

Date: 9 December 2008

JUDICIAL RECORDS SERVICES  
RECEIVED

2008 DEC 10 A 10:35

**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, ALTERNATIVELY FOR ADMISSION OF DOCUMENTS INTO  
EVIDENCE OR FOR RECALL OF WITNESS TK**

**Office of the Prosecutor**

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

**Counsel for Nyiramasuhuko**

Ms. Nicole Bergevin  
Mr. Guy Poupard

**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 Defence for Nyiramasuhuko's "*Requête en exclusion de preuve ou, alternativement en versement de preuve de parties de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed confidentially on 13 October 2008 ("Nyiramasuhuko's Motion");

**CONSIDERING** the:

- i. "*Réponse de Arsène Shalom Ntahobali à la Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed on 14 October 2008 ("Ntahobali's Response");
- ii. "*Réponse de Sylvain Nsabimana à la Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed confidentially on 16 October 2008 ("Nsabimana'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 de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed confidentially on 17 October 2008 ("Kanyabashi's Response");
- iv. "Prosecutor's Response to the '*Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*'", filed confidentially on 17 October 2008 ("Prosecution Response");
- v. "*Réplique de la Requérante à la réponse du Procureur à sa requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*", filed confidentially on 20 October 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 TK testified before this Chamber in May 2002.<sup>1</sup> On 20 and 24 September and 1 October 2003, the Witness gave statements to the Canadian Police (RCMP), and testified as Witness C-22 in the trial of Désiré Munyaneza in Canada on 29, 30 May and

<sup>1</sup> 20, 21, 22, 23, 27 and 28 May 2002.

4, 5 June 2007. The instant Motion is filed pursuant to alleged contradictions in the Witness's testimonies before this Chamber and the Canadian court and statements before the ICTR Prosecution investigators and the RCMP. Attached to the Motion are Witness TK's statements before the RCMP and transcripts of her testimony in the Munyaneza trial. The transcripts of the statements before the RCMP bear track changes. On request of the Chamber, the Parties verified with the Canadian authorities that these documents were indeed copies of the final versions of the RCMP transcripts.<sup>2</sup>

### SUBMISSIONS OF THE PARTIES

#### *Nyiramasuhuko's Motion*

2. The Defence alleges that in her testimony during the Munyaneza proceedings, Witness TK has contradicted her testimony before this Chamber on several issues.

3. The Defence alleges an inconsistency regarding the death of the Witness's parents. The Defence alleges that in 1996, Witness TK stated to the ICTR Prosecution investigators that when she fled from Gikongoro to Butare, her parents had already been killed. Before the Canadian court, the Witness testified that her father survived the stay at Butare *préfecture* and is still alive. According to the Defence, this inconsistency casts doubt on the credibility of her testimony before this Chamber regarding the events at Butare *préfecture* and the alleged presence of Nyiramasuhuko when male family members were beaten and killed at the *préfecture*. Witness TK was confronted with the alleged contradiction between her testimony and the statement taken by ICTR Prosecution investigators on 12 November 1996. The Witness provided an explanation which the Defence does not find conclusive.

4. The Defence alleges an inconsistency regarding Witness TK's family members who left Gikongoro with her to go to Butare. Before this Chamber, Witness TK testified that she left Gikongoro together with her brothers, older sisters, nephews and nieces. She did not mention her parents. In the Munyaneza proceedings the Witness testified that she left Gikongoro with her brothers, an elder sister, her parents and other family members.

5. The Defence alleges an inconsistency regarding the start of fighting in Butare and the reasons for hiding at Benebikira convent. Before this Chamber, Witness TK testified that she was hiding with other people at the Benebikira convent because she saw houses burning. She further testified that the situation deteriorated the day after the landing of an airplane in Butare. Before the Canadian court, the Witness testified that the gunfire started immediately after the airplane landed; furthermore, the Witness did not mention that she hid at the convent because of burning houses, but because of the airplane and the subsequent shooting.

6. The Defence alleges an inconsistency regarding the presence of Witness TK's parents at the *préfecture* office and in Rango. In the statement taken by the ICTR Prosecution investigators in 1996, Witness TK indicated that her parents were killed before she departed from Gikongoro, and before this Chamber the Witness alleged that her parents died in 1994. Before the Canadian court, Witness TK allegedly testified to being with her father and mother when they were transferred from the Benebikira convent to the *préfecture* office and that her parents were still alive in 1997.

<sup>2</sup> *The Prosecutor v Nyiramasuhuko et al*, Case No. ICTR-98-42-T. Prosecutor's observation on the final version of the Desiré Munyaneza transcripts received from Canada relating to Defence motions to exclude evidence and/or recall witnesses, 19 November 2008. *The Prosecutor v Nyiramasuhuko et al*, Case No. ICTR-98-42-T, Informations à la chambre suite à la requête de Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties du témoignage, ou alternativement en rappel de témoin, filed on 17 November 2008.

7. The Defence alleges an inconsistency regarding Witness TK's identification of Pauline Nyiramasuhuko when the Witness arrived at the *préfecture*. Before this Chamber, the Witness testified that she saw Nyiramasuhuko for the first time when she arrived at the *préfecture* whereas in her statement before the RCMP in 2003, the Witness learned about Nyiramasuhuko when she overheard a conversation between Shalom Ntahobali and a woman at the *préfecture*.

8. The Defence alleges an inconsistency regarding Witness TK's testimony about the killing of men at Butare *préfecture*. Before this Chamber, the Witness alleged that all men who were brought from the convent to the *préfecture* offices with Witness TK were beaten up and subsequently killed. Before the Canadian court, she testified that her father had also been brought to the *préfecture* and beaten up, but that he survived.

9. The Defence alleges an inconsistency regarding Witness TK's testimony about when she saw the men for the last time at the *préfecture*. Before this Chamber, Witness TK said that she did not see any of the men alive after 5 p.m. on the day that they were abducted, whereas she testified before the Canadian court that after being beaten up, the men were released and joined the other refugees; later they were separated from the women and killed. According to the Defence, this suggests that the men were not killed at the *préfecture*. In addition, before this Chamber, Witness TK mentioned the arrival of only one vehicle at the *préfecture* office on the day she arrived there, whereas before the Canadian court she referred to three vehicles arriving in the evening at the *préfecture* office.

10. The Defence alleges an inconsistency regarding Witness TK's testimony about Prosecution Witness SJ. Before this Chamber, the Witness stated that she did not know the reasons why Witness SJ was travelling with her from Rwanda to Arusha in May 2002, whereas before the Canadian court, Witness TK admitted to knowing why this person was travelling with Witness TK to Arusha.

11. On the basis of these contradictions, the Defence requests the exclusion of the evidence of Witness TK; or, alternatively, the admission into evidence of extracts of Witness TK's testimony before the Canadian court referred to in the instant Motion; or, alternatively, the recall of Witness TK for further cross-examination on the basis of the Witness's testimony in the Canadian proceedings on the following points:

- Events at Benebikira convent: the persons accompanying Witness TK when she left Cyanika parish for the Benebikira convent; the persons who arrived with Witness TK at the convent; the moment when Witness TK decided to hide within the convent; the persons found with Witness TK at the convent;
- Events at the *préfecture* office: the persons who were escorted with Witness TK to the *préfecture* office; the men who came from the convent to the *préfecture* and who were beaten up behind the office; when and how the men who were taken behind the office were killed; the persons who had come to the *préfecture* office from the convent and who survived until the transfer to Rango; the persons who were transferred from the convent to the *préfecture* and who were still alive when the RPF arrived in July 1994;
- Surviving family members: Witness TK's family members who were still alive during the Witness's testimony before the Canadian court at the end of May and in early June 2007;
- Events concerning the landing of an airplane in Butare in 1994: when the Witness heard or saw the plane landing in Butare; when the Witness heard or saw gunfire or grenade explosions after the arrival of the airplane;

- Events concerning the Witness's arrival in Arusha in 2002: how the Witness found out that Witness SJ came to Arusha to testify before they travelled together to Arusha; how the Witness knew that Witness SJ was on the same airplane as her when they travelled to Arusha to testify; the identities of the other persons on the airplane that TK might have known; what the Witness knew about the trial for which she came to testify and what she knew about the accused.

12. The Defence further requests an order allowing the Prosecution to re-examine the Witness on the same points; prohibiting anyone from informing the Witness about the reasons for recall and prohibiting the Witness from being given the transcripts of her testimonies in Arusha and Canada; and prohibiting Witness TK from communicating with anyone about her past testimonies in Arusha prior to her testimony.

***Ntahobali's Response***

13. The Defence for Ntahobali supports the Motion and requests the Chamber to further cross-examine Witness TK on issues referred to in the Motion which affect Ntahobali's rights.

***Nsabimana's Response***

14. The Defence for Nsabimana recalls that Witness TK testified against Nsabimana with respect to the events at the *préfecture* office. The Defence requests that, if Witness TK is recalled, it be allowed to further cross-examine the Witness within the limits set by the Chamber.

***Kanyabashi's Response***

15. The Defence for Kanyabashi submits that if recalled, Witness TK's further testimony should be limited to the alleged contradictions listed in the Motion; she should not be allowed to introduce fresh evidence which may incriminate Kanyabashi or cause him any prejudice, given the advanced stage of the proceedings. The Defence requests to be allowed to cross-examine Witness TK if the Chamber grants the Motion.

***Prosecution Response***

16. The Prosecution opposes the request for exclusion of Witness TK's evidence and submits that the Defence has failed to show that the evidence causes prejudice to Nyiramasuhuko and therefore has not met the criteria for exclusion of evidence.

17. The Prosecution opposes the request to introduce into evidence the extracts of Witness TK's testimony during the Munyaneza trial. It submits that the admission into evidence of the extracts would be unfair to the Witness and would not assist the Chamber in its determination of the guilt or innocence of Nyiramasuhuko.

18. The Prosecution opposes the request to recall Witness TK for cross-examination. It submits that, if there are any at all, the inconsistencies between the Witness's testimonies before this Chamber and the Canadian court are minor and do not prejudice Nyiramasuhuko's defence or affect the Witness's credibility. Therefore, the Defence has failed to show that the requirements for recall of a witness are met.

19. Regarding the request to cross-examine Witness TK on the alleged death of her parents, the Prosecution submits that the Witness's statement to the ICTR Prosecution investigators in 1996 is not evidence. Furthermore, the Defence had ample opportunity in

2002 to cross-examine the Witness on any discrepancies between the statement and the examination in chief, which the Defence did at length with regard to her statements to the ICTR Prosecution investigators. The Prosecution points out that any comparison exercise should occur between the testimony of the Witness before this Trial Chamber and her testimony before the Canadian court.

20. The Prosecution submits that before this Trial Chamber, the Witness was asked in a general manner to relate whether members of her family survived the war, whilst the question in the Munyaneza trial required the Witness to relate whether members of her family were alive at a particular moment, that is, after the RPF freed them at Rango forest. There is therefore no contradiction in the testimonies. Finally, in the Munyaneza trial, Witness TK explained the alleged inconsistency and stated that when she was referring to her parents, in Rwandese culture, as the last born, she had spent so many years living with her elder sister, that she considered this sister and her husband family as her parents. It is this sister and her children and husband who were killed during the events and to whom she was referring when she said her parents were killed.

21. The Prosecution submits that the Defence had every opportunity to cross-examine Witness TK on whether or not her parents accompanied her on the trip from Gikongoro to Butare, but did not do so. The transcripts of the Munyaneza trial do not yield anything new in this regard.

22. The Prosecution submits that there is no contradiction concerning the Witness's testimony about where and when the Witness hid in the Benebikira convent. In any event, a witness cannot be recalled for every small detail given in another arena.

23. The Prosecution submits that the alleged testimony of the Witness in the Munyaneza trial that her parents were with her in Rango and still alive on the day of testimony on 4 June 2007 is not inconsistent with the Witness's testimony before this Chamber, where the Witness never denied that her parents were with her at the *préfecture* office and at Rango.

24. According to the Prosecution, there is no inconsistency regarding the identification of Nyiramasuhuko. Before this Trial Chamber, the Witness was asked how she came to know Pauline Nyiramasuhuko. In the Munyaneza trial, the Witness was responding to the question of how she came to know Shalom Ntahobali. It is therefore misleading to assert that the identification of Pauline Nyiramasuhuko was different when the question at the Munyaneza trial was not even directed to knowledge of Nyiramasuhuko.

25. The Prosecution submits that the Defence's allegation that before this Chamber, the Witness did not mention that her father was among the men who were beaten up and killed at the *préfecture*, whereas she testified about this event before the Canadian court, does not amount to an inconsistency. It is a mere omission.

26. The Prosecution submits that there is no contradiction regarding the Witness's testimony about the beating up and killing of the men at the *préfecture* office. The Witness testified both before this Trial Chamber and at the Munyaneza trial that the men were taken away and beaten and then later killed. During the Munyaneza trial, the Witness was asked more detailed questions, for example about vehicles present at the *préfecture*, and answered accordingly. The Defence's allegation that the Witness indicated before the Canadian court that the men were not killed at all or were not killed at that place is mere speculation.

27. The Prosecution contends that there is no inconsistency concerning the Witness's knowledge of Witness SJ between the evidence at the Munyaneza trial and before this

Chamber. Before this Chamber, the Witness was not quite sure about Witness SJ's family name; contrary to the Defence allegation, the Witness did not state during the Munyaneza trial that she had a conversation with Witness SJ about this trial. The Witness simply said that she knew that Witness SJ testified in Arusha because they travelled together.

*Nyiramasuhuko's Reply*

28. The Defence submits that its request for exclusion of the said testimony is justified. Witness TK's contradictions are serious and affect her credibility, which has an impact on the determination of the guilt or innocence of the accused.

29. Regarding its alternative request to recall Witness TK, the Defence submits that the Witness's contradictions are not minor; the integrity of the proceedings would be affected seriously if the Chamber did not take into account the listed contradictions while assessing Witness TK's credibility.

30. The Defence states that it could not have cross-examined Witness TK about her parents' death in Gikongoro, because there were no contradictions between TK's testimony before this Chamber and prior statements in this regard. The Defence alleges that contrary to the Prosecution's allegation, it cross-examined Witness TK about the members of her family with whom she fled from Gikongoro to Rutare.

31. The Defence states that it seeks to recall and cross-examine Witness TK about her testimony that she was hiding at the Benchikira convent because she saw houses being burned, not because her house had been burned as suggested by the Prosecution's title on this issue in reply to the Motion.

**DELIBERATIONS**

*Exclusion of Evidence*

32. Exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused.<sup>3</sup> An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witness's testimony.<sup>4</sup> In the Chamber's view, the alleged contradictions, even if established, do not warrant the exclusion of the Witness's testimony under the circumstances of this Motion. The Chamber therefore denies the Motion for exclusion of the evidence of Witness TK and shall now address the alternative requests in the Motion.

*Admission of Documents into Evidence*

33. 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 shall admit any relevant evidence which it deems to have probative value. At the admissibility stage, the moving party needs to show only *prima facie* that the document is relevant and has probative value.<sup>5</sup> The probative value of a document also

<sup>3</sup> *Prosecutor v. Karemera, et al., Case No. ICTR-98-44-T*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness's Testimony, Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, 20 April 2006, para. 8.

<sup>4</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.

<sup>5</sup> *The Prosecutor v. Bagosora et al., Case No. ICTR-98-41*, Decision on Ntahakuze Motion to Deposit Certain United Nations Documents, 19 March 2007, paras. 2,3.

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.<sup>6</sup>

34. The Chamber notes that the Defence requests to introduce the statements of Witness TK made before the Canadian police (RCMP) on 20 and 24 September and 1 October 2003. The Chamber also notes that the transcripts of the said statements disclosed by the Parties contain track changes and do not bear the Witness's signature. Therefore, the Chamber considers that even if the alleged witness statements could be relevant to the case of Nyiramasuhuko, they lack sufficient indicia of reliability for proving their authenticity. For these reasons, the Chamber finds the statements to be inadmissible under Rule 89 (C).<sup>7</sup> Moreover, introducing statements 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 the right to a fair trial under Articles 19 and 20 of the Statute.<sup>8</sup>

35. With respect to the transcripts of Witness TK's testimony in the Munyanza trial, the Chamber considers that they may possess sufficient indicia of reliability. Nevertheless, and as stated above, introducing the transcripts of a witness's testimony to challenge his credibility without hearing that witness on those issues would run contrary to the spirit of the Statute and in particular, to the principle of the right to a fair trial under Articles 19 and 20 of the Statute.<sup>9</sup> For these reasons the Chamber finds inadmissible the transcripts of Witness TK's testimony made in the Munyanza trial under Rule 89 (C).

36. The Chamber will now address the alternative request to recall Witness TK.

**Recall of Witness TK**

37. 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>10</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's 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

<sup>6</sup> *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. See also *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-1, Decision on Kanyabashi's Motion to Re-Open his Case and to Recall Prosecution Witness QA, 2 July 2008, para. 29

<sup>7</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-1, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89(C), 25 May 2006, para. 4.

<sup>8</sup> *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-1, 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. 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.

<sup>9</sup> *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-1, 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. 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.

<sup>10</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Recall and Further Cross-Examination of Prosecution Witness QCB, 20 November 2008, par. 35. Also, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-1, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBO and QY For Additional Cross-examination, 3 March 2006, para. 32.



is no need for the witness's explanation of the inconsistency, because it is minor or its nature is self-evident, then the witness will not be recalled.<sup>11</sup>

38. The Chamber notes that Witness TK testified before the Chamber in May 2002; that Witness TK gave statements to the RCMP in September and October 2003; and that Witness TK testified in the trial against Désiré Munyaneza in May and June 2007. Therefore, the statements and evidence originating from Canada could not have been presented during Witness TK's testimony. Nevertheless, as a preliminary matter, 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.

*Testimony about the death of Witness TK's parents*

39. The Chamber considers that any apparent contradictions between a witness's statement made to the ICTR Prosecution investigators and which is not repeated during the witness's testimony before the ICTR, and a testimony given before another court does not prejudice the accused and therefore cannot justify a recall. The Chamber therefore denies the request to recall and cross-examine Witness TK on the alleged inconsistencies between her statement to the ICTR Prosecution investigators where she stated that her parents were already dead when she fled Gikongoro and her testimony before the Canadian court that her father was still alive. In addition, the Chamber notes that the Defence could have cross-examined the Witness before this Chamber in 2002 regarding her 1996 Statement on the specific issue of the death of her parents but chose not to do so.

40. Witness TK's respective testimonies before this Chamber and the Canadian court do not appear contradictory regarding the death of her parents. Witness TK testified before this Chamber that she lost her parents in consequence of the events of 1994. She was not asked and did not testify about the specific circumstances or time of their deaths.<sup>12</sup> Before the Canadian court, the Witness testified that her father was still alive when they were brought to Rango in May 1994 and that he survived the war.<sup>13</sup> The Witness also testified that her father died later, without detailing the specific circumstances under which he died.<sup>14</sup> Furthermore, the Witness stated before the Canadian court that, according to Rwandese culture, she considered her elder sister and this sister's husband, with whom she had lived for an extended period of time, as her parents, thus giving an explanation for any apparent inconsistency.<sup>15</sup> For these reasons, the Chamber denies the request to recall and cross-examine Witness TK on this issue.

*Testimony about Witness TK's family members with whom she fled Gikongoro to Butare*

41. Witness TK's respective testimonies before this Chamber and the Canadian court do not appear contradictory regarding the family members with whom she fled to Butare. Before this Chamber, Witness TK did not mention her parents as being among the family members who accompanied her when she fled to Butare.<sup>16</sup> Before the Canadian court, she testified that her parents went with her to Butare.<sup>17</sup> The Chamber observes that before this Chamber,

<sup>11</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's motion to re-open his case and to re-call Prosecution Witness QA, 2 July 2008, para. 33.

<sup>12</sup> Testimony before this Chamber, T. 20 May 2002, p. 108

<sup>13</sup> Testimony before the Canadian court T. 4 June 2007, K038-7762, 7763

<sup>14</sup> Testimony before the Canadian court T. 6 June 2007, K038-7865

<sup>15</sup> Testimony before the Canadian Court, T. 4 June 2007, K038-7762, 7763 and 7830, 7832

<sup>16</sup> Testimony before this Chamber, T. 23 May 2002, pp. 57-58

<sup>17</sup> Testimony before the Canadian Court, T. 29 May 2007, K038-7693, 7694

Witness TK was not asked specifically about whether or not her parents accompanied her to Butare, and so the Witness did not deny the presence of her parents in Butare. This is a mere omission and the failure to put this to the Witness does not amount to a prejudice against the Accused which would warrant the recall of the Witness. Therefore, the Chamber denies the request to recall and cross-examine Witness TK on this issue.

*Testimony about the start of fighting in Butare and reasons for hiding at Benebikira convent*

42. Witness TK's respective testimonies before this Chamber and the Canadian court may appear inconsistent regarding the exact time when the situation in Butare worsened. Witness TK testified before this Chamber that the day after the landing of the airplane, the situation worsened and she started to hear shots being fired.<sup>18</sup> Before the Canadian court, the Witness stated that she heard the start of the gunfire later the same evening that the airplane landed.<sup>19</sup> The Chamber considers that this discrepancy is minor and does not amount to an inconsistency which failure to put to the Witness would prejudice the Accused and warrant the recall of the Witness. Therefore the Chamber denies the request to recall and cross-examine the Witness on this issue.

43. Witness TK's respective testimonies before this Chamber and the Canadian court do not appear to be inconsistent regarding the reason why the Witness hid at the Benebikira convent. In both testimonies, Witness TK testified that the killing of Tutsi was the main reason for her hiding at the convent.<sup>20</sup> Before this Chamber, Witness TK added that she hid because she saw houses burning, but she did not give such detail before the Canadian court. The Chamber considers that Witness FAI's more detailed testimony before this Chamber does not amount to any inconsistency. For these reasons, the Chamber denies the request to recall and cross-examine Witness TK on this issue.

*Testimony about the presence of Witness TK's parents at the préfecture office and at Rango*

44. As noted above, the Chamber considers that any apparent contradictions between a witness's statement made to the ICTR Prosecution investigators, which is not repeated during the witness's testimony before the ICTR, and a testimony given before another court does not prejudice the accused and therefore cannot justify a recall. In addition, the Chamber notes that the Defence could have cross-examined the Witness before this Chamber in 2002 regarding her 1996 Statement on the specific issue of the death of her parents but chose not to do so. The Chamber therefore denies the request to recall and cross-examine Witness TK on the alleged inconsistencies between her statement to the ICTR investigators, where she stated that her parents were killed before departing from Gikongoro, and her testimony before the Canadian court that, amongst other people, she was with her parents when being transferred from the Benebikira convent to the *préfecture* office.

45. Witness TK's respective testimonies before this Chamber and in the Canadian court do not appear to be inconsistent regarding the presence of her parents at the *préfecture* office and at Rango. Witness TK testified before this Chamber that all the people with her at the convent were taken to the *préfecture*.<sup>21</sup> The Witness was not asked and did not testify whether or not her parents were among those persons. Before the Canadian court, when

<sup>18</sup> Testimony before this Chamber, T. 27 May 2002, p. 88 and T. 20 May 2002, pp. 25-27

<sup>19</sup> Testimony before the Canadian Court, T. 29 May 2007, K038-7700 and Testimony before the Canadian Court, T. 29 May 2007, K038-7705, 7706 and T. 29 May 2007, K038-7709

<sup>20</sup> Testimony before this Chamber T. 20 May 2002, pp. 25-27 and Testimony before the Canadian Court, T. 29 May 2007, K038-7705, 7706

<sup>21</sup> Testimony before this Chamber, T. 20 May 2002, p. 108 and T. 23 May 2002, pp. 57-58 and T. 20 May 2002, p. 30

Witness TK was specifically asked about her father and mother, she confirmed her mother's presence at the *préfecture* and her father's presence both at the *préfecture* and at Rango.<sup>22</sup> The Chamber considers that the omission to mention the presence of her parents at the *préfecture* or Rango without having been asked about it does not amount to an inconsistency. Therefore, the Chamber denies the request to recall and cross-examine the Witness on these issues.

*Testimony about Witness TK's knowledge of Nyiramasuhuko*

46. Witness TK's testimony before this Chamber and the statement before the RCMP about how she identified Pauline Nyiramasuhuko at the *préfecture* office do not appear to be contradictory. Before this Chamber, the Witness testified that on the day she arrived at the *préfecture* office, people showed her Nyiramasuhuko, whom the Witness had not known previously.<sup>23</sup> In the portion of the RCMP statement referred to by the Defence, the Witness said that she overheard a conversation between Shalom Ntahobali and a woman at the *préfecture*, from which she first learned the identities of Shalom Ntahobali and Nyiramasuhuko. The Witness does not indicate the exact date of this event.<sup>24</sup> The Chamber considers that the testimony and statement appear to have been given in answer to questions within different contexts and therefore do not seem to be contradictory. Moreover, and as stated above, the statements before the RCMP lack sufficient indicia of reliability and their content should therefore be assessed with caution. Therefore, the Chamber denies the request to recall and cross-examine Witness TK on this issue.

*Testimony about killing of men at the préfecture office*

47. Witness TK's respective testimonies before this Chamber and in the Canadian court do not appear contradictory regarding the alleged beating and killing of men at Butare *préfecture*. Before this Chamber, the Witness testified that the men who were brought from the convent to the *préfecture* office with Witness TK were beaten up and subsequently killed. The Witness was neither asked whether her father was among the men who were beaten up, nor was she asked whether any of the men survived the beating. The Witness did not give any evidence in this regard.<sup>25</sup> Before the Canadian court, when questioned specifically about her father, the Witness stated that her father was among the men who were beaten at the *préfecture*, but that he survived.<sup>26</sup> While the Witness's testimony before the Canadian court may be more detailed, the mere omission to mention the fate of her father without having been asked about it does not amount to an inconsistency. The failure to put this omission to the Witness does not amount to a prejudice against the Accused which would warrant the recall of the Witness. For these reasons, the Chamber denies the request to recall and cross-examine Witness TK on this issue.

*Testimony about when the men were killed at the préfecture office and the number of vehicles*

48. Witness TK's respective testimonies before this Chamber and the Canadian court do not appear to be contradictory regarding when and where the killing of these men took place and about the number of cars arriving at the *préfecture* that day. Before this Chamber,

<sup>22</sup> Testimony before the Canadian Court, T. 29 May 2007, K038-7723 and T. 4 June 2007, K038-7820, 7821 and T. 4 June 2007, K038-7822

<sup>23</sup> Testimony before this Chamber, T. 20 May 2002, p. 40

<sup>24</sup> Statement of Witness TK, K038-7644, 7645

<sup>25</sup> Testimony before this Chamber T. 20 May 2002, pp 38, 39

Testimony before this Chamber, T. 20 May 2002, p. 43-44

<sup>26</sup> Testimony before the Canadian court, T. 4 June 2007, K038-7821 and Testimony before the Canadian court T. 4 June 2007, K038-7821

Witness TK testified that she saw these men around 5 p.m. on the day they were abducted, but that the next morning she found that they had been killed. When questioned, the Witness clarified that the men were beaten up earlier that day, but that she did not see them again after 5 p.m.<sup>27</sup> Before the Canadian court, Witness TK stated that after the men had been beaten they returned to the refugees, but in the evening of the same day, they were separated from the women and killed. The Witness did not deny that the men were killed at the *préfecture* office.<sup>28</sup> Furthermore, before this Chamber, the Witness was not asked about the number of vehicles arriving at the *préfecture* that evening, and before the Canadian court, the Witness mentioned the arrival of three vehicles, without indicating whether the men were loaded onto these vehicles.<sup>29</sup> The Chamber considers that in both testimonies the Witness stated that the men were first beaten and killed during the evening of the same day. The Defence's assertion that, according to Witness TK's testimony before the Canadian court, the killing took place at a location other than the *préfecture* is mere speculation. Finally, the mere omission to mention before this Chamber the number of vehicles arriving at the *préfecture* without having been asked about it, does not amount to an inconsistency. The failure to put this omission to the Witness does not amount to a prejudice against the Accused which would warrant the Witness's recall. For these reasons, the Chamber denies the request to recall and cross-examine Witness TK on these issues.

*Witness TK's knowledge of Witness SJ and why she travelled to Arusha*

49. Witness TK's respective testimonies before this Chamber and in the Canadian court appear to be inconsistent regarding Witness TK's testimony about her knowledge of Prosecution Witness SJ and the reasons why Witness SJ travelled to Arusha. Before this Chamber, the Witness testified that she travelled in the same airplane as Witness SJ to Arusha in 2002, but that she did not know the reason why Witness SJ was travelling with her.<sup>30</sup> Before the Canadian court, Witness TK appears to have stated that she knew that Witness SJ had testified in Arusha because they had been travelling together to Arusha and stayed at the same place.<sup>31</sup> The Witness did not specify how and when she learned that Witness SJ came to testify to Arusha; nor did she say that she had a conversation with Witness SJ before her testimony. Any apparent discrepancy between the Witness's testimonies before this Chamber and in the Canadian court in this regard does not amount to an inconsistency which failure to put to the Witness would prejudice the Accused and warrant the recall of this Witness. For these reasons, the Chamber denies the request to recall and cross-examine Witness TK on these issues.

50. Finally the Chamber considers that the Defence has failed to give any reasons for recalling and cross-examining Witness TK on the following issues :

- the persons accompanying Witness TK when she left Cyanika parish for the Benchikira convent;
- the persons who arrived with Witness TK at the convent;
- the persons who had come to the *préfecture* office from the convent and who survived until the transfer to Rango;
- the persons who were transferred from the convent to the *préfecture* and who were still alive when the RPF arrived in July 1994;

<sup>27</sup> Testimony before this Chamber, T. 20 May 2002, p. 43-44  
<sup>28</sup> Testimony before the Canadian court, T. 29 May 2007, K038-7730, 7731  
<sup>29</sup> Testimony before the Canadian court, T. 29 May 2007, K038-7730, 7731  
<sup>30</sup> Testimony before this Chamber, T. 20 May 2002, p. 123, 124  
T. 21 May 2002, pp. 83-86 (ICS)  
<sup>31</sup> Cited from the Motion, para. 77

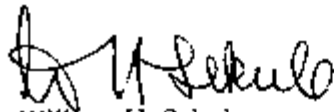
- how the Witness found out that Witness SJ came to Arusha to testify before they travelled together to Arusha;
- how the Witness knew that Witness SJ was in the same airplane as her when they travelled to come to Arusha to testify;
- the identities of the other persons in the airplane that Witness TK might have known;
- what the Witness knew about the trial for which she came to testify and what she knew about the accused;

51. The Chamber therefore denies the request to recall and cross-examine Witness TK on the issues mentioned above.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DENIES** the Motion in its entirety.

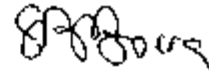
Arusha, 9 December 2008



William H. Sekule  
Presiding Judge



Arlente Ramaroson  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]