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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: 14 January 2009

The PROSECUTOR v. Joseph KANYABASHI

Case No. ICTR-96-15-T

The PROSECUTOR v. Sylvain NSABIMANA

Case No. ICTR-97-29-T

Joint Case No. ICTR-98-42-T

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**DECISION ON KANYABASHI'S AND NSABIMANA'S MOTIONS FOR RECALL
OF PROSECUTION WITNESS FAI**

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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 Ramarosan and Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the

- i. “*Requête de Joseph Kanyabashi afin que le témoin FAI soit rappelé*”, filed confidentially on 13 November 2008 (“Kanyabashi’s Motion”);
- ii. “*Requête de Sylvain Nsabimana aux fins de rappel du témoin FAI en vertu des articles 54 et 73 du règlement*”, filed confidentially on 3 December 2008 (“Nsabimana’s Motion”);

CONSIDERING the:

- i. “*Réponse de Sylvain Nsabimana à la ‘Requête de Joseph Kanyabashi afin que le témoin FAI soit rappelé’*”, filed confidentially on 20 November 2008 (“Nsabimana’s Response to Kanyabashi’s Motion”);
- ii. “Prosecutor’s Response to the ‘*Requête de Joseph Kanyabashi afin que le témoin FAI soit rappelé*’”, filed on 21 November 2008 (“Prosecution’s Response to Kanyabashi’s Motion”);
- iii. “Alphonse Nteziryayo’s Response to the ‘*Requête de Joseph Kanyabashi afin que le témoin FAI soit rappelé*’”, filed confidentially on 21 November 2008 (“Nteziryayo’s Response to Kanyabashi’s Motion”);
- iv. “*Réplique de Joseph Kanyabashi à la Réponse du Procureur à sa Requête afin que le témoin FAI soit rappelé*”, filed confidentially on 25 November 2008 (“Kanyabashi’s Reply”);
- v. “*Réponse de Joseph Kanyabashi à la ‘Requête de Sylvain Nsabimana aux fins de rappel du témoin FAI en vertu des articles 54 et 73 du règlement’*”, filed confidentially on 4 December 2008 (“Kanyabashi’s Response to Nsabimana’s Motion”);
- vi. “Prosecutor’s Response to the ‘*Requête de Sylvain Nsabimana aux fins de rappel du témoin FAI en vertu des articles 54 et 73 du règlement*’”, filed on 5 December 2008 (“Prosecution’s Response to Nsabimana’s Motion”);
- vii. “*Réplique de Sylvain Nsabimana à la Réponse du Procureur à sa Requête aux fins de rappel du témoin FAI en vertu des articles 54 et 73 du règlement*”, filed confidentially on 10 December 2008 (“Nsabimana’s Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

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

INTRODUCTION

1. Prosecution Witness FAI gave eight statements to the Rwandan authorities between 1997 and 2000. On 7 December 2000, the Rwandan Prosecution finalised its "Record of the End of Investigation" concerning, among others, Witness FAI. Prosecution Witness FAI testified before this Chamber between 30 October and 6 November 2002. On 13 November and 3 December 2008, Kanyabashi and Nsabimana respectively filed confidential Motions for the recall of Witness FAI to cross-examine him on issues relating to his statements made before the Rwandan authorities. The statements are annexed to the Motions.

SUBMISSIONS OF THE PARTIES

Kanyabashi's Motion

2. The Defence requests to recall Prosecution Witness FAI for further cross-examination. Alternatively, the Defence requests to exclude Witness FAI's testimony if Witness FAI does not appear before this Court despite the Chamber's decision for recall.

3. The Defence submits that after Witness FAI's arrest in Rwanda, the Witness made several confessions and statements that were not communicated to the Defence before the Witness's testimony, despite several requests to this effect. The Defence closed its cross-examination before receiving the Witness's prior statements. Approximately five years after Witness FAI's testimony, eight statements made to Rwandan authorities were disclosed by the Prosecution to the Defence.¹

4. The Defence has also obtained copies of the transcripts of Witness FAI's testimony before the Canadian Court in the Munyaneza trial in January and February 2007. On 6 November 2008, the Prosecution disclosed a record concerning the end of investigation of the Rwandan authorities dated 7 December 2000 with regard to Witness FAI, among others.

5. The Defence submits that during his cross-examination before this Chamber, Witness FAI gave very little detail about the precise facts surrounding the charges against him in Rwanda and did not mention the criminal activities that were discussed in four of his statements to the Rwandan authorities.

6. The Defence requests to cross-examine Witness FAI regarding his alleged killing of a girl. During his testimony before this Chamber, Witness FAI denied having stabbed a young girl. However, in Rwanda he was accused of killing and organising the assassination of a girl. Furthermore, Witness FAI admitted before the Rwandan authorities to having pulled the hair of an unconscious girl who had been attacked and then removing her eyes with a knife. In another statement, Witness FAI spoke again about the murder of the girl with a knife. In his 20 December 2000 statement before the Rwandan authorities, Witness FAI did not deny having torn out the eyes of a girl. In his 20 November 2000 statement, Witness FAI gave another version of the assassination of this girl stating that she was killed while he was on the scene in the company of people he was commanding.

¹ Statements dated 5 August 1997, 20 January 1998, 9 February 1999, 15 December 1999, 27 January 2000; statement transcribed on 27 October 2000, but undated and unsigned; statements dated 20 November 2000 and 20 December 2000.

7. The Defence requests to cross-examine Witness FAI regarding the attempted murder of a woman, a crime he was accused of committing by the Rwandan authorities. On 5 August 1997, Witness FAI stated that he delivered this woman to people in Bugesera who then threw her into a pit. On 20 November 2000, he was formally charged with failing to care for that woman and Witness FAI stated that he accepted that he had refused to give her medical treatment.

8. The Defence requests to cross-examine Witness FAI on the killing of a person during the Karama attack. According to the Defence, in his statement of 1998, Witness FAI admitted to having probably killed at least one person during the Karama attack.

9. The Defence requests to cross-examine Witness FAI on his involvement in large-scale massacres in 1994. According to the Defence, before this Chamber, the Witness attempted to minimise his role in the crimes committed in Rwanda. Before this Chamber, the Witness admitted to having participated in two attacks in 1994, one at Rwezamenyo and one at Karama. Before the Rwandan authorities, Witness FAI admitted to having also participated in attacks against Tutsi refugees at Migina and in the hills of Nyamure, and to having launched an attack at Cyimyuzo.

10. The Defence requests to cross-examine Witness FAI on how many victims resulted in the large-scale massacres in which he was involved. According to the Defence, Witness FAI alleged before this Chamber that approximately ten persons were killed during the Rwezamenyo attack and approximately 100 persons were killed during the Karama attack. In a statement before the Rwandan authorities in 1999, Witness FAI said that approximately 15,000 persons were killed at Rwezamenyo, approximately 10,000 at Nyamure and approximately 6,000 at Karama.

11. The Defence requests to cross-examine Witness FAI on other crimes for which the Witness admitted responsibility before the Rwandan authorities and about which the Defence was unaware when it cross-examined Witness FAI. According to the Defence, in his statement of 27 January 2000, Witness FAI did not deny the accusations that he had killed persons at CND and Kinyihira or that he had delivered girls to be sex slaves. But Witness FAI changed his statement on 20 November 2000, denying the latter accusation. In the same statement, Witness FAI admitted to having supplied fuel that was used to set fire to two houses. In his 9 February 1999 statement, Witness FAI admitted to having used the ambulance belonging to the Health Centre to transport soldiers who were coming to kill Tutsi refugees.

12. The Defence requests to cross-examine Witness FAI about acts he imputed to Kanyabashi during his testimony before this Chamber. According to the Defence, Witness FAI testified to having been present at a meeting at the Butare *préfecture* office during which Kanyabashi allegedly said that the search for the accomplices of the enemy in the forests had to continue, that this was being done with the participation of youth who had received military training, and that the training should be extended to other *communes*. In addition, Witness FAI claimed that the Civil Defence had two goals: to help the military at the front and to participate in the massacre of Tutsi. The Witness also stated that there was no difference between the young trainees and the *Interahamwe*. However, in his 15 December 1999 statement to the Rwandan authorities, Witness FAI stated that this meeting was called to encourage youth to receive military training. He added that, at that time, the massacres

were almost finished and the emphasis was more on war operations. In this statement, Witness FAI did not mention Kanyabashi's speech.

13. The Defence requests to cross-examine Witness FAI about his interests in incriminating the Accused in the Butare trial. According to the Defence, Witness FAI attempted to minimise his crimes before this Chamber and falsely transferred his own responsibility onto the accused of the Butare trial. In doing so, he could hope for a reduced sentence or better treatment in prison, because the Rwandan authorities would like the accused at the ICTR to be found guilty. According to the Defence, Witness FAI's testimony should therefore be assessed by the Trial Chamber as accomplice evidence.

14. The Defence asserts that while Witness FAI denied before this Chamber that he was testifying in the hope of receiving a light punishment, he asked for clemency in his 5 August 1997 and 15 December 1999 statements. The Defence submits that Witness FAI has already shown himself to be someone who has attempted to convert his testimony into favours. During his testimony before the Canadian court, he admitted to having written to the Canadian authorities asking them to intervene in his favour so as to improve his living conditions. On another occasion, he wrote to the Canadian authorities to request the best food, notably Rwandan dishes, and to ask for their intervention so that he could return to the prison where he was normally detained.

15. Finally, the Defence notes that they were recently informed that Witness FAI was convicted by a *Gacaca* court in Rwanda. The Defence is presently attempting to obtain this file and notes that this Motion does not take into account any further issues which may be raised by the judgement.

Nsabimana's Response to Kanyabashi's Motion

16. The Defence for Nsabimana supports the Motion and requests to be allowed to cross-examine Witness FAI.

Prosecution's Response to Kanyabashi's Motion

17. The Prosecution opposes the Motion. It submits that the Trial Chamber has heard sufficient evidence from Witness FAI with respect to the crimes committed by him so as to enable the Chamber to properly form a view as to his credibility and the weight that should be attached to his testimony.

18. The Prosecution submits that before this Chamber, the Witness admitted to his complicity in the girl's death in the same manner as in his statements before the Rwandan authorities. Before the Rwandan authorities, FAI appeared to admit to having taken out the eyes of a girl without specifying who this girl was. Witness FAI also admitted to having handed over a woman to the people of Bugesera. However, Witness FAI did not admit to having killed either the girl or the woman with his own hands.

19. The Prosecution submits that Witness FAI was not under any obligation to tell the Chamber about his assumption that he may have killed at least one person during the attack on Karama and that this kind of assumption would not constitute an inconsistency with the evidence before this Chamber.

20. Contrary to the Defence submission, Witness FAI did not attempt to minimise his role in the large-scale attacks at Rwezamenyo and Karama. The Witness admitted before this Chamber to having taken part in those killings. Nothing would be gained from recalling the Witness on the numbers of persons killed at both locations even if the numbers given by the Witness before this Chamber and before the Rwandan authorities may differ. Recalling Witness FAI on this issue would lead the Chamber to an enquiry into those massacres, which is not within the Chamber's purview.

21. Concerning the request to cross-examine Witness FAI about other crimes allegedly committed by Witness FAI, the Prosecution submits that Witness FAI appeared before this Chamber as a witness and not as an accused and that the evidence led was not intended to detail all the criminal acts he may have committed.

22. The Prosecution submits that the Defence had the opportunity to cross-examine Witness FAI on why he did not refer to Kanyabashi's utterances at the said meeting in his four statements to the ICTR investigators, which were disclosed to the Parties in unredacted form on 18 September and 1 October 2001. The Prosecution further submits that Witness FAI never denied before the Rwandan authorities or at the Munyaneza trial that Kanyabashi uttered these words during the said meeting. Therefore there is no contradiction between the Witness's testimony before this Chamber and his statements before the Rwandan and Canadian authorities.

23. The Prosecution submits that Witness FAI's testimony does not qualify as accomplice evidence. The Witness has not recounted any offence that he committed alongside Kanyabashi which would suggest that he became Kanyabashi's accomplice. In any event, even if accomplice evidence should be considered with caution, it is permissible to rely on the testimony of those who were partners in crime with persons being tried before it.

Nteziryayo's Response

24. The Defence for Nteziryayo supports the Motion and agrees that the disclosure of Witness FAI's statements to the ICTR was delayed. The Defence requests to cross-examine Witness FAI on the issues concerning Witness FAI's involvement in various crimes as set out in the Motion.

Kanyabashi's Reply

25. The Defence for Kanyabashi submits that any documents of significant probative value may warrant the recall of a witness, even if they do not contain any inconsistency with the Witness's testimony. According to the Defence, the crimes committed by Witness FAI directly affect his credibility and the Defence could only conduct a limited cross-examination because it did not know the content of Witness FAI's statements to the Rwandan authorities.

Nsabimana's Motion

26. The Defence for Nsabimana requests to recall Witness FAI and to cross-examine him on a meeting at Butare *préfecture*. Before this Chamber, Witness FAI testified that the issues discussed in the first meeting he attended in Butare *préfecture* were: the examination of the government programme to massacre Tutsi who were described as RPF accomplices; the reports from the various *bourgmestres* on the progress of the programme in their *communes*;

the promise of aid from the *préfet* to the *bourgmestre* of Muyira; and the military training programme for youth proposed by *bourgmestre* Kanyabashi and approved by *préfet* Nsabimana. According to the Defence, in his statements before the Rwandan authorities, the Witness did not mention any of these alleged issues. Instead, Witness FAI said in his 15 December 1999 and 20 December 2000 statements before the Rwandan authorities that the first meeting he attended in Butare *préfecture* concerned the recruitment of youth to undergo military training at Ngoma because, at this time, the massacres had practically ended and the emphasis was being put on war operations.

27. The Defence requests to cross-examine Witness FAI about the circumstances of his return to Butare. Before this Chamber, the Witness testified that he returned to Butare after a person gave him a written message from the *préfet* asking him to rejoin his service and return to Butare. In his 20 December 2000 statement before the Rwandan authorities, Witness FAI alleged instead that he returned to Butare after having received a phone call from the *préfet*. In his 9 February 1999 statement before the Rwandan authorities and in his testimony in Canada on 2 February 2007, Witness FAI said that he returned after having received a telegram from *préfet* Nsabimana. These contradictory testimonies raise doubts about whether the Witness was asked to rejoin his service or to return to Butare, and about whether he actually attended the incriminating meetings with Nsabimana. It further indicates that Witness FAI seeks to attribute facts to Nsabimana, which the latter categorically denies.

Kanyabashi's Response to Nsabimana's Motion

28. The Defence for Kanyabashi supports Nsabimana's Motion and asks to be permitted to cross-examine Witness FAI on all issues on which the Chamber will grant Nsabimana's Motion for Witness FAI's recall.

Prosecution's Response to Nsabimana's Motion

29. The Prosecution opposes the Motion and submits that Witness FAI's credibility cannot be challenged on the basis of differences between his evidence in relation to two accused in different trials.

30. The Prosecution submits that there are no contradictions relating to the meeting at Butare *préfecture* in Witness FAI's testimonies before this Chamber and the Canadian court and in his statements before the Rwandan authorities. According to the Prosecution, Witness FAI was asked different and more detailed questions before the Rwandan authorities and answered accordingly. Witness FAI did not say in his statements before the Rwandan authorities or the Canadian court that the meeting had nothing to do with the massacre of the Tutsi; indeed in the Munyaneza trial, Witness FAI stated that the purpose of the meeting was the military training of youth as well as the killing of Tutsi. Furthermore, the Defence used its opportunity to cross-examine Witness FAI on issues dealing with his credibility.

31. The Prosecution submits that the apparent inconsistency on the circumstances of Witness FAI's return to Butare is not material and therefore the recall of a witness is not warranted. According to the Prosecution, the essence of the issues has remained the same in the Witness's testimonies and statements.

Nsabimana's Reply

32. The Defence for Nsabimana submits that the inconsistencies in the Witness's testimony before this Chamber and his statements before the Rwandan authorities indicate that Witness FAI told lies about the meeting. According to the Defence, Witness FAI was asked similar questions before the Rwandan authorities and before this Chamber relating to the objects of this meeting. Nevertheless, in none of the statements before the Rwandan authorities did the Witness assert that the meeting presided over by *préfet* Nsabimana was aimed at discussing or planning the massacre of Tutsi. The Defence states that in his testimony before the Canadian court, Witness FAI contradicted his statement of 15 December 1999 that the massacres had practically ended at the time of the meeting.

33. The Defence states that the fact that Witness FAI's testimony and statements are consistent concerning his return to Butare does not minimise any contradiction on the reason why he returned to Butare and the location to which he was invited to return.

DELIBERATIONS

34. 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.² 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 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.³

35. The Chamber notes that Prosecution Witness FAI testified before the ICTR between 30 October and 6 November 2002; that during its cross-examination of Witness FAI before this Chamber, the Defence requested from the Prosecution the disclosure of the Witness's prior confessions and statements made to the Rwandan authorities.⁴ It would appear that in 2007, the Prosecution disclosed to the Parties Witness FAI's prior statements made to various Rwandan authorities and the transcripts of Witness FAI's testimony during the Munyaneza trial before the Canadian court given in January and February 2007. In 2008, the Prosecution disclosed a document containing a report with the title "End of investigation of the Rwandan authorities" dated 7 December 2000. The Chamber considers that Witness FAI's statements to the Rwandan authorities and the report were made before Witness FAI testified before this Chamber, but that due to late disclosure, the Defence could not have put these documents to the Witness during its cross-examination. Therefore, the Motion is timely filed.

² *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.

³ *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.

⁴ T. 5 November 2002 p. 22 (ICS) ; T. 6 November 2002 p. 6.

Kanyabashi's Requests:

Witness FAI's Alleged Personal Involvement in the Killing of a Girl

36. Witness FAI's testimony before this Chamber and his statements to the Rwandan authorities on his participation in the killing of a girl do not appear to be contradictory. Before this Chamber, Witness FAI admitted to his complicity in the killing of a girl but denied having stabbed her to death. The Witness did not identify the girl.⁵ In his 5 August 1997 and 27 January 2000 statements before the Rwandan authorities, Witness FAI admitted to having cut out the eyes of an unconscious girl, without specifying whether or not he killed her. In his later statements of 20 January 1998 and 20 November 2000, the Witness denied having killed that girl but admitted to having been present when the girl was killed, and to having dragged her by the hair and stabbed her after she was already dead.⁶

37. The Chamber considers that it remains unclear whether Witness FAI was actually referring to the same girl in his testimony before this Chamber and in his statements before the Rwandan authorities. Assuming this is the same girl, the apparent inconsistency concerning the Witness's participation in the girl's killing in the testimony before this Chamber and the 5 August 1997 and 27 January 2000 statements appears to be minor. The evidence led before this Chamber already includes Witness FAI's participation in this incident and may be taken into account when assessing this Witness's credibility. Furthermore, this crime is not linked to any charge against the Accused. Therefore, no prejudice arises from the Defence's inability to put this apparent inconsistency to the Witness and the Chamber denies the request to recall Witness FAI on this issue.

Witness FAI's Alleged Personal Involvement in the Attempted Killing of a Woman

38. Witness FAI's testimony before this Chamber and his statements to the Rwandan authorities on Witness FAI's participation in the attempted killing of a woman do not appear to be contradictory. Before this Chamber, the Witness did not mention his involvement in the attempted murder of this woman. However, Witness FAI admitted to having been charged in Rwanda for having acted in association with offenders and for incitement for genocide. He was not asked specifically about the attempted murder of that woman or to list all crimes he was personally involved in or accused of, but only to give one example of his participation, which the Witness provided.⁷ In his statements to the Rwandan authorities, he admitted to having handed over this woman to attackers and to having failed to help her when she was attacked, without giving details on the time of this event. He did not state that he killed the woman with his own hands.⁸

39. The Chamber considers that the mere omission to mention this incident before this Chamber without having been questioned about it does not amount to a contradiction. In addition, the Chamber notes that the evidence led already indicates that Witness FAI participated in crimes that may be taken into account when considering the Witness's credibility. This crime is not related to any charges against the Accused before this trial.

⁵ Testimony before this Chamber, T. 31 October 2002, pp. 83, 84.

⁶ Statement of 5 August 1997 English Transcript, p. 3; Statement of 20 January 1998, English Transcript, p. 7; Statement of 20 November 2000 English Transcript, p. 1.

⁷ T. 4 November 2004, pp. 18, 19 (ICS).

⁸ Statement of 5 August 1997 English Transcript p. 5.; Statement of 20 January 1998, English Transcript, p. 7; Statement of 20 January 2000 English Transcript, p. 7

Therefore, no prejudice arises from the Defence's inability to put this new material to the Witness and the Chamber denies the request to recall Witness FAI on this issue.

Witness FAI's Alleged Personal Involvement in Killing a Person during the Karama Attack

40. Witness FAI's testimony before this Chamber and the statements before the Rwandan authorities as to whether or not he killed anyone during the Karama attack may appear to be inconsistent. Before this Chamber, Witness FAI denied having personally killed anyone during the Karama attack⁹ but before the Rwandan authorities, he stated that he fired two shots and may have wounded or even killed one person.¹⁰ However, the Chamber considers that this discrepancy is minor. The inability to put this discrepancy to the Witness will not prejudice the Accused. Therefore, the Chamber denies the request to recall and cross-examine the Witness on this issue.

Witness FAI's Alleged Involvement in Large-Scale Massacres in 1994

41. Witness FAI's testimony before this Chamber and his statements before Rwandan authorities on his involvement in large-scale massacres in 1994 may be inconsistent. Before this Chamber, the Witness generally admitted to having participated in killings, and to having been charged for incitement to commit genocide. The Witness admitted to having participated in two attacks, one at Rwezamenyo and one at Karama.¹¹ In his 9 February 1999 and 27 January 2000 statements before the Rwandan authorities, Witness FAI appears to have admitted to having personally participated in the attacks of Rwezamenyo and at Karama and to having been involved in the attacks of Migina, Nyamure¹² and Cyimyuzo.¹³

42. However, the Chamber considers that while the statements before the Rwandan authorities appear to describe the Witness's direct participation in the Rwezamenyo and Karama attacks, they appear vague regarding the Witness's degree of involvement in the Migina, Nyamure and Cyimyuzo attacks. Furthermore, the Chamber notes that the evidence led already indicates that Witness FAI participated in killings and in the incitement of crimes, which may be taken into account when considering the Witness's credibility. Any additional evidence relating to the Witness's involvement in attacks appears to be of a cumulative nature. Furthermore, these attacks are not part of the charges against the Accused. Therefore, the failure to put these inconsistencies to the Witness will not prejudice the Accused and does not warrant a recall. For these reasons, the Chamber denies the request to recall and cross-examine the Witness on these issues.

Numbers of Persons Killed during the Karama, Nyamure and Rwezamenyo Attacks

43. Witness FAI's testimony before this Chamber and his statements before the Rwandan authorities regarding the number of victims of the large scale massacres in which the Witness is alleged to have participated appear to be inconsistent. Before this Chamber, Witness FAI testified that approximately ten persons were killed during the Rwezamenyo attack and approximately 100 persons were killed during the Karama attack.¹⁴ In his 9 February 1999

⁹ T. 5 November 2002, p. 28 (ICS)

¹⁰ Statement of 20 January 1998 p. 7.

¹¹ T. 30 October 2002 pp. 95, 96; T. 5 November 2002, pp. 27, 28 (ICS).

¹² Statement of 9 February 1999, p. 2, 3.

¹³ Statement of 27 January 2000, p. 3.

¹⁴ T. 5 November 2002 pp. 27, 28 (ICS).



statement before Rwandan authorities, Witness FAI said that approximately 15,000 persons were killed at Rwezamenyo, approximately 10,000 at Nyamure and approximately 6,000 at Karama.¹⁵ However, the Chamber recalls that the evidence led before this Chamber already points to the Witness's involvement in attacks which may be taken into account when assessing Witness FAI's credibility. Furthermore, none of the attacks are part of the charges against any of the Accused. Therefore, the failure to put this inconsistency to the Witness does not prejudice the Accused and does not warrant the recall of the Witness. For these reasons, the Chamber denies the request to recall and cross-examine the Witness on this issue.

Witness FAI's Alleged Involvement in Other Crimes

44. Witness FAI's testimony before this Chamber and the statements before the Rwandan authorities regarding other crimes allegedly committed by Witness FAI do not appear contradictory. Before this Chamber, Witness FAI admitted to having participated in the genocide by way of association and incitement. He was not asked to list all the crimes in which he participated, and he did not do so. In his 27 January 2000 statement, several accusations were put to Witness FAI, including the killing at CND and Kinihira and the delivery of girls as sex slaves. To these accusations, Witness FAI pleaded guilty in a general way.¹⁶

45. In his 20 November 2000 statement, the Witness denied the accusation of having delivered girls as sex slaves.¹⁷ These accusations are not mentioned in the December 2000 Investigation Report.¹⁸ In his 20 November 2000 statement, Witness FAI admitted to having supplied fuel that was used to set two houses on fire¹⁹ and in his 9 February 1999 statement, Witness FAI admitted to having used the ambulance belonging to the Health Centre to transport soldiers who were coming to kill Tutsi refugees.²⁰ The Chamber considers that the omission to mention these accusations before this Chamber without having been specifically asked about them does not amount to a contradiction. The evidence led before this Chamber already indicates the Witness's involvement in crimes. Additional evidence on this issue would appear to be of cumulative nature. Furthermore, the said crimes do not directly relate to charges against the Accused. Therefore, the failure to put this additional material to the Witness does not prejudice the Accused and the recall of the Witness is not warranted. For these reasons the Chamber denies the request to recall and cross-examine the Witness on these issues.

Witness FAI's Testimony about Acts Imputed to Kanyabashi before this Chamber

46. Witness FAI's testimony before this Chamber and his statements before the Rwandan authorities regarding a speech allegedly given by Kanyabashi during a meeting and regarding the aim of this meeting do not appear to be contradictory. Before this Chamber, Witness FAI testified to having been present at a first meeting at the Butare *préfecture* office after the Witness's nomination. At this meeting Kanyabashi allegedly said that the search for the accomplices of the enemy in the forests had to continue, that this was being done with the

¹⁵ Statement of 9 February 1999, p. 2, 3.

¹⁶ Statement of 27 November 2000, p. 9.

¹⁷ Statement of 20 November 2000 English Transcript p. 2.

¹⁸ Annex XII

¹⁹ Statement of 20 November 2000 English Transcript p. 2.

²⁰ Statement of 9 February 1999, p. 2,3



participation of militarily trained youth, and that the training should be extended to other *communes*.²¹ According to Witness FAI, there was no difference between the young trainees and the *Interahamwe*. In his 15 December 1999 statement, Witness FAI said that this meeting was called to urge the youth to receive military training. He further stated that killings were still ongoing in several *communes* and that during the meeting all *bourgmestres* took the floor to speak about the trend of the massacres in their respective *communes*.²² The Chamber considers that while the Witness's statement before the Rwandan authorities may be more general and not focused on the use of the trained youth to search for surviving Tutsi, it does not appear to contradict the Witness's testimony before this Chamber about Kanyabashi's speech. Concerning the Defence's submission that Witness FAI did not mention Kanyabashi's speech to the ICTR Prosecution investigators, the Chamber considers that the Defence could have put this issue to the Witness during its cross-examination of the Witness. Therefore, the Chamber denies the Defence's request to recall and cross-examine Witness FAI on these issues.

47. Witness FAI's testimony before this Chamber and his statements before the Rwandan authorities regarding the Witness's responsibility while holding a political position do not appear to be contradictory. Before this Chamber and in his statements, Witness FAI testified about his attendance at meetings and his involvement in military training sessions after being appointed to this position.²³ The fact that the Witness asked the Rwandan authorities not to try him in the capacity of this political position is not inconsistent with his testimony before this Chamber. Therefore the Chamber denies the Defence's request to recall and cross-examine Witness FAI on these issues.

Witness FAI's Alleged Interests in Incriminating the Accused of the Butare Trial

48. The question of whether or not Witness FAI should qualify as an accomplice witness is an issue that will be addressed at a later stage of this trial. The Chamber considers that the Defence's allegations on this point are mere speculation. The fact that before this Chamber Witness FAI stated that he was not concerned about the determination of his sentence, in particular in view of the fact that he made a confession,²⁴ is not in contradiction with his pleadings for clemency in his statements before the Rwandan courts in 1997 and 1999, when he made this confession,²⁵ or with his testimony given in the Canadian court.²⁶ The Chamber reiterates that it is well aware of the evidence led before this Chamber that Witness FAI was a detained witness who was tried before the Rwandan authorities while testifying before this Chamber, that he admitted to having participated in crimes in 1994, and that he obtained a position of political responsibility in 1994. This evidence may be taken into account when assessing Witness FAI's credibility.²⁷ For these reasons the Chamber denies the Defence's request to recall and cross-examine Witness FAI about his alleged interest in minimising his crimes and falsely transferring his own responsibility to the Accused of the Butare trial.

²¹ T. 31 October 2002 pp. 28-31.

²² Statement of 15 December 1999 English Version, p. 2; Statement of 20 December 2000, p. 5 English Version

²³ See Fn. 22.

²⁴ T. 6 November 2002 p. 6.

²⁵ Statement of 5 August 1997 English Version p. 6; Statement of 15 December 1999 English Version p. 3.

²⁶ Testimony before the Canadian court, 3 February 2007

²⁷ T. 5 November 2002 p. 11 (ICS); T. 6 November 2002 p. 5.

Alternative Request for Exclusion of Witness FAI's Evidence

49. The Chamber has denied the request for recall of Witness FAI. Therefore, the Defence alternative request for exclusion of Witness FAI's evidence, in case of his non-appearance despite recall, becomes moot.

Nsabimana's Requests

Witness FAI's Testimony about the Meeting at the Butare Préfecture

50. Witness FAI's testimonies before this Chamber and before the Canadian court and his statements before the Rwandan authorities regarding the issues discussed during a meeting at the Butare *préfecture* do not appear to be contradictory. Before this Chamber, Witness FAI testified that at the meeting the government programme to kill Tutsi was discussed and the various *bourgmestres* reported on the progress of this programme in their *communes*.²⁸ Witness FAI further said that during this meeting, the *préfet* promised aid to the *bourgmestre* of Muyira concerning displaced persons following the RPF attack.²⁹ Witness FAI also testified about the military training programme for youth proposed by *bourgmestre* Kanyabashi and approved by *préfet* Nsabimana.³⁰ In his 15 December 1999, 27 October 2000 and 20 November 2000 statements, Witness FAI said that this meeting was called to urge the youth to receive military training. In his 15 December 1999 statement, Witness FAI also stated that killings were still ongoing in *communes* and that all the *bourgmestres* took the floor to speak about the trend of the massacres in their respective *communes*.³¹ In addition, the Chamber notes that Witness FAI said in his 9 February 1999 statement that after returning to Butare, he attended meetings convened by the *préfet* to assess the advancement of the killings.³² In his testimony before the Canadian court, Witness FAI testified that the goals of the meeting were to carry out an evaluation of how the killings of the Tutsi were proceeding and how to ensure an efficient strategy. Furthermore, the recruitment and training of young men was discussed. Witness FAI also stated that the *bourgmestres* were given the floor to talk about the situation in their *communes* and that some of them requested military assistance, which was granted by *préfet* Nsabimana.³³

51. The Chamber considers that while the Witness's testimony before this Chamber, his statements before the Rwandan authorities and his testimony before the Canadian court may focus on different aspects of the meeting, they are not inconsistent concerning the goal of and the issues discussed during this meeting. Therefore, the Chamber denies the request to recall and cross-examine Witness FAI on this issue.

Witness FAI's Testimony about the Circumstances of his Return from Gikongoro to Butare

52. The Witness's testimony before this Chamber, his statements before the Rwandan authorities and his testimony before the Canadian court appear to be inconsistent regarding the circumstances of his return from Gikongoro to Butare. Before this Chamber, the Witness

²⁸ T. October 2002 pp. 24, 25.

²⁹ T. 31 October 2002 pp. 25, 26.

³⁰ T. 31 October 2002 pp. 28-31.

³¹ Statement of 15 December 1999 English Version, p. 2; Statement of 20 December 2000 English Version, p.5.

³² Statement of 15 December 1999 English Version, p. 3.

³³ Testimony before the Canadian Court, pp. 1231-1237.

testified that he returned to Butare after a person gave him a written message from the *préfet* asking him to return to Butare. In his 20 December 2000 statement before the Rwandan authorities, Witness FAI alleged instead that he returned to Butare after having received a phone call from the *préfet*. In his 9 February 1999 statement before the Rwandan authorities and in his testimony in Canada on 2 February 2007, Witness FAI said that he returned after having received a telegram from *préfet* Nsabimana. However, the Chamber considers that the conclusions drawn by the Defence from this inconsistency are mere speculation. The inconsistency appears to be minor and failure to put this inconsistency to the Witness does not prejudice the Accused and does not warrant the recall of the Witness. For these reasons, the Chamber denies the request to recall and cross-examine Witness FAI on this issue.

FOR THE ABOVE REASONS, THE TRIBUNAL

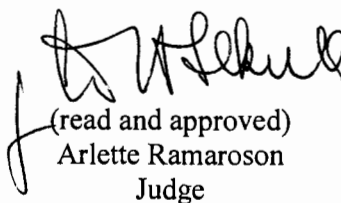
DENIES the Motions in their entirety.

Arusha, 14 January 2009



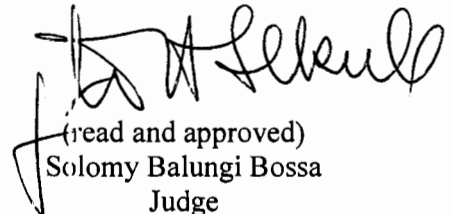
William H. Sekule

Residing Judge



(read and approved)
Arlette Ramarason
Judge

(absent at the time of
signature)

(read and approved)
Solomy Balungi Bossa
Judge

(absent at the time of
signature)