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**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 1 September 2006

ICTR-98-42-T
01-09-2006
(11791-11783)

The PROSECUTOR v. Élie NDAYAMBAJE
(Case No. ICTR-96-8-T)

The PROSECUTOR v. Joseph KANYABASHI
(Case No. ICTR-96-15-T)

The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T)

The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T)

Joint Case No. ICTR-98-42-T

DECISION ON NDAYAMBAJE'S MOTION FOR EXCLUSION OF EVIDENCE

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the “Chamber”);

SEISED of Ndayambaje’s “*Requête en extrême urgence d’Elie Ndayambaje aux fins d’exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l’acte d’accusation*”, filed on 31 May 2006 (the “Motion”);

HAVING RECEIVED the

- i. “Prosecutor’s Response to the *Requête en extrême urgence d’Elie Ndayambaje aux fins d’exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l’acte d’accusation*”, filed on 9 June 2006 (“Prosecution’s Response”);
- ii. “*Réplique à la Réponse du Procureur à la Requête en extrême urgence d’Elie Ndayambaje aux fins d’exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l’acte d’accusation*”, filed on 20 June 2006 (“Ndayambaje’s Reply”)¹;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), specifically Rule 47 (C) of the Rules;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

Defence for Ndayambaje

1. The Defence requests the exclusion of testimonies or parts of testimonies of 14 Prosecution witnesses² because they concern facts or elements not pleaded in the Indictment and because it has not had a timely notification of these allegations.
2. The Defence argues that if the Chamber does not exclude the impugned evidence at this stage of the proceedings, Ndayambaje will suffer serious prejudice because along with the charges in the Indictment, the Accused will have to counter new facts or elements resulting from testimonies of Prosecution witnesses, even though the Chamber will have to dismiss them in its final deliberations.³
3. The Defence submits that, to be admissible, evidence must be relevant to an element of a crime with which the Accused is charged and therefore sufficiently related to some charge in the Indictment. If the Prosecution fails to establish the

¹ See the Chamber’s Decision on Ndayambaje’s Motion for Extension of Time to Reply to the Prosecutor’s Response to Its Motion for Exclusion of Evidence of 30 June 2006, which granted the relevant Motion to admit a Reply after the time frame stipulated.

² These witnesses are Witness QAR, Witness TO, Witness QAO, Witness QAF, Witness FAL, Witness TP, Witness TW, Witness QAL, Witness RV, Witness FAU, Witness EV, Witness RT, Witness QBZ, and Witness FAG.

³ The Motion, para. 46.

relevance of evidence to a charge against the Accused, this evidence must be deemed inadmissible.⁴ The Defence stresses that the indictment must set out the material facts with enough detail to enable the accused to prepare his defence.⁵ In this respect, the jurisprudence of both ICTY and ICTR clearly indicates that nothing can replace the indictment.⁶ In particular, pre-trial submissions or disclosures are no adequate substitute for a properly pleaded indictment.⁷ Failure to allege known material facts in an indictment is unacceptable and can only be remedied in exceptional cases,⁸ since such an omission would impact negatively on the ability of the Accused to prepare his defence.⁹ Such vagueness can only be harmless if it is shown that the accused's ability to prepare his case has not been materially impaired. If this is not demonstrated, the indictment causes injustice and the trial is rendered unfair.¹⁰ The Defence recalls that a vague indictment in and of itself may be sufficient to reverse a conviction.¹¹

4. While it is possible that evidence may turn out differently from what was expected, the Defence submits that in such cases, the indictment must be amended or proceedings adjourned, or certain evidence must be excluded as not being within the scope of the indictment.¹²
5. The Defence concedes that in some circumstances, a defective indictment may be cured, but submits that in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.¹³ Besides, a defective indictment can only be cured by information in a pre-trial brief when the material fact was already contained in the indictment in such a way that it could be discerned by the attentive reader.¹⁴ The Defence recalls that the mere service of witness statements or "will-say" statements is not sufficient to inform the Defence

⁴ The Motion, paras. 38-39, quoting *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Evidence Outside the Scope of the Indictment, 27 September 2004, paras. 2, 5.

⁵ The Motion, paras. 51, 74, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber Judgement, 23 October 2001, paras. 88-90; *Prosecutor v. Blaskic*, Judgement, 29 July 2004, paras. 213, 215.

⁶ The Motion, paras. 56, 59, quoting *Prosecutor v. Ntagerura et al.*, Trial Chamber, Judgement, 25 February 2004, Separate Opinion of Judge Dolenc, para. 11.

⁷ The Motion, paras. 57-58, 76, quoting *Prosecutor v. Ntagerura et al.*, Trial Chamber, Judgement, 25 February 2004, paras. 37, 66, confirmed on Appeal, 6 February 2006; *Prosecutor v. Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, para. 2.

⁸ The Motion, para. 60, quoting *Prosecutor v. Ntakirutimana et al.*, Trial Chamber, Judgement, 13 December 2004, para. 125.

⁹ The Motion, paras. 62-64, 75, quoting *Prosecutor v. Kupreskic et al.*, Judgement, 23 October 2001, paras. 98, 122; *Prosecutor v. Brdanin*, Decision on Motion for Acquittal, 28 November 2003, para. 88; *Prosecutor v. Stakic*, Trial Chamber, Judgement, 31 July 2003, paras. 771-772.

¹⁰ The Motion, para. 75, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber, 23 January 2001, para. 122.

¹¹ The Motion, para. 55.

¹² The Motion, paras. 51, 61, quoting *Prosecutor v. Kupreskic et al.*, Judgement, 32 October 2001, para. 92 and *Prosecutor v. Kvočka et al.*, Appeals Chamber, Judgement, 25 February 2005, para. 30.

¹³ The Motion, para. 78, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber, 23 January 2001, para. 114. The Defence also relies on the Separate Opinion of Judge Dolenc in the *Ntagerura* Judgement, 25 February 2004, para. 24.

¹⁴ The Motion, paras. 70, 73, 80, quoting *Prosecutor v. Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-trial Brief, 30 September 2005, paras. 13-14; *Prosecutor v. Gacumbitsi*, Judgement, 17 June 2004, para. 188; *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, Fn 7.

of material facts that the Prosecution intends to prove at trial.¹⁵ In the instant case, there has been no sufficient notice to cure the defects of the Indictment.¹⁶

6. The Defence submits that it must object if evidence regarding a fact not pleaded in the Indictment is about to be admitted. However, failure to object contemporaneously is not equivalent to a complete waiver. According to the Defence, the Chamber has always refused to consider the vagueness of the Indictment or any other defect in Prosecution disclosures with regard to evidence introduced by witnesses, even though this was raised in objections by Ndayambaje's co-accused.¹⁷ Because of the numerous decisions by the Chamber in this sense, objections were not appropriate at the time. The Defence adds that now is the right time because the Defence case has not yet begun and the number of witnesses the Defence intends to call will be affected.¹⁸ The Motion is not moot or premature, and it is in the interest of justice and of efficient proceedings to dismiss the listed testimonies now.¹⁹ The Defence states that denying the Motion would be a denial of justice.²⁰
7. The Defence submits that Ndayambaje will suffer irremediable prejudice if he has to present a defence for events that are not pleaded in his Indictment, more than ten years after their alleged perpetration.²¹ The Defence argues that since it did not know that certain evidence was going to be presented, it could not direct its investigations or efficiently confront Prosecution witnesses as regards this evidence.²² This prejudice cannot be remedied by merely presenting witnesses.²³
8. The Defence also submits that vague indictments infringe upon judicial economy,²⁴ whereas the identification of persons in the indictment contributes to the efficient conduct of proceedings.²⁵ Apart from respecting the rights of the Accused, the exclusion of the abundant evidence regarding facts not pleaded in the Indictment will diminish the length of proceedings, which is a constant

¹⁵ The Motion, paras. 66, 81, 83-84, quoting *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgement, 9 July 2004, para. 197. The Defence also relies on *Prosecutor v. Kordic*, Appeals Chamber, Judgement, 17 December 2004, paras. 170-172; *Prosecutor v. Casimir Bizimungu*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GPC, GKD and GFA, 23 January 2004, para. 13; *Prosecutor v. Ntagerura*, Separate Opinion of Judge Dolenc, 25 February 2004, Fn 27.

¹⁶ The Motion, paras. 68, 77, 90, 93, 95, 101.

¹⁷ The Motion, paras. 108-123.

¹⁸ The Motion, paras. 49, 125-132.

¹⁹ The Motion, paras. 49, 134-135, 399, quoting *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 5; *Prosecutor v. Casimir Bizimungu*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GPC, GKD and GFA 23 January 2004, para. 18.

²⁰ The Motion, para. 49.

²¹ The Motion, para. 372, 379.

²² The Motion, para. 376.

²³ The Motion, para. 377.

²⁴ The Motion, para. 414, quoting *Prosecutor v. Zigiranyirazo*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004, para. 28.

²⁵ The Motion, para. 415, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Preliminary Motion Based on Defects in the Form and in the Substance of the Indictment, 1 November 2000, para. 60.

concern of the Chamber.²⁶ Also, it is in the interest of justice that Prosecution as well as Defence witnesses are only heard insofar as their testimonies are relevant to the case.²⁷ In consequence, the analysis of the evidence by all Parties, their pleadings and the final deliberations would be shortened.²⁸

Prosecution's Response

9. The Prosecution submits that the Motion is essentially predicated upon Rule 72 (A) of the Rules but has been filed out of time. Therefore, the Chamber should not hear the Motion, as it is time-barred.²⁹ However, should the Chamber rule that the Motion is admissible, the Prosecution relies on a number of arguments.³⁰
10. The Prosecution submits that the appropriate time to object to the admissibility of evidence is when it is presented.³¹ However, with regard to the impugned witnesses, the Defence did not object to the admissibility of their testimony, except for Witnesses RV and QBZ. Therefore, there is now an onus on the Defence to show prejudice, as the Motion is untimely.³² The Prosecution submits that failure to object before the Chamber will usually result in the Appeals Chamber disregarding the argument.³³
11. For instance, the Prosecution notes that there was no contemporaneous objection by the Defence when Witness QAR testified. Rather, the Defence exhaustively cross-examined him and had him recalled, without alleging that the witness's evidence related to Mugombwa church was inadmissible because it had not been pleaded in the Indictment.³⁴
12. The Prosecution also submits that the absence of a material fact in the Indictment does not mean that it cannot be relied upon. Rather, the test for ascertaining whether such material fact should be admitted and/or relied upon is whether the accused received proper notice.³⁵ It further submits that the Indictment against Ndayambaje is not vague, but sets out the material facts with sufficient specificity.

²⁶ The Motion, paras. 416-417, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, 7 April 2006, para. 75; Scheduling Order of 14 December 2005, p. 2, paras. g, h.

²⁷ The Motion, para. 418.

²⁸ The Motion, para. 422.

²⁹ Prosecution's Response, para. 7, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Motion for Separate Trial, 25 April 2001.

³⁰ Prosecution's Response, para. 7.

³¹ Prosecution's Response, para. 9, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness TN, 1 July 2002.

³² Prosecution's Response, paras. 9-10, quoting *Prosecutor v. Kayishema and Ruzindana*, Appeals Judgement, para. 91; *Prosecutor v. Niyitegeka*, Appeals Judgement, 9 July 2004, para. 199.

³³ Prosecution's Response, para. 10, quoting *Prosecutor v. Kamuhanda*, Appeals Judgement, 19 September 2005, para. 21.

³⁴ Prosecution's Response, para. 12, quoting *Prosecutor v. Nyiramasuhuko et al.*, *Requête afin d'inviter la Chambre à rappeler le témoin QAR en vertu de la décision de la Chambre d'Appel intitulée "Decision in the Matter of Proceedings under Rule 15bis (D)"*, filed on 19 December 2003.

³⁵ Prosecution's Response, para. 13, quoting *Prosecutor v. Kupreskic et al.*, Appeals Judgement, paras. 77-125; *Prosecutor v. Stakic*, Appeals Judgement, 22 March 2006, paras. 105-132; *Prosecutor v. Naletilic*, Judgement, 3 May 2006; *Prosecutor v. Ntakirutimana*, Appeals Judgment, para. 27, citing *Prosecutor v. Kupreskic et al.*, Appeals Judgment, paras. 117-120; *Prosecutor v. Niyitegeka*, Appeals Judgment, para. 197.

The Prosecution's case against Ndayambaje falls squarely within the ambit of the *Kupreskic et al.* definition of the sheer scale of the alleged crimes that may make it impracticable to require a high degree of specificity.³⁶ However, having regard to the complexity of the issues, the material facts have been pleaded with sufficient specificity to assist the Defence in the preparation of its case.³⁷

13. The Prosecution submits that even if the Chamber were to find the Indictment deficient, such defects would have been cured by the Prosecution's timely, clear and consistent disclosure of information to the Defence. Therefore, no unfair prejudice has been caused to the Defence that would require the sought remedy, as is again supported by its defence strategy, involving extensive cross-examination of the impugned witnesses.³⁸
14. The Prosecution recalls that the Defence submitted its Pre-Defence Brief on 23 October 2004 and that it contains a list of witnesses who will be called to rebut the evidence introduced by the impugned witnesses. Therefore, contrary to the Defence's allegations as to prejudice, it has had ample time to consider the Prosecution evidence and to prepare its defence case.³⁹
15. The Prosecution submits that the Chamber should allow the impugned evidence to stand in its entirety, because in any event, it corroborates the factual allegations specifically pleaded in the Indictment.⁴⁰

Ndayambaje's Reply

16. The Defence states that it is surprised that its Motion has been qualified as being both "time-barred" and premature by the Prosecution, as these are contradictory.⁴¹ It reiterates that the Motion is not time-barred and contains no preliminary objections,⁴² nor is it based on Rule 72 (A) of the Rules.⁴³ As to the Prosecutor's argument that the Motion is premature, the Defence refers to two decisions to indicate that this is not the case.⁴⁴
17. The Defence submits that the fundamental legal question is whether the Prosecution could remedy the defects in the Amended Indictment by disclosure contained in the Pre-Trial Brief, the "will-say" statements, or the testimonies.⁴⁵ The Defence stresses that while the Prosecution alleges that the Indictment is not vague, on the other hand, it relies on a decision in *Kupreskic et al.* which states that "there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity".⁴⁶

³⁶ Prosecution's Response, para. 14, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber, para. 89.

³⁷ Prosecution's Response, para. 15.

³⁸ Prosecution's Response, para. 17.

³⁹ Prosecution's Response, para. 27.

⁴⁰ Prosecution's Response, paras. 32, 34.

⁴¹ Reply, para. 6.

⁴² Reply, para. 7.

⁴³ Reply, para. 13.

⁴⁴ Reply, paras. 8-11, quoting *Prosecutor v. Bagosora et al.*, Decision of 27 September 2005, para. 7, and *Prosecutor v. Kajelijeli*, Appeals Chamber, Decision of 23 May 2005, para. 200.

⁴⁵ Reply, para. 16.

⁴⁶ Reply, para. 19, quoting *Prosecutor v. Kupreskic*, Judgement, para. 89.

18. The Defence also submits that contrary to the Prosecution's arguments, the "exhaustive" cross-examinations of witnesses have not clarified the Indictment. Rather, faced with the multiple contradictions contained in the testimonies of Prosecution witnesses and the silence of the Indictment, the Defence does not know anymore on which elements it must base its case.⁴⁷
19. Further, as to the Prosecution's submissions that the evidence should be kept as corroborative evidence of the facts pleaded in the Indictment, the Defence states that it is inappropriate for the Prosecution to sustain, 18 months after closing its case, that evidence which is inadmissible as direct evidence should be conserved as corroborative evidence of the vague and imprecise elements of the Indictment.⁴⁸
20. The Defence submits that the absence of information in the Indictment, combined with the numerous contradictions and improbabilities in the testimonies, prevent it from presenting a full defence, particularly with regard to a defence of alibi.⁴⁹

DELIBERATIONS

21. The Chamber has carefully considered the Parties' submissions. The Chamber observes that as a preliminary issue, it has to address the question of whether the Motion is brought at the right point in time.
22. The Chamber notes the Tribunal's jurisprudence to the effect that the appropriate time to object to the admissibility of evidence is when the evidence is introduced.⁵⁰ In the instant case, the Defence by its own admission did not object contemporaneously to the testimony of any of the impugned witnesses.⁵¹ Even if the Chamber were to accept the Defence's argument that the decisions overruling the objections of other defence teams had the effect of *res judicata* for the Accused Ndayambaje,⁵² such objections do not seem to have been raised with regard to the witnesses whose testimony the Defence seeks to have excluded.
23. Nonetheless, the Chamber recalls that the Accused is not barred from raising submissions regarding the vagueness of the indictment in support of the exclusion of evidence at a later stage in the trial proceedings.⁵³
24. The Chamber recalls the Appeals Chamber's holding in the *Butare* case, according to which there can be no conviction of an Accused on the basis of facts

⁴⁷ Reply, para. 29.

⁴⁸ Reply, para. 31.

⁴⁹ Reply, para. 36.

⁵⁰ *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness TN, 1 July 2002, para. 18; *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 199; *Prosecutor v. Bizimungu et al.*, Decision on Casimir Bizimungu's Motion to Declare Part of the Testimony of Witness GTD Inadmissible, 30 November 2004, paras. 11, 13; *Prosecutor v. Ntakirutimana et al.*, Appeals Chamber, Judgment, 13 December 2004, para. 22.

⁵¹ The Motion, para. 109, 110, 115, 117-119.

⁵² The Motion, paras. 126, 127, 129.

⁵³ *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 199.

not charged in the indictment but introduced by testimonies.⁵⁴ However, the Chamber underscores that whilst an allegation may not have been specifically pleaded, this does not in itself render such evidence inadmissible because it may be relevant to the proof of any allegation pleaded in the indictment. The Chamber recalls the Appeals Chamber's Decision that

[i]ndeed, pursuant to Rule 89(C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. It should be recalled that admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of the evidence. Consequently, although on the basis of the present indictment it is not possible to convict Nyiramasuhuko in respect of her presence at the installation of Ndayambaje, evidence of this meeting can be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment.⁵⁵

25. The Chamber notes that some Trial Chambers' decisions are to the effect that it is appropriate to treat questions regarding the exclusion of evidence based on a vague indictment during trial proceedings.⁵⁶ However, on the basis of the cited jurisprudence of the Appeals Chamber, and with regard to the particular circumstances of this case, as well as the interests of justice, the Chamber is not satisfied that there is a basis to exclude the concerned testimonies at this stage. Some of the matters raised may be considered at a later stage of the proceedings.
26. Finally, the Chamber has noted that issues relating to the credibility and evaluation of evidence have been raised in the Motion, whereas they also ought to be considered at a later stage with the totality of the evidence.

⁵⁴ *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, para. 13.

⁵⁵ *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, para. 15, recalled in *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 12, and *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 7, quoting *Prosecutor v. Rutaganda*, Appeal Judgement, 26 May 2003, para. 33, citing *Prosecutor v. Delalić*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 31.

⁵⁶ *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 196; *Prosecutor v. Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 7; *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 7.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in every respect.

Arusha, 1 September 2006



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William H. Sekule
Presiding Judge

Handwritten signature of Arlette Ramarason in black ink.

Arlette Ramarason
Judge

Handwritten signature of Solomy Balungi Bossa in black ink.

Solomy Balungi Bossa
Judge

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