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26-08-2011
(104119-104108)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 26 August 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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DECISION ON THE DEFENCE MOTION FOR RECONSIDERATION OR
CERTIFICATION TO APPEAL THE ORAL DECISION OF 13 JULY 2011, AND ON
THE REDUCTION OF THE DEFENCE WITNESS LIST

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MWS

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Trial Chamber’s Oral Decision of 13 July 2011” filed on 19 July 2011 (the “Defence Motion”);

CONSIDERING the:

- i. “Prosecution’s Response to Defence Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Trial Chamber’s Oral Decision of 13 July 2011”, filed confidentially on 25 July 2011 (the “Prosecution Response”); and
- ii. “Defence Reply to Prosecution’s Response to Defence Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Trial Chamber’s Oral Decision of 13 July 2011” filed on 27 July 2011 (the “Defence Reply”);

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

NOW DECIDES the Defence Motion pursuant to Articles 19 and 20 of the Statute and Rules 54, 73 and 73 *ter* of the Rules.

INTRODUCTION

1. The Prosecution closed its case-in-chief on 31 August 2010, after presenting 20 witnesses over the course of 53 trial days.
2. On 21 October 2010, the Defence filed its Pre-Defence Brief, and announced its intention to call 96 witnesses.¹
3. At the Pre-Defence Conference on 25 October 2010, the Chamber urged the Defence to examine its witness list to ensure that it includes only witnesses that are required for the presentation of an adequate and clear Defence.²
4. On 16 November 2010, the Defence presented the Accused as its first witness. He testified over the course of 23 trial days from 16 November through 14 December 2010, and from 3 February through 14 February 2011.³
5. After the Accused completed his testimony on 14 February 2011, the Chamber directed the Defence to file, before the end of the first week of March, an updated list of witnesses it

¹ Pre-Defence Brief, 21 October 2010, para. 5

² T. 25 October 2010, p. 7.

³ The Chamber adjourned the proceedings on 17 January and 31 January 2011, pursuant to Defence requests. T, 17 January 2011, p. 2 (adjourning pending a Decision by the Bureau); T. 31 January 2011, pp. 2-5 (adjourning for three days).

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realistically intended to call. The Chamber also reserved the right, after the list was filed, to make a determination as to the number of witnesses to be called by the Defence.⁴

6. On 28 February 2011, the Chamber repeated this direction for the Defence to file an updated list of witnesses no later than 4 March 2011. The Chamber also ordered that the Defence case-in-chief be scheduled to resume on 6 June 2011, and that the Parties be prepared for the proceedings to continue through 15 July 2011. Although the Chamber noted its expectation that the Defence would be able to complete its case-in-chief during this period of time, the Chamber ordered the Parties to be prepared for the proceedings to resume from 15 through 26 August 2011, if necessary.⁵

7. On 4 March 2011, the Defence filed an Amended Pre-Defence Brief reducing the number of witnesses to 58. The Amended Pre-Defence Brief noted, however, that a number of witnesses were still the subject of two pending Defence Motions filed under Rule 92 *bis*.⁶

8. On 11 and 12 April 2011, the Chamber denied the Defence Motions filed pursuant to Rule 92 *bis*.⁷

9. On 13 May 2011, the Chamber ordered that the Defence case-in-chief be rescheduled to resume on 13 June 2011.⁸

10. During 19 trial days from 13 June through 13 July 2011, the Defence presented 12 witnesses.

11. On 11 July 2011, the Chamber confirmed that the next session would be from 15 through 26 August 2011. The Chamber stated that it planned to resume again from 19 September up to the end of October 2011, and that it expected that during this period, there would be finalization of the Defence case and possibly other issues that may arise.⁹

12. On 13 July 2011, the Chamber issued an Oral Order to the Defence ("Oral Order").¹⁰ Based on the Amended Pre-Defence Brief and the number of witnesses who had testified thus far, the Chamber calculated that about 45 Defence witnesses remained. Considering the Defence will-say statements, the Amended Pre-Defence Brief, other relevant submissions, and the case as a whole, the Chamber observed that a number of Defence witnesses were repetitive. The Chamber found this number to be excessive, and ordered the Defence to significantly reduce this number. The Chamber also ordered the Defence to file its final list by 1 August 2011.¹¹

13. The Defence did not file a final list of its witnesses by 1 August 2011, nor has the Defence provided any justification for not having done so.

⁴ T. 14 February 2011 pp. 115-116.

⁵ Scheduling Order Pursuant to Rule 54 of the Rules of Procedure and Evidence (TC), 28 February 2011, p. 4.

⁶ Amended Pre-Defence Brief, 4 March 2011, paras. 5-6.

⁷ Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 11 April 2011, p. 6; Decision on Defence Second Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 12 April 2011, p. 7. The Defence filed a third Motion for eight written statements to be admitted pursuant to Rule 92 *bis* on 4 July 2011, which is currently pending before the Trial Chamber.

⁸ Variation of Scheduling Order (TC), 13 May 2011, p. 2.

⁹ T. 11 July 2011, pp. 54-55.

¹⁰ T. 13 July 2011, pp. 89-90.

¹¹ *Id.*

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14. On 15 August 2011, the trial proceedings resumed. In the 9 trial days since this resumption, the Defence has called 3 witnesses to testify.

15. As of the filing of this Decision, the Defence has presented 16 witnesses over the course of 54 trial days.

SUBMISSIONS OF THE PARTIES

Defence Motion

Reconsideration

16. The Defence invites the Chamber to reconsider its Oral Order on the grounds that it was erroneous or constituted an abuse of discretion resulting in an injustice.¹²

17. The Defence submits that the Chamber abused its discretion in ordering a reduction of Defence witnesses after the completion of the third session of the Defence case. Had the Defence been directed to reduce its witnesses at an earlier stage, it would have reconsidered its entire case strategy. The Defence would have presented its most important witnesses first, and would have not given as much consideration to the preferences and availabilities of the witnesses. Indeed, some of the 12 Defence witnesses who testified during the most recent session may no longer have been presented. The Defence despairs that it now may not have sufficient witnesses to address all the allegations against the Accused. The Defence argues the Oral Order violates the Accused's right to a fair trial and equality of arms between the Prosecution and Defence under Article 20 of the Tribunal's Statute.¹³

18. The Defence submits that as its case had already run for some 20 trial days, it had a "reasonable expectation" that there would be no further reduction of its witnesses.¹⁴

19. As the Defence had adhered to the anticipated duration of the testimonies of the next 12 witnesses, and there were no undue delays during the most recent session, whatever factors led the Chamber to order a reduction in Defence witnesses must have been present at the completion of the previous session that ended on 14 February 2011. There was thus no reason for the Oral Order to be issued more than four months afterwards.¹⁵

20. The Defence further submits that there are serious legal doubts as to the correctness of the Oral Order. The Defence interprets Rule 73 *ter* (D) as allowing the Chamber to order the reduction of Defence witnesses only during the Pre-Defence Conference, or in any event, not once the Defence case has already commenced.¹⁶

¹² Defence Motion, paras. 31-32, 80, citing *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T ("*Nzabonimana*"), Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber Decision of 3 February 2010" rendered on 26 March 2010 (TC), 7 May 2010 ("*Nzabonimana* Trial Decision").

¹³ Defence Motion, paras. 34-35.

¹⁴ *Id.*, para. 36.

¹⁵ *Id.*, paras. 40-42.

¹⁶ *Id.*, paras. 46-49.



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21. The Defence notes that the Oral Order merely finds that a number of Defence witnesses are repetitive, without expounding thereon, in contravention of the requirements of Rule 73 *ter* (D). The Defence submits that the Chamber is required under Rule 73 *ter* (D) to specify that an excessive number of witnesses are being called to prove the same facts.¹⁷

22. The Defence states that the Chamber failed to take the complexity of the case into account. In addition to over 45 different incidents alleged in the Indictment, the Defence must likewise address 38 material facts not charged therein and/or in the Pre-Trial Brief, as well as numerous material facts falling outside the temporal jurisdiction of the Tribunal. The Prosecution likewise raised a considerable number of new allegations during the cross-examination of the Accused.¹⁸

Certification to Appeal

23. The Defence submits that the Oral Order meets the two requirements for certification under Rule 73 (B).¹⁹

24. The Defence submits that the Oral Order has a significant effect on the fair and expeditious conduct of the proceedings as the forced reduction of its witnesses will radically transform its case and impinge on its ability to defend the Accused. The Defence reiterates that prior to the Oral Order, the Chamber had not issued any further directives for the Defence to further reduce its witnesses since the Defence filed its Amended Pre-Defence Brief on 4 March 2011, which contained a reduced witness list. As Defence witnesses had already begun testifying, the Defence was led to believe that the varied witness list in its Amended Pre-Defence Brief was acceptable to the Chamber. The Defence laments that it will be constrained to abandon a significant number of witnesses essential to countering the various allegations the Accused is facing.²⁰

25. The Defence further submits that the issue of the reduction of witnesses significantly affects the outcome of the trial, as the Defence will be unable to address all the allegations against the Accused. This will increase the likelihood of a conviction for the Accused.²¹

26. The Defence contends that an immediate resolution by the Appeals Chamber of this issue will materially advance the proceedings. It would be too late if this issue were resolved when the Judgement is appealed, as the Defence would have been forced to conduct a truncated Defence case with a limited number of witnesses.²²

¹⁷ *Id.*, paras. 50-51.

¹⁸ *Id.*, para. 52.

¹⁹ *Id.*, paras. 56-61, citing *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T (“*Nyiramasuhuko et al.*”), Decision on Joseph Kanyabashi’s Motion for Certification to Appeal the Decision of 21 March 2007 (TC), 3 May 2007 (“*Nyiramasuhuko et al.* Trial Decision”); *The Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Request for Certification to Appeal Trial Chamber’s Decision on Defence Filings (TC), 4 July 2005.

²⁰ Defence Motion, paras. 62-69.

²¹ *Id.*, paras. 70-72.

²² *Id.*, paras. 74-77, citing *Nyiramasuhuko et al.* Trial Decision, para. 23.

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Prosecution Response

Reconsideration

27. The Prosecution contends that the Defence has mischaracterized the jurisprudence cited in support of the Defence Motion,²³ and submits that the Defence has not established that the Oral Order merits reconsideration.²⁴

28. The Prosecution rebuts the Defence's interpretation of Rule 73 *ter* (D) as allowing the Chamber to order the reduction of Defence witnesses only during the Pre-Defence Conference. The Prosecution submits that Rule 73 *ter* (D) is merely recommendatory rather than mandatory in this regard.²⁵

29. The Prosecution highlights that the Defence listed an unnecessarily large number of witnesses to testify in relation to the same Indictment paragraphs. The Prosecution notes that there are at least 10 Indictment paragraphs with 20 or more Defence witnesses slated to testify thereon.²⁶

Certification to Appeal

30. The Prosecution submits that the Oral Order does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings. On the contrary, a reversal of the Oral Order would only permit the Defence to call redundant or repetitive witnesses for numerous Indictment paragraphs and allow certain witnesses to testify on more Indictment paragraphs than originally envisioned.²⁷

31. The Prosecution contends that the Defence cannot equate the number of witnesses it is allowed to call with a fair trial, as numerous Defence witnesses are slated to testify on the same Indictment paragraphs. As there is a substantial surplus of Defence witnesses vis-à-vis the Indictment paragraphs, a reduction in the number of Defence witnesses will not significantly impact upon the fair and expeditious conduct of the proceedings. In fact, the converse is true, as allowing the Defence to call all the witnesses currently listed will result in unduly protracted proceedings.²⁸

32. As the Defence is capable of proceeding with a reduced number of witnesses, an immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings.²⁹

²³ Prosecution Response, paras. 21-24, citing *Nzabonimana* Trial Decision, paras. 22-23, 35-36, 38-39.

²⁴ Prosecution Response, paras. 30, 45-46.

²⁵ *Id.*, para. 25.

²⁶ *Id.*, para. 26, Annexes A and B.

²⁷ *Id.*, paras. 29, 46.

²⁸ *Id.*, paras. 38-41, Annexes A and B.

²⁹ *Id.*, paras. 42-44.

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Defence Reply

Reconsideration

33. The Defence reiterates that it has established how the Oral Order seriously impairs the conduct of a full and effective defence.³⁰

34. The Defence points out that the Prosecution does not cite any legal basis for its contention that Rule 73 *ter* (D) allows the Trial Chamber to order a reduction of the number of Defence witnesses after the commencement of the Defence case.³¹

35. While the Prosecution highlights the increase in the number of Indictment paragraphs that some Defence witnesses are to testify on, the Prosecution fails to mention that this had minimal impact on the anticipated duration of their testimonies. The Defence adds that the testimonies of the Defence witnesses which have already been completed hewed faithfully to their estimated duration, and in some cases took even less time than anticipated.³²

36. The Defence stresses that the Prosecution fails to mention that the Defence must likewise address numerous allegations falling outside the scope of the Indictment or Pre-Trial Brief, and beyond the temporal jurisdiction of the Tribunal.³³

37. The Defence observes that the Prosecution neither proffered any explanation as to the apparent delay with which the Oral Order was issued, nor did it comment on the Defence assertion that the Accused is significantly prejudiced by the issuance of the Oral Order at this stage of the proceedings.³⁴

Certification to Appeal

38. The Defence reiterates that the Chamber only has discretion under Rule 73 *ter* (D) to reduce the number of Defence witnesses before the commencement of the Defence case.³⁵

39. The Defence states that, contrary to the Prosecution's argument that granting certification to appeal would be improper as this would permit the Defence to call redundant witnesses for various Indictment paragraphs, granting certification would merely provide the Appeals Chamber with an opportunity to ensure that the Accused's rights are observed throughout the remainder of the trial.³⁶

³⁰ Defence Reply, para. 9.

³¹ *Id.*, para. 14.

³² *Id.*, paras. 15-19.

³³ *Id.*, paras. 21-22.

³⁴ *Id.*, paras. 26-28.

³⁵ *Id.*, para. 31.

³⁶ *Id.*, paras. 35, 38.

DELIBERATIONS

Reconsideration

40. The Chamber recalls the Tribunal's jurisprudence on reconsideration.³⁷

The Chamber notes at the outset that the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.³⁸

41. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.³⁹

42. The Defence relies on the third ground for reconsideration.

43. The Chamber recalls that it is well-established before this Tribunal that a Trial Chamber possesses the discretion under Rule 73 *ter* (D) to reduce the number of witnesses if it considers that an excessive number of witnesses are being called to prove the same facts.⁴⁰

44. There is no basis for the Defence assertion that any reduction of Defence witnesses must be ordered before the commencement of the Defence case. Rule 73 *ter* regulates the

³⁷ Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 17 ("Decision of 15 July 2010"), citing Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Decision of 7 July 2010"), para. 16; Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Protective Measures of 9 February 2010 (TC), 31 March 2010 ("Decision of 31 March 2010"), para. 21; *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004 ("*Bagosora et al.* Decision of 15 June 2004"), para. 7.

³⁸ *Bagosora et al.* Decision of 15 June 2004, para. 7.

³⁹ Decision of 15 July 2010, para. 18, citing Decision of 7 July 2010, para. 17; Decision of 31 March 2010, para. 22; *The Prosecution v. Édouard Karemera et al.* ("*Karemera et al.*"), Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4; *Bagosora et al.* Decision of 15 June 2004, para. 9.

⁴⁰ *Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009 ("*Karemera et al.* Appeals Decision"), para. 17; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary His Witness List (AC), 21 August 2007 ("*Nyiramasuhuko et al.* Appeals Decision"), para. 10; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case (AC), 20 July 2005 ("*Orić* Appeals Decision"), para. 8.

conduct of the Pre-Defence Conference, during which the Chamber may order the Defence to reduce the number of witnesses. This does not mean, however, that such issues cannot be addressed at other stages of the proceeding.

45. A proper construction of Rule 73 *ter* must take into consideration the rest of the Rules and the Tribunal's Statute. In particular, Rule 54 provides that the Chamber may issue any order as may be necessary for the conduct of the trial, without limiting the timing thereof, so long as the rights of the Accused are respected. The Chamber notes that other Trial Chambers have ordered a reduction of the number of Defence witnesses after the Pre-Defence Conference,⁴¹ and after the commencement of the Defence case.⁴²

46. The Appeals Chamber has noted that mounting a full Defence often necessitates less time and fewer witnesses than establishing the Prosecution case:

The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.⁴³

47. The Chamber issued the Oral Order with due regard to the Defence witnesses' will-say statements, the Amended Pre-Defence Brief, other relevant submissions and the case as a whole. Prior to issuing the Oral Order, the Chamber observed that a number of the remaining Defence witnesses appeared to be unnecessarily repetitive, and their anticipated testimonies appeared to be of varying *prima facie* probative value.

48. Accordingly, the Chamber finds that the Defence has failed to establish that the Chamber erred or abused its discretion in issuing the Oral Order. The Chamber therefore denies the Defence Motion insofar as it seeks reconsideration of the Oral Order.

Certification to Appeal

49. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings

⁴¹ See *Nzabonimana* Trial Decision; *Nzabonimana*, Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (TC), 26 March 2010.

⁴² See, for example, *The Prosecutor v. Dominique Ntawukuliyayo*, Case No. ICTR-05-82-T, Decision on Defence Motion for Leave to Vary its Witness List to Add Three Witnesses and Extend Protective Measures; and the Chamber's Further Order to Reduce the Defence Witness List (TC), 30 September 2009, para. 1; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T ("*Casimir Bizimungu et al.*"), Decision on Prosper Mugiraneza's Motion for Leave to File Documents Out of Time and Order for Further Reduction of Witness List (TC), 20 February 2008, para. 1; *Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Extend Deadlines in Scheduling Order of 4 December 2007 and Order for Reduction of Witness List (TC), 28 January 2008, para. 1; *Nyiramasuhuko et al.*, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006 (TC), 21 March 2007, para. 1.

⁴³ *Orić* Appeals Decision, para. 7, cited with approval in *Karemera et al.* Appeals Decision, para. 30.

or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.⁴⁴

50. Even where both requirements of the Rule are satisfied, certification is not automatic, but it remains at the discretion of the Trial Chamber. Moreover, “certification to appeal must remain exceptional.”⁴⁵

51. The Chamber recalls that when determining whether to grant leave to appeal, it is not concerned with the correctness of its impugned decision. All considerations such as whether there was an error of law or abuse of discretion in the decision at stake are for the consideration of the Appeals Chamber after certification to appeal has been granted, and are therefore irrelevant to the decision for certification. Insofar as the Parties have made such arguments, the Trial Chamber will not consider them.⁴⁶

52. In the Chamber’s view, the issue of whether the Chamber may order a reduction in the Defence witness list after the Pre-Defence Conference does not meet the standard of Rule 73 (B) for certification. As noted above, numerous Trial Chambers have ordered such a reduction after the Pre-Defence Conference. Moreover, the Chamber has not placed a limit on the number of witnesses, on the length of their testimony, or on the subject matters to which they might testify, and the Oral Order of 13 July 2011 has not been complied with. The Chamber considers that an immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings, and therefore denies the Defence Motion for certification to appeal the Oral Order.

Reduction of Defence Witness List

53. The Chamber recalls that after urging the Defence to examine closely its number of witnesses⁴⁷ and to file a realistic list of witnesses,⁴⁸ the Chamber ordered the Defence to reduce the number of its witnesses significantly, which stood at about 45 who remained to testify.⁴⁹ Despite being ordered to do so by 1 August 2011, the Defence has opted not to file an updated list of witnesses.

54. The Chamber notes with regret that, in addition to ignoring the Chamber’s Oral Order to file a reduced witness list by 1 August 2011, the Defence has not moved for a stay of this

⁴⁴ Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Prosecution Motion to Vacate the Trial Date (TC), 29 June 2010 (“Decision of 29 June 2010”), para. 17, citing Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision of 25 March 2009 on Defence Motion to Vary Trial Date (TC), 15 April 2009 (“Decision of 15 April 2009”), para. 16.

⁴⁵ Decision of 29 June 2010, para. 19, citing Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber’s Decision on the Trial Date Rendered on 15 July 2009 (TC), 10 August 2009, para. 11; *Karemera et al.*, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; Decision of 15 April 2009, para. 17.

⁴⁶ Decision of 29 June 2010, para. 20, citing Decision of 15 April 2009, para. 18; *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4; *Casimir Bizimungu et al.*, Decision on Bicumumpaka’s Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicumumpaka and Mugenzi for Disclosure of Relevant Material.” (TC), 4 February 2005, para. 28.

⁴⁷ T. 25 October 2010, p. 7.

⁴⁸ T. 14 February 2011, pp. 115-116.

⁴⁹ T. 13 July 2011, pp. 89-90.

Order or provided any explanation for its non-compliance. This is unacceptable, and the Chamber reminds the Defence that “[a] violation of a court order *as such* constitutes an interference with the Tribunal’s administration of justice” which can fall within the ambit of Rule 77 (A) for contempt of the Tribunal.⁵⁰ The Chamber does not expect to be faced with such non-compliance in the future.

55. Under these circumstances, the Chamber considers that it must address this issue *proprio motu*. In doing so, the Chamber notes that the *Nyiramasuhuko et al.* and *Karemera et al.* Trial Chambers addressed a Defence refusal to reduce its witnesses further by ordering *proprio motu* a reduction to a specific number of witnesses.⁵¹ In both cases, the Appeals Chamber dismissed the subsequent Defence appeals.⁵²

56. The Chamber is mindful that the number of witnesses allotted to the Defence must be sufficient to allow him a fair opportunity to present his defence, and must respect the equality of arms between the Parties.⁵³ Nevertheless, the Chamber again notes that some of the Defence witnesses are unnecessarily repetitive and excessive.⁵⁴

57. The Defence is entitled to be heard in relation to the presentation of its case.⁵⁵ Accordingly, the Chamber has closely considered the Pre-Defence Brief, the Amended Pre-Defence Brief, the will-say statements of proposed witnesses, other relevant submissions, and the case as a whole, including its complexity. The Chamber has also taken into account the Defence submissions concerning the timing of this reduction.⁵⁶

58. After carefully considering these factors, the Chamber concludes that 19 additional Defence witnesses will be sufficient to guarantee the Accused a fair opportunity to present his defence. Given that the Defence has already called 16 witnesses, this additional number amounts to a total of 35 Defence witnesses.

59. The Chamber further recalls that while the Prosecution presented 20 witnesses over the course of 53 trial days, the Defence has called 16 witnesses over 54 trial days, including 23 days of testimony from the Accused. In light of the evidence already adduced, and taking note of Rule 90 (F), the Chamber considers that the Defence should lead its remaining witnesses in a manner that avoids any unnecessary repetition and consumption of time. The Chamber repeats its expectation⁵⁷ that during the next trial session from 19 September up to the end of October 2011, there will be finalisation of the Defence case and possibly other issues that may arise.

⁵⁰ *In the Case Against Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement (AC), 19 May 2010, para. 20.

⁵¹ *Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi’s Motions for Modification of His Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje’s Request for Extension of Time Within Which to Respond to the Scheduling Order of 13 December 2006 (TC), 21 March 2007, paras. 35, 38, p. 9; *Karemera et al.* Case No. ICTR-98-44-T, Decision on Mathieu Ndirumpatse’s Motions for Reconsideration and Extension of Time-Limits for the Presentation of His Case (TC), 17 September 2008, para. 12, p. 7.

⁵² *Nyiramasuhuko et al.* Appeals Decision, para. 27; *Karemera et al.* Appeals Decision, para. 33.

⁵³ See, for example, *Nyiramasuhuko et al.* Appeals Decision, paras. 21, 24-26. See also, for example, Articles 19 (1), 20 (2), 20 (4)(b), 20 (4)(d), and 20 (4)(e) of the Statute.

⁵⁴ For instance, the Chamber notes that, among other matters, the anticipated evidence of 21 Defence witnesses impeach the credibility of Prosecution Witness ANAO, and that of more than 20 Defence witnesses pertain to paragraphs 16, 25, 42, 51 and 52 of the Indictment.

⁵⁵ See, for example, *Nyiramasuhuko et al.* Appeals Decision, para. 16.

⁵⁶ See generally Defence Motion; Defence Reply.

⁵⁷ See T. 11 July 2011, pp. 54-55.

60. Therefore, the Chamber orders the Defence to file its final list of witnesses, which is not to exceed 19 remaining witnesses, to make a total of 35 witnesses. Because the Defence is expected to conclude its case-in-chief by 31 October 2011, the Chamber orders that this final list be filed by 5 September 2011. However, the Chamber directs the Defence to file the order of appearance of at least its 6 next witnesses by 2 September 2011.

FOR THE ABOVE REASONS, THE CHAMBER

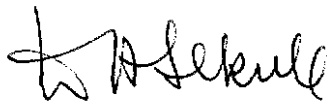
DENIES the Defence Motion;

ORDERS the Defence to file its final list of witnesses by 5 September 2011;

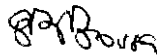
DIRECTS the Defence to file the order of appearance of at least its 6 next witnesses by 2 September 2011; and

REMINDS the Parties of the need to comply fully with the Chamber's Orders in the future.

Arusha, 26 August 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

