



ICTR-99-54-T
15 - 09 - 2011
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

104292
MME/MP

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 15 September 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS/ARCHIVES
UNICTR
2011 SEP 15 P 3 PM 1

DECISION ON THE DEFENCE MOTION FOR RECONSIDERATION AND/OR
CERTIFICATION TO APPEAL THE DECISION OF 26 AUGUST 2011

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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 Compliance with the Trial Chamber's Order to Reduce Significantly the Witness List and Defence Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 26 August 2011" filed confidentially on 1 September 2011 (the "Defence Motion");

NOTING that the Prosecution did not file a Response;

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

NOW DECIDES the Defence Motion pursuant to Rule 73 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 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

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).

⁴ T. 14 February 2011, pp. 115-116.

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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"). 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 45 Defence witnesses 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 2011.¹⁰

13. On 19 July 2011, the Defence filed a Motion for Reconsideration and/or Certification to Appeal the Oral Order. The Prosecution filed a Response, and the Defence filed a Reply thereto.

14. The Defence did not file its final list of witnesses by 1 August 2011.

15. On 15 August 2011, trial proceedings resumed and continued until 26 August 2011. In the course of these 9 trial days, the Defence called 3 witnesses to testify.

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

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, para. 23; 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, para. 26. 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.

17. On 26 August 2011, the Chamber denied the Defence Motion seeking reconsideration and/or certification to appeal the Oral Order ("Impugned Decision"). In addition, the Chamber *proprio motu* ordered the Defence to file its final list of witnesses by 5 September 2011, which was not to exceed 19 remaining witnesses, amounting to a total of 35 Defence witnesses ("*Proprio Motu* Order").¹¹

18. On 1 September 2011, the Defence filed the present Motion. Incorporated into the Defence Motion was a Compliance with the Oral Order. The Defence apologized to the Chamber and explained that it did not ignore the Oral Order and had in fact addressed it immediately by filing the Defence Motion. It assumed that the Defence Motion constituted *per se* and *de facto* a stay of the Oral Order, without requiring a categorical request to this effect.¹²

19. In compliance with the Oral Order, the Defence reduced its remaining number of witnesses to 29. The Defence submits, however, that the *Proprio Motu* Order to reduce the remaining number of its witnesses to 19 precluded it from conducting a proper and full defence of the Accused. The Defence further requested a stay of the *Proprio Motu* Order until determination of the Defence Motion.¹³

20. On 2 September 2011, the Chamber denied the Defence request for a stay of the *Proprio Motu* Order, considering that this was not warranted under the circumstances.¹⁴

21. On 5 September 2011, the Defence filed the Order of Appearance of its final list of 19 remaining Defence witnesses in compliance with the *Proprio Motu* Order.¹⁵

SUBMISSIONS

Reconsideration

22. The Defence invites the Chamber to reconsider the Impugned Decision on the grounds that there has been a material change in circumstances and that there was an abuse of power or discretion resulting in an injustice.¹⁶

Material Change in Circumstances

23. The Defence submits that its substantial compliance with the Oral Order, then reducing the remaining Defence witnesses to 29, constitutes a material change in circumstances since the issuance of the Impugned Decision.¹⁷

¹¹ 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 (TC), 26 August 2011 ("Impugned Decision"), paras. 55-60.

¹² Defence Motion, paras. 32-33.

¹³ *Id.*, paras. 31, 38, 44, p. 33.

¹⁴ Order Denying the Defence Request for a Stay of the Order to File its Final List of Witnesses by 5 September 2011 (TC), 2 September 2011.

¹⁵ Order of Appearance of the Defence Witnesses pursuant to the Trial Chamber's Order of 2 September 2011, 5 September 2011.

¹⁶ See generally, Defence Motion, paras. 39-88.

¹⁷ *Id.*, paras. 41-42.

24. The Defence cites a *Nzabonimana* Trial Decision which reconsidered a previous Decision to impose a number of 30 Defence witnesses as the Defence therein had relaxed its opposition to the reduction of the number of its witnesses and offered to reduce them to 44.¹⁸

25. The Defence contends that the Impugned Decision places the Accused in an extremely prejudicial and detrimental situation where he will not be able to conduct a complete and effective defence. The Defence considers that the appropriate basis for determining the sufficient number of Defence witnesses is not the number of Prosecution witnesses who were called, but rather the number of allegations the Accused is facing. Most of the Prosecution witnesses in this case were able to testify on numerous allegations. The Defence points out that other accused before the Tribunal were able to call a greater number of witnesses vis-à-vis the allegations they faced. The Defence is further concerned with the requirement of corroboration, necessitating that more than one Defence witness testify to challenge each allegation.¹⁹

Abuse of Power or Discretion

26. The Defence submits that the *Proprio Motu* Order was an abuse of power or discretion by the Chamber as the Defence was not given any opportunity to be heard thereon. The Defence contends that the Chamber merely made a general reference to its submissions about the timing of the *Proprio Motu* Order without actually addressing any of them. The Chamber likewise did not explain why it considered 19 to be a sufficient number of remaining Defence witnesses.²⁰

27. The Defence stresses that the Chamber disregarded the complexity of the case. The Defence needs to lead evidence to demonstrate the Accused's alibi from 7 to 12 April 1994 and from 23 April to 23 May 1994, and on his ability to travel between Kigali and Gisenyi. The Defence must further refute 48 paragraphs of the Indictment, 38 material facts outside the Indictment and/or Pre-Trial Brief, 9 material facts outside the temporal jurisdiction of the Tribunal, and more than 10 allegations introduced during the cross-examination of the Accused. The Defence must likewise call as witnesses various individuals subject of major allegations in the Indictment. The Defence illustrates the insufficiency of a total of 35 witnesses by way of a table annexed to the Defence Motion.²¹

28. The Defence takes exception to the Chamber's statement in the Impugned Decision that other Trial Chambers of this Tribunal have ordered a reduction of the number of Defence witnesses after the commencement of the Defence case. The Defence argues that the Trial Decisions cited in the Impugned Decision actually pertained to multi-accused cases, wherein the Orders for the reduction of Defence witnesses were issued prior to, or at most less than one week after, the commencement of the Defence case for the particular Accused concerned.²²

¹⁸ *Id.*, para. 43, citing *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, 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"), para. 39.

¹⁹ Defence Motion, paras. 44-52.

²⁰ *Id.*, paras. 68-73, 77.

²¹ *Id.*, paras. 52, 54-65, 74, Annex A.

²² *Id.*, paras. 84-88.

29. The Defence further argues that the Accused should not be counted among the number of witnesses the Defence can call, as he has the right to testify under Article 20 of the Tribunal's Statute. The Defence points out that in other cases before the Tribunal where a reduction of Defence witnesses was ordered, the Accused was allowed to testify in addition to the number imposed by the Trial Chamber. Accordingly, the Accused should not be penalized for testifying first and for the amount of time his testimony took. The Defence adds that the Chamber was well aware of the number of days the Accused spent on the stand when he completed his testimony on 14 February 2011, and had no reason to wait until 13 July 2011 to issue the Oral Order and until 26 August 2011 to impose a limit of 35 Defence witnesses.²³

Certification to Appeal

30. The Defence submits that the Impugned Decision meets the two requirements for certification under Rule 73 (B). The issue warranting certification is not the discretion of the Chamber to order a reduction of Defence witnesses but whether the Order to reduce the number of remaining witnesses to 19 at this late stage of the proceedings affects the fairness and expeditiousness of the proceedings, and the outcome of the trial.²⁴

31. The Defence submits that the Impugned Decision has a significant effect on the fair and expeditious conduct of the proceedings. The reduction of the Defence witness list to 19 individuals will significantly prejudice the ability of the Defence to defend the Accused. The Defence reiterates that if it had known prior to commencing its case that it would only be able to present 35 witnesses, it would have presented its more important witnesses first rather than call them to the stand based on their availability. The Defence will now have to abandon a significant number of essential witnesses, in contravention of the Accused's right to a fair trial.²⁵

32. The Defence notes that various Trial Chambers have granted certification to appeal Decisions ordering the reduction of Defence witnesses, including one situation in *Karemwa* *et al.* wherein certification was granted *proprio motu*.²⁶

33. The Defence adds that the issue of the belated reduction of witnesses impacts upon the outcome of the trial. The Defence submits that it will not be able to address all the allegations against the Accused, which increases the likelihood of his conviction.²⁷

34. In addition, the Defence posits that an immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings. The Defence recalls that the Impugned Decision concluded that an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings, as among others, it had not placed a limit on the number of witnesses. In contrast, the Chamber has now imposed a specific number of remaining witnesses upon the Defence. This issue must be resolved by the Appeals Chamber at the current stage of the proceedings, and not during the appeal on the merits, so that the Accused will still have a chance to present a sufficient number of witnesses should the

²³ *Id.*, paras. 46-51, 75.

²⁴ *Id.*, para. 94.

²⁵ *Id.*, paras. 89-95, 97, 99-104.

²⁶ *Id.*, paras. 96, 98.

²⁷ *Id.*, paras. 105-108.

Appeals Chamber determine that the imposition of 19 remaining witnesses upon the Defence was unreasonable.²⁸

35. The Prosecution did not file a Response to the Defence Motion.

DELIBERATIONS

Reconsideration

36. The Chamber recalls the Tribunal's jurisprudence on reconsideration:²⁹

...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.³⁰

37. 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.³¹

38. The Defence relies on the second and third grounds for reconsideration.

Material change in circumstances

39. The Defence contends that there has been a material change in circumstances as a result of the reduction of its witness list to 29 at the time of the Defence Motion.

40. The Defence fails to understand that compliance with the Oral Order does not amount to a material change in circumstances meriting reconsideration of the Impugned Decision. This ground for reconsideration pertains to new circumstances which alter the premise of the original Decision, which does not apply in this case.³²

²⁸ *Id.*, paras. 109-115.

²⁹ *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.

³⁰ *Bagosora et al.* Decision of 15 June 2004, para. 7.

³¹ *Id.*, para. 9; *The Prosecutor 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.

³² See generally, *Bagosora et al.* Decision of 15 June 2004, para. 9. The *Nzabonimana* Trial Decision cited by the Defence is not applicable to the case at bar. In that situation, the Defence sought reconsideration of the Decision ordering the reduction of witnesses on the ground of abuse of power or discretion. The Trial Chamber therein denied the Motion for Reconsideration on this ground, but *proprio motu* reconsidered its previous

41. The Defence further contends that the Accused's ability to conduct a complete and effective defence will be seriously prejudiced if he will be limited to a total of 35 witnesses. The Chamber considers, however, that this ground is more appropriately appreciated in relation to the ground for reconsideration of abuse of power or discretion and will therefore be discussed below.

42. The Defence has thus not established that there was a material change in circumstances since the issuance of the Impugned Decision meriting its reconsideration.

Abuse of Power or Discretion

43. 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 is being called to prove the same facts. Moreover, the Chamber possesses the discretion and authority to order the reduction of Defence witnesses at any appropriate stage of the proceedings, as long as the rights of the Accused to a fair trial and to a full and effective defence are observed.³³

44. The Chamber gave due regard to the Defence witnesses' will-say statements, the Amended Pre-Defence Brief, other relevant submissions and the case as a whole,³⁴ which necessarily entailed consideration of the complexity of the case.³⁵ The Oral and *Proprio Motu* Orders were issued in the context of previous repeated instructions to the Defence to reduce the number of its witnesses.³⁶ The Chamber had sufficient basis to conclude that the Defence would be able to conduct a complete and effective defence of the Accused with a total of 35 witnesses.³⁷ The Chamber therefore did not abuse its power or discretion in issuing the Impugned Decision.

Certification to Appeal

45. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (1) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings

Decision on the ground of a material change in circumstances and in the interests of justice as the Defence had indicated a willingness to reduce the number of its witnesses to 44 down from 184.

³³ *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. 26, and *Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009 ("*Karemera et al.* Appeals Decision"), para. 30, both citing *Prosecutor v. Naser Orić*, ICTY Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case (AC), 20 July 2005, para. 7.

³⁴ Impugned Decision, para. 57.

³⁵ See generally, *Karemera et al.* Appeals Decision, paras. 25, 27. The Appeals Chamber approved the Trial Chamber's reliance on the Pre-Defence Brief and the Prosecution and Defence evidence heard to date in considering the repetitive nature of the testimonies and consequently reducing the total number of Defence witnesses to 35. The Appeals Chamber concluded that the Trial Chamber properly considered the complexity of the case and whether the reduced number of Defence witnesses would still allow the Accused Ngirumpatse the opportunity to present a full defence.

³⁶ T. 25 October 2010, p. 7; T. 14 February 2011, pp. 115-116; Scheduling Order Pursuant to Rule 54 of the Rules of Procedure and Evidence (TC), 28 February 2011, p. 4.

³⁷ See generally, *Nyiramasuhuko et al.* Appeals Decision, paras. 18-19, 21-24.

or the outcome of the trial, and (2) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.

46. 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.³⁸

47. 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.³⁹

48. The Chamber considers that the reduction of Defence witnesses at this particular stage of the proceedings involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Considering that the Chamber intends to complete the trial phase of the case by 31 October 2011,⁴⁰ it is likewise of the view that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. The Chamber therefore grants the Defence Motion insofar as it seeks certification to appeal the Impugned Decision.

³⁸ *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; 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; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 February 2008 on Disclosure (TC), 19 February 2009, para. 5.

³⁹ *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*, ICTY 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; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomupaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomupaka and Mugenzi for Disclosure of Relevant Material." (TC), 4 February 2005, para. 28.

⁴⁰ T. 26 August 2011, p. 32.

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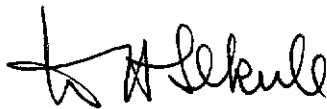
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion insofar as it seeks reconsideration of the Impugned Decision;

GRANTS certification to appeal the Impugned Decision with respect to the issue of whether the Trial Chamber may order the reduction of the remaining Defence witnesses to 19 at this particular stage of the proceedings; and

DECLARES that, pending resolution of this matter by the Appeals Chamber, the Defence will be able to call no more than 19 remaining witnesses, and the proceedings will continue on 19 September 2011 as previously scheduled.

Arusha, 15 September 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



[Seal of the Tribunal]



Mparany Rajohnson
Judge