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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 2 October 2009

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-PT

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE MOTION RAISING DEFECTS IN THE PROSECUTION
PRE-TRIAL BRIEF OF 19 AUGUST 2009**

Office of the Prosecutor:

Richard Karegyesa
David Akerson
Adelaide Whest
Didace Nyirinkwaya
Dennis Mabura

For the Accused:

Marie-Pierre Poulain
Kate Gibson

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INTRODUCTION

1. On 7 July 2009, the Prosecution filed a Second Amended Indictment pursuant to a Decision issued by Trial Chamber I on 3 July 2009 granting in part a Defence Motion concerning defects in the Indictment.¹ On 21 July 2009, the Prosecution filed its Provisional Pre-Trial Brief, which included a list of 28 witnesses. Pursuant to the Chamber's Scheduling Order issued on 11 August 2009, the Prosecution filed a finalized Pre-Trial Brief on 19 August 2009, from which Witnesses AIY and BDT had been deleted, leaving a list of 26 Prosecution witnesses.

2. On 3 September 2009, the Defence filed a motion before this Chamber alleging defects in the finalized version of the Prosecution Pre-Trial Brief.² On 8 September 2009, the Prosecution filed its Response opposing the Defence Motion.³

DISCUSSION

Applicable Law

3. Article 20 (4) (a) of the Tribunal's Statute provides that the Accused is entitled "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her".

4. The Chamber recalls that Rule 73*bis* which implements Article 20(4)(a) of the Statute,⁴ requires that the Pre-Trial Brief set out:

(iv) A list of witnesses the Prosecutor intends to call with:

- (a) The name or pseudonym of each witness;
- (b) A summary of the facts on which each witness will testify;
- (c) The points in the indictment on which each witness will testify; and
- (d) The estimated length of time required for each witness;

5. Pursuant to Rule 73*bis* (B)(i) and (F), the objective of the pre-trial brief is to address the "factual and legal issues" required to clarify the Prosecution case. The pre-trial brief is therefore relevant to the case only as far as it develops the Prosecution strategy at trial in accordance with the Indictment.⁵

¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Decision on Defence Motion Concerning Defects in the Amended Indictment, 3 July 2009.

² *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Defence Motion Raising Defects in the Prosecution Pre-Trial Brief of 19 August 2009, 3 September 2009 ("Defence Motion").

³ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Prosecutor's Response to "Defence Motion Raising Defects in the Prosecution Pre-Trial Brief of 19 August 2009", 8 September 2009, ("Prosecution's Response").

⁴ *The Prosecutor v. Augustin Ndirabwire*, Case No. ICTR-99-54-T, Decision on Defence Motions Objecting to the Prosecution's Pre-Trial Brief, 25 June 2009 ("*Ndirabwire* Decision of 25 June 2009"), para. 30.

⁵ *Ibid.*



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6. The Tribunal's jurisprudence has established that "the analysis of the case in the Prosecution Pre-Trial Brief serves as a tool for the Defence to properly anticipate the evidence, adequately prepare for the cross-examination of witnesses, and for effective preparation to meet the case against the Accused person".⁶

Preliminary Matters

Summaries of Prosecution Witnesses

7. The Defence submits that the Prosecution cannot seek to introduce through its witness summaries matters which are not in the Second Amended Indictment or in the part of the Pre-Trial Brief setting out the definitive terms of its case.⁷ The Defence submits further that it wishes to "alert the Chamber in advance of any attempt of the Prosecution to do so".⁸ The Chamber notes the Defence concern but observes that it has not substantiated its allegations, nor has it requested particular relief. Nonetheless, the Chamber recalls that "whether the witness' statements actually support the relevant paragraphs is an issue best considered at trial, in the context of all the evidence".⁹

Admission of Facts

8. The Defence submits that the Prosecution is mistaken in its assertion at page 42 of its Pre-Trial Brief that the Defence admits the occurrence of systematic attacks against the civilian population.¹⁰

9. The Chamber takes note of the Prosecution's response that this particular fact should be marked as a "Contested Fact".¹¹

Alleged Defects Regarding Prosecution Reliance on Witnesses not included in the Prosecution Witnesses List

10. The Defence submits that the Prosecution refers to Witnesses AIY and BTD at paragraphs 33, 68 and 71 of its finalized Pre-Trial Brief despite their deletion from the "List of Prosecution Witnesses". It therefore requests that allegations made by these witnesses be deleted from the Prosecution Pre-Trial Brief.¹²

11. The Chamber notes the Prosecution's submission that the names of these witnesses were "inadvertently included after discovery that these two witnesses AIY and BTD have since died in Rwanda."¹³

⁶ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief, 24 November 2004, para. 30. See also *Ngirabatware*, Decision of 25 June 2009, para. 30.

⁷ Defence Motion, para. 25.

⁸ *Ibid.*

⁹ *Ngirabatware*, Decision of 25 June 2009, para. 37.

¹⁰ Defence Motion, para. 28.

¹¹ Prosecution Response, para. 33.

¹² Defence Motion, para. 8.

¹³ Prosecution's Response to Defence Motion, para. 17.

12. In view of the fact that these Prosecution witnesses will not be called to testify, the Chamber considers that their allegations cannot be relied upon in support of the charges against the Accused.

13. In the interests of the expeditiousness of the proceedings, the Chamber does not consider it necessary to grant the relief sought by the Defence, namely to instruct the Prosecution to delete these allegations from the Pre-Trial Brief.¹⁴ Rather, the Chamber will not consider the allegations of Witness BTM at paragraph 33, and those of Witness AIY, at paragraphs 68 and 71 as relevant to the case, even if they remain in the Pre-Trial Brief.

14. The Defence submits further that Witnesses BBS, AIS and BBC have not been included in the lists annexed to either version of the Pre-Trial Brief, and that the Prosecution cannot rely upon allegations of witnesses who will not be called to testify.¹⁵

15. The Chamber observes that the Prosecution clarified in its Response that it might file a Rule 92bis motion in relation to Witnesses BBS, AIS and BBC for admission of written statements in lieu of oral testimony.¹⁶ The Chamber recalls its Scheduling Order of 11 August 2009 instructing the Prosecution to file any motions under Rule 92bis no later than 12 October 2009. Considering the Prosecution's clarification, the Chamber does not deem it necessary to remove the allegations of these witnesses at this stage. If the Prosecution does file any Rule 92bis motions for the aforementioned witnesses who do not appear on the Prosecution Witness List, the Chamber will of course consider how to proceed in light of the obligation to ensure a fair trial, and the impact that additions to the Witness List, so close to the commencement of trial, may have on the Accused's rights.

Alleged Defects Regarding the Substance of the Pre-Trial Brief

16. The Defence avers that several allegations in the Pre-Trial Brief were not pleaded in the Second Amended Indictment and therefore constitute an attempt by the Prosecution to impermissibly set out new and expanded charges, which have no link to the case against the Accused.¹⁷ The Defence contends that the impugned allegations¹⁸ do not elaborate or provide further details of the charges contained in the Second Amended Indictment, as permitted by the jurisprudence of the Tribunal. The Defence submits that neither the Pre-Trial Brief nor witness statements can be used to introduce new material facts in lieu of seeking leave to amend the Indictment. The Defence accordingly requests that the Chamber declare that certain paragraphs of the Pre-Trial Brief are irrelevant to establishing the counts in the Indictment.¹⁹

¹⁴ See *Zigiranyirazo* Decision, para. 2. See also *The Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Joint Defence Motion for an Update of the Prosecution's Pre-Trial Brief, 2 November 2004, para. 5: "it would not promote the interests of judicial economy to require the Prosecution to amend the Pre-Trial Brief at this late date".

¹⁵ Defence Motion, paras. 9-10.

¹⁶ Prosecution's Response to Defence Motion, paras. 19-20.

¹⁷ Defence Motion, para. 15.

¹⁸ Defence Motion, para. 17 referring to paragraph 33 of the Pre-Trial Brief; para. 18 referring to paragraphs 66 to 70 of the Pre-Trial Brief; paras. 19-20 referring to paragraph 71 of the Pre-Trial Brief; para. 21 referring to paragraph 73 of the Pre-Trial Brief.

¹⁹ Defence Motion, paras. 15-17, 22.



17. The Prosecution submits that the allegations challenged by the Defence provide further and better particulars of the evidence in support of the charges contained in the Second Amended Indictment, without introducing new charges against the Accused.²⁰

18. The Chamber recalls that the Indictment is the primary accusatory instrument. Any other accusatory instrument cannot add charges or material facts amounting to charges that were not pleaded in the Indictment.²¹ The Chamber will address the specific paragraphs of the Prosecution's Pre-trial Brief challenged by the Defence and examine whether or not the factual allegations contained in these paragraphs relate to allegations already contained in the Second Amended Indictment or add new charges. The Chamber will also consider if allegations which broaden the scope of allegations in the Second Amended Indictment lead to unfairness or prejudice to the Accused.²²

a. Allegation in paragraph 33

19. The Defence submits that the allegation of a meeting in Murambi *commune* in paragraph 33 of the PTB is not pleaded in the Second Amended Indictment and has no link to the charges against the Accused. The Defence contends that the Prosecution seeks to expand the charges by including the alleged meeting at Murambi *commune* office as an additional meeting not mentioned in paragraph 14 of the Indictment. According to the Defence, paragraph 14 refers to a different meeting at a different location with different participants.²³

20. The Chamber observes that the contested allegation, contained in the last sentence of paragraph 33, is based on Witness BTB, a witness who will no longer be called by the Prosecution. The Chamber therefore recalls its finding that this particular allegation will not be considered as relevant to the case against the Accused.²⁴

b. Allegations in paragraphs 66 to 70

21. The Defence submits further that the allegations in paragraphs 66 to 70 relate to pre-1994 events which had previously been pleaded in the Amended Indictment but which are not pleaded in the Second Amended Indictment. The Defence argues that the Prosecution does not provide a link between these allegations and any paragraph of the Second Amended Indictment.²⁵ The Defence contends that paragraphs 66 to 70 are consequently irrelevant to the case, as the Prosecution had decided to drop the paragraphs of the Amended Indictment relating to pre-1994 events, which, the Defence submits, can no longer be part of the Prosecution's case.²⁶

22. The Chamber recalls that, consistent with the established jurisprudence, the provisions of the Statute relating to the Tribunal's temporal jurisdiction do not preclude the Chamber from admitting and considering evidence concerning events that occurred prior to 1994

²⁰ Prosecution's Response to Defence Motion, paras. 15, 23.

²¹ *The Prosecutor v. Augustin Ndirakobuca*, Case No. ICTR-99-54-T, Decision on Defence Motion Objecting to the Prosecution's Pre-Trial Brief, 2 June 2009, ("*Ndirakobuca* Decision of 2 June 2009"), para. 31; *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence Motion to Exclude some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, ("*Zigiranyirazo* Decision"), para. 2.

²² See *Ndirakobuca*, Decision of 2 June, para. 32.

²³ Defence Motion, para. 17.

²⁴ See *supra* paragraph 13.

²⁵ Defence Motion, para. 18.

²⁶ Defence Motion, para. 18 referring to paras. 13-15 of the Amended Indictment of 10 May 2005.



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where, for example, the purpose of such evidence is to: (i) clarify a given context; (ii) establish by inference the elements of criminal conduct occurring in 1994; or (iii) demonstrate a deliberate pattern of conduct.²⁷ The proper stage to determine the admissibility and evidential value, if any, of allegations referring to events prior to 1 January 1994, is during the assessment of evidence.²⁸

23. The Chamber notes at the outset that paragraph 68 of the Pre-Trial Brief relies upon Prosecution Witness AIY who will no longer be called to testify.²⁹ This particular allegation is thus no longer relevant to the case. As to paragraphs 66, 67, 69 and 70 of the Pre-Trial Brief, the Chamber observes after careful review that they do not relate to the same events mentioned in paragraphs 13 to 15 of the Amended Indictment which have been dropped by the Prosecution.³⁰

24. The Chamber is mindful that it has jurisdiction only in respect of crimes committed between 1 January and 31 December 1994.³¹ The Chamber considers that the Prosecution's decision to abandon certain allegations concerning pre-1994 events in the Second Amended Indictment does not prevent it from adducing, at this stage of the proceedings, evidence which provides additional contextual information to the case. The contested allegations at paragraphs 66 to 70 of the Pre-Trial Brief do not constitute charges against the Accused. These paragraphs merely provide information which is relevant to the background and the context of the specific allegations brought against the Accused in the Second Amended Indictment. Even if there are no references to pre-1994 events in the Second Amended Indictment, the Chamber considers that the timely disclosure of these factual allegations at this stage does not lead to unfairness or prejudice to the Accused.

25. Thus, the Chamber does not consider that the Defence challenge to paragraphs 66, 67, 69 and 70 of the Prosecution Pre-Trial Brief is founded.

c. Allegations in paragraph 71

(i) Umurehe attack

26. The Chamber observes that this allegation is based on Witness AIY who has been removed from the Prosecution Witness List.³² Hence, the Chamber considers that the Prosecution cannot rely on this Witness in its Pre-Trial Brief, as stated above in paragraph 13.

(ii) Cerai School massacre

27. The contested allegation in the Pre-Trial Brief reads as follows: "About April 12 or 13, 1994, Gatete coordinated the *Interahamwe* to massacre Tustis at the Cerai School." The

²⁷ *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, ("*Nahimana et al.*, Judgement (AC)"), para. 315.

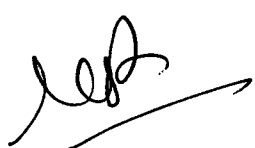
²⁸ Gatete, Decision on Defence Motion concerning Defects in the Indictment, 3 July 2009, para. 30.

²⁹ The allegation at issue reads as follows: "Gatete personally trained and armed *Interahamwe* groups to insure they could function efficiently."

³⁰ Compare paras 13-15 of the Amended Indictment of 10 May 2005 with paras 66-70 of the Prosecution Pre-Trial Brief.

³¹ Articles 1 and 7 of the Statute. See *Nahimana et al.*, Judgement (AC), para. 313.

³² The allegation in paragraph 71 reads as follows: "In Umurehe, Gatete personally participated in an attack on a Tutsi family along with the *Interahamwe*."



Defence submits that this allegation, not mentioned in the Second Amended Indictment, amounts to a material fact which should have been pleaded by the Prosecution.³³

28. The Chamber notes that Cerai School is in Kibungo *prefecture*, Rulenge *secteur*, Rukira *commune*³⁴ and that Rukira *commune* is specifically pleaded in the Second Amended Indictment at paragraph 25. The Chamber notes further that paragraph 25 contains particulars clearly referring to the participation of the Accused in massacres committed against Tutsi in Rukira in mid April 1994.³⁵

29. Contrary to the Defence submission³⁶, the Chamber finds that the allegation at issue in paragraph 71 of the Prosecution Pre-Trial Brief does correspond to paragraph 25 of the Second Amended Indictment and elaborates on the allegations contained therein. When read in the context of paragraph 25, the allegation in the Pre-Trial Brief provides further details relevant to charges already contained in the Indictment.

30. The Chamber observes that the Prosecution case has not yet commenced and that the Defence still has time to investigate this allegation further. The Chamber concludes that this allegation does not introduce a new charge and its timely disclosure does not lead to unfairness or prejudice to the Accused.

d. Allegation in paragraph 73

31. The allegation challenged by the Defence is the following: "On April 10, 1994, Gatete, *Bourgmestre* Mwange, the deputy *bourgmestre*, communal policemen, [...], and *Interahamwe* militia attacked the Gakoni Adventist Orphanage." The Defence contends that this allegation is not contained in the Second Amended Indictment, that the Prosecution has not linked this allegation to any paragraphs of the Indictment and that, as such, it seeks to add a new element to its case.³⁷

32. The Chamber notes that the alleged attack on the Gakoni Adventist Orphanage cannot be found in the Second Amended Indictment. A reference to Gakoni is present in paragraphs 14 and 15 of the Indictment, and paragraph 17 refers to various *secteurs* in Murambi *commune*.³⁸ However, paragraph 14 only refers to meetings held by Gatete in various

³³ Defence Motion, para. 20.

³⁴ Prosecution Pre-Trial Brief, pp. 50-51, Witness Summary of BBQ.

³⁵ Paragraph 25 reads: "Mid to late April, Jean-Baptiste Gatete arrived in Rulenge, Rukira *commune* with a caravan of armed Murambi communal police, civilian militias and the *bourgmestre* of Kbarondo and Kigrama *communes*. Jean-Baptiste publicly castigated the local residents for not massacring the Tutsi. Jean-Baptiste Gatete ordered the *Interahamwe* to rape and kill Tutsi in Rukira, including women and children. The following morning, those *Interahamwe*, [...] destroyed Tutsi homes and raped and killed Tutsi civilians in Rukira.[...]"

³⁶ Defence Motion, para. 20.

³⁷ Defence Motion, para. 21.

³⁸ Paragraph 14 reads as follows: "On or about 7 April 1994, Jean-Baptiste Gatete held meetings with local administrative officials in various *secteurs* and *cellules* of Murambi *commune* including Rwankuba, Gakenke, Kiramuzi, Gakoni and Nyabisindu for the purpose of distributing weapons and instigating civilian militias to exterminate Tutsi civilians whom he blames for President Habyarimana's death.[...]" Paragraph 15 reads: "During the morning of 7 April 1994, Jean-Baptiste Gatete facilitated the transport of the *Interahamwe* through various Murambi *commune* *secteurs* and *cellules*, including Akarambo, Gakoni, [...], and commanded the *Interahamwe*, some of whom were [...], to kill the civilian Tutsi." See also paragraph 17 which reads: "On or about 7 April to 12 April 1994, Jean-Baptiste Gatete circulated through various *secteurs* of Murambi *commune*,



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locations, including Gakoni, "for the purpose of distributing weapons and instigating civilian militias to exterminate Tutsi civilians". Paragraph 14 does not mention either that a particular attack or massacre against Tutsis took place in Gakoni, or that the Accused participated in such an attack. Similarly, paragraphs 15 and 17 of the Indictment cannot be read as to include the contested allegation, which refers to an attack carried out by the Accused and others on the Gakoni Orphanage.³⁹

33. In addition, according to the established jurisprudence of both the International Criminal Tribunal for the Former Yugoslavia, and this Tribunal, "where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail".⁴⁰

34. In view of this requirement and taking into consideration that the references to Gakoni in the Indictment do not state the occurrence of an attack in Gakoni in which the Accused participated, the Chamber considers that the allegation relating to the Gakoni Orphanage does not merely provide more detail on the factual basis of allegations already contained in the Indictment. Rather, the Chamber finds that this allegation constitutes a new and precise material fact which should have been pleaded in the Second Amended Indictment. The Chamber concludes that the Indictment does not provide sufficient notice to the Accused regarding the alleged massacre at Gakoni Orphanage and will consequently consider this allegation as irrelevant to the charges against the Accused.

Rule 92bis Witnesses

35. The Defence requests the Chamber to remind the Prosecution that any proposed Rule 92bis witnesses should be drawn from the List of Prosecution Witnesses included in the Pre-Trial Brief, as opposed to introducing further witnesses.⁴¹

36. The Prosecution submits in reply that Rule 92bis allows the Prosecutor at a subsequent date to the filed Pre-Trial Brief, or at a time ordered by a Trial Chamber, to introduce any further witnesses upon providing cogent legal reasons to the Trial Chamber. The Prosecution submits further that the Chamber has designated 12 October 2009 to be the date for Rule 92bis filings and that it is premature for the Defence to make this submission.⁴²

37. The Chamber recalls its ruling setting the deadline for the filing of any motion under Rule 92bis as 12 October 2009. The Chamber also recalls that Rule 92bis contains safeguards to guarantee that the rights of the Accused are respected in admitting any written statements.

including Kiramuruzi, Gakenke, Rwankuba, Rubona, and Nyabysindu where he incited and instigated the *Interahamwe* with a megaphone, commanding and ordering them to kill Tutsi."

³⁹ See supra fn. 38.

⁴⁰ *The Prosecutor v. Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić, Drago Josipović, Vladimir Šantić*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, ("*Kupreskić et al.*", Judgement (AC)), para. 89. See also *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, ("*Seromba Judgement (AC)*", para. 27; *Mikaëli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, ("*Muhimana Judgement (AC)*", para. 76; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, ("*Gacumbitsi Judgement (AC)*", para. 49; *The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, ("*Ntakirutimana, Judgement (AC)*", para. 32.

⁴¹ Defence Motion, paras. 26-27.

⁴² Prosecution Response to Defence Motion, paras. 28-31.



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Rule 92bis (A) requires that the statement goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment, and Rule 92bis (A)(ii)(c) allows a witness who has provided a written statement to be called for cross-examination. Furthermore, pursuant to Rule 92bis (E), the Defence may have an opportunity to respond to a Prosecution's request to admit any such statements at the appropriate time.

38. The Defence request is accordingly dismissed.

FOR THESE REASONS, the Chamber


GRANTS the Motion in part;

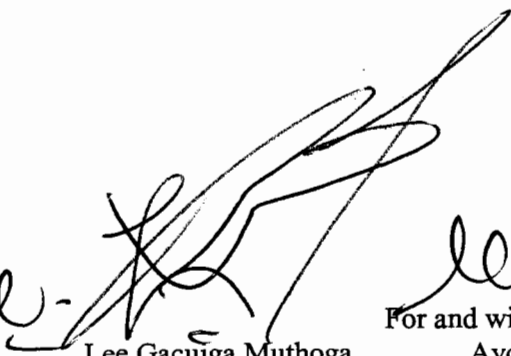
DECLARES that the following allegations contained in the Prosecutor's Pre-Trial Brief of 19 August 2009, as specifically indicated above, are not relevant to the case:


1. the allegation of Witness BTD at paragraph 33;
2. the allegations of Witness AIY at paragraphs 68 and 71;
3. the allegation in paragraph 73 relating to the attack on the Gakoni Adventist Orphanage.

DENIES the Motion in all other respect.

Arusha, 2 October 2009


Khalida Raahid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


For and with the consent of
Aydin Sefa Akay
Judge

[Seal of the Tribunal]

