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SCSL-2004-16-PT
(4912-5073)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: 4 May 2004

THE PROSECUTOR

Against

Alex Tamba Brima

Ibrahim Bazzy Kamara

Santigie Kanu

CASE NO. SCSL – 2004 – 16 – PT

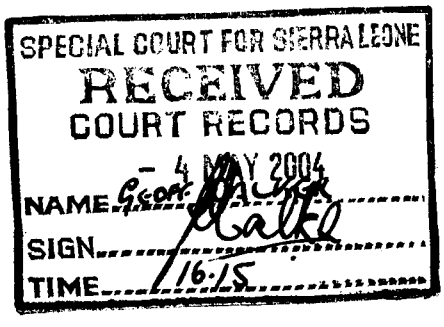
RENEWED PROSECUTION MOTION FOR PROTECTIVE MEASURES PURSUANT TO ORDER TO THE PROSECUTION FOR RENEWED MOTION FOR PROTECTIVE MEASURES DATED 2 APRIL 2004

Office of the Prosecutor:
Luc Côté
Robert Petit
Lesley Taylor
Sharan Parmar
Boi Tia Stevens

Counsel for Alex Tamba Brima
Terrence Terry

Counsel for Ibrahim Bazzy Kamara
Ken Fleming, Q.C.

Counsel for Santigie Kanu
Geert-Jan Alexander Knoops



I. INTRODUCTION

1. The Prosecution files this Renewed Motion for Protective Measures in accordance with the Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004.
2. In compliance with the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial dated 1 April 2004, on 26 April the Prosecution filed a Prosecution Witness List of 266 witnesses. This motion provides an overview of the reasons for the protective measures sought for those witnesses.
3. The Prosecution notes that in its Order the Trial Chamber has found that reference to specific categories of witnesses may facilitate this task. Accordingly, the Prosecution has divided the 266 witnesses into 2 groups: (I) witnesses of fact and (II) experts/those who have waived their right to protection. Within group I, the witnesses are further divided into 3 categories, namely: (A) victims of sexual assault and gender crimes; (B) child witnesses and (C) insider witnesses.
4. Annexed to this motion and marked Annex A are the pseudonyms of Group I witnesses divided in the 3 categories mentioned above. Group II witnesses are listed under Annex B.
5. The Prosecution wishes to emphasize that the categorization of witnesses is based on the witness list filed on 26 April 2004. As stated during the Pre-trial conference held on 29 April 2004, this list is not final and the actual number of witnesses called could be less. Therefore, the actual number of witnesses who will be subjected to the protective measures, if granted, will be less than 266.

II LEGAL CONSIDERATIONS

6. Articles 16 and 17 of the Statute for the Special Court (the Statute) and Rules 69, 75, 79 and of the Rules of Procedure and Evidence for the Special Court (the Rules) establish considerations relevant for the Court in making decisions that safeguard the privacy and security of victims and witnesses consistent with the rights of the Accused.
7. These provisions and the international jurisprudence make clear that a balance must be struck between security for the Prosecution witnesses and fairness to the Defence. In terms,

Article 17 makes clear that the right of an Accused to a fair and public hearing is subject to measures ordered by the Special Court for the protection of victims and witnesses. There is nothing which indicates that an Accused's right to a fair trial is "somehow hampered or compromised in service of witness protection". (*Prosecutor v Bagosora, Nsengiyumva, Kabiligi and Ntabakuze,* ICTR-98-41-I, 5 December 2001, paragraph 16). A fair trial means fair treatment to the Prosecution and to witnesses as well as to the Accused. (*Prosecutor v Bradnin & Talic*, IT-99-36, 3 July 2000; *Prosecutor v Tadic*, IT-94-1, 10 August 1995).

9. Rule 69 states that a party may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise. Rule 69 (C) states that "... the identity of the victim or witness shall be disclosed in sufficient time **before a witness is to be called** to allow adequate time for preparation of the prosecution and the defence." (Emphasis added.)
10. Rule 75(B) of the Rules provides a wide range of measures for protecting the identity of victims and witnesses ranging from the use of pseudonyms to the use of closed circuit television. This list of measures is not exhaustive. Judges of international criminal tribunals have a sovereign power to evaluate the measures they deem most appropriate to ensure the protection of victims and witnesses. (*See Tadic*, *supra*, 10 August 1995; *Prosecutor v Blaskic*, IT-95-14, 10 July 1997).
11. In this motion, the protective measures sought by the Prosecution for the respective categories of witnesses include the following: (a) non-disclosure of the identity of witnesses of fact to the public; (b) delayed disclosure of the identity of witnesses to the Defence until 42 days before they testify in court; (c) the use of voice alteration device during the testimony of some witnesses and (d) the use of closed circuit television through which some witnesses will give their testimony.
12. The Prosecution submits that the protective measures sought in this motion do not derogate from the public interest or the right of the Accused to a fair and public hearing. Measures of confidentiality concerning the identity of witnesses vis-à-vis the public and the media are entirely consistent with the doctrinal reasons for and practical application of a fair and public hearing. The public and the media do not need to know the identity of every witness to hear, understand or report the evidence given by those witnesses or to observe that the

trial process is fair.

13. In relation to the non-disclosure of the identity of witnesses to the Defence, the Prosecution submits that, as the substance of the witness' testimony have been disclosed to the Defence by way of the disclosure of witness statements and the charts summarizing the anticipated testimony of witnesses, the Defence is on sufficient notice as to the anticipated testimony of witnesses and this should facilitate preparation for their case. The delayed disclosure of the identity of Prosecution witnesses is not prejudicial to the Defence, as 42 days before testimony is sufficient time to allow the Defence to conduct any inquiries relating to remaining issues, such as credibility of the identified witness. (*See, for example, Prosecutor v Muvunyi and others* ICTR-2000-55-I, 25 April 2001.)
14. Protective measures are equally available to Defence witnesses if needed. The Prosecution acknowledges that the availability of witnesses not only for the Prosecution but for the Defence as well is vital to the trial process.

III. FACTUAL CONSIDERATIONS

15. While considerations specific to each category of witnesses are presented below, the Prosecution maintains that conditions in Sierra Leone create difficulties for all witnesses and victims. The Prosecution submits that these conditions demand continued witness protection measures in order to safeguard the security and privacy of witnesses and victims and the integrity of the evidence and these proceedings.
16. The Prosecution relies upon the attached declarations made by Mr. Brima Acha Kamara, Inspector-General of the Sierra Leone Police (Annex C), Dr. Alan White, Chief of Investigations of the Office of the Prosecutor (Annex D) and Mr. Thomas Lahun, Investigator for the Office of the Prosecutor (Annex E), on the security concerns relating to Sierra Leone and its neighbouring countries. (*See Prosecutor v Musabyimana* ICTR-2001-62-I, 19 February 2002).
17. The Prosecution submits that this evidence establishes that stability in Sierra Leone's post-conflict society is still fragile. It can reasonably be expected that this situation will be made more rather than less precarious by the planned December 2004 UNAMSIL withdrawal, which will be undertaken during the course of trial proceedings.

18. The Prosecution submits that these considerations are important in evaluating the security concerns of all individual witnesses. The appropriateness of protective measures for witnesses should not be assessed solely on the representations of the parties; rather their appropriateness should be assessed "in the context of the entire security situation affecting the concerned witnesses". (*Prosecutor v Kamuhanda,* ICTR-99-54-T, 22 March 2001.) Given the locus of the alleged crimes and the seat of the Special Court in Freetown, regional security issues are relevant. (*See Prosecutor v Kajelijeli,* ICTR-98-44-I, 6 July 2000.) Indeed, protective measures can be ordered on the basis of a current security situation even where the existence of threats or fears as regards specific witnesses has not been demonstrated. (*See Muvunyi and others, supra*).

19. The Prosecution submits that the attached declarations of Mr. Saleem Vahidy, Chief of Victims and Witness Support Unit for the Special Court (Annex F), and Mr. Lahun establish an objective basis for concluding that the fear of reprisals expressed by witnesses and victims for themselves and their families continues to be real and present. Victims and witnesses come from the same small communities as the perpetrators, their families and their supporters. The affairs of an individual within such a community quickly become known to all members of that community.

Group I Witnesses: Witnesses of Fact

20. For all witnesses of fact or lay witnesses, the Prosecution requests that the current orders authorizing non-disclosure of the identity of Prosecution witnesses to the public and delayed disclosure to the Defence of the identity of witnesses until 42 days before they testify in court remain in force. Accordingly, the Prosecution requests that witnesses of fact testify in court using pseudonyms and from behind a screen that will shield them from public view. The Prosecution also seeks an order that photography, filming or other recording of the identity of witnesses be prohibited. These measures are minimal and are justified by the twin concerns of the general security situation of Sierra Leone and the objectively established fear of reprisal of witnesses and victims. They do not pose any impediment to the Defence preparation for trial. Further, these minimal measures are consistent with the standard practice at and conditions under which witnesses testify at the ICTR where the rule is for these measures to apply and open hearing without protective

measures, the exception. (*See Muvunyi, Musabyimana, Kamuhanda, supra)*

Category A Witnesses – Sexual Assault Witnesses and Victims

21. In addition to security concerns, the Prosecution seeks to protect the privacy of witnesses who are victims of sexual violence, as is provided for by Rule 75(B)(i)(c). A list of these witnesses (referred to by pseudonyms) who are about 33 in number is attached hereto under Annex A.

22. Victims of sexual assault live with strong feelings of shame and guilt and fear being stigmatized by their communities or even rejected by their families should it become known that they were victims of sexual assault (*See* Declarations of Mr. Lahun and Ms. An Michels, Psychologist for the Witness and Victims Support Unit for the Special Court, attached hereto as Annex G.) Testifying in public can result in rejection by the victim's family and community. (*See Tadic, supra,* IT-94-1, 10 August 1995). In the instant case, many of the women and girls who were sexually assaulted became "wives" of the rebels and some even gave birth to children "fathered" by rebels. The risk of stigmatization or rejection is heightened for these women and their children. This is particularly so in communities like Sierra Leone, that are small and closely knit.

23. The prosecution requests that the confidentiality and privacy of these witnesses be protected vis-à-vis the public and media by allowing these witnesses to testify with the aid of voice distortion equipment in accordance with Rule 75(B)(i)(a). The use of voice distortion equipment will protect the privacy of these witnesses by ensuring that the public cannot identify the witnesses by their voice, a real possibility given the close-knit communities in Sierra Leone, as well as the fact that witnesses will testify to crimes of sexual violence in specific locations.

Category B Witnesses - Children

24. In addition to being victims, child witnesses are exceptionally vulnerable because they provide evidence on the individual criminal responsibility of the accused persons and thus also fall within the category of insider witnesses. The Prosecution therefore submits that specific protective measures must be accorded to child witnesses to ensure their safety and to prevent any re-traumatization, which would affect their ability to testify during the trial.

(*See* the Declaration of An Michels.) A list of these witnesses (referred to by pseudonyms) who are about 28 in number is attached hereto as Annex G.

25. The child witnesses are clearly at a developmental stage in their lives. This, coupled with the trauma and disruption to family and school life which they endured during the conflict, has an effect on their ability to become familiar with, and be intimidated by criminal proceedings. Having been forced to become perpetrators themselves, child witnesses are also likely to misperceive criminal proceedings and feel that they themselves are on trial.

26. Child witnesses are likely to be familiar to the accused, as many of them were initiated, recruited by and/or served under accused persons and their subordinates, who also assumed the position of an authority figure. As such, these witnesses possess substantial fears of confronting and being seen by the accused. Theirs fears are bolstered by experiences where children have attempted escape and were later recognized and recaptured.

27. The Prosecution submits that the Trial Chamber must balance protection of child witnesses from the trauma of testifying in the presence of an accused with the ability of the accused persons to face their accuser, in which "the latter must yield to the greater public interest in the protection of the witness". (*Prosecutor v. Delalic*, IT-96-21, 28 April 1997, paragraph 65).

28. The Prosecution therefore seeks an order consistent with Rule 75(B)(i)(a) that Category B witnesses be allowed to testify via closed circuit television, which may be observed by the Defence and the Trial Chamber, but not the public. The Prosecution submits that the use of closed circuit television for the testimony of child witnesses permits the Defence to observe and hear the testimony of the child, while minimizing serious emotional distress from presence of the defendant and impact on ability to communicate, which would handicap the presentation of his/her testimony.[1]

29. Rule 79(A)(ii) specifically refers to the involvement of minors as a ground upon which the press and public may be excluded from all or part of the proceedings. As with Category A witnesses, the Prosecution reserves the right to make requests for additional measures for

[1] Closed circuit, also known as live-link television, is permitted for testimony by children in several countries, including Australia, Canada, England, New Zealand, Scotland and the United States.

child witnesses as the need arises on an individual basis.

Category C Witnesses - Insiders

30. The testimonies of Category C witnesses are crucial to the proof of the Prosecution's case. A list of these witnesses (referred to by pseudonyms) who are about 25 in number is attached hereto as Annex H. These witnesses give evidence of the structure of the RUF and AFRC and directly implicate the Accused in the crimes alleged, often in unique or particularly notable atrocities. Further, these witnesses are often themselves implicated in the commission of atrocities.

31. The Prosecution submits that the evidence supporting the fear of reprisals for these witnesses and their families is particularly cogent.

32. The Prosecution accepts that the face to face confrontation between Category C witnesses and the Accused will be particularly important to the Defence and to the Trial Chamber in assessing the credibility of the evidence given. Accordingly the Prosecution seeks the same protective measures for these witnesses as for Category A witnesses, namely the use of a screen and voice distortion equipment.

Group 2: Experts Witnesses

33. The Prosecution concedes that as a rule expert witnesses should testify in openb court without the use of pseudonym nor screens. However as the Prosecution stated at the Pre Trial Conference held on 29th April 2004 the mere fact that a witness is considered an expert witness does not signify that protective measures are unnecessary for such a witness.

34. As stated during the Pre Trial Conference the Prosecution undertakes to release to Counsel for the Defence the names of the witnesses found under Annex B as soon as it has been confirmed with these witnesses that this would not impede their ability to testify nor constitute a security risk but reserves itself the right to request specific protective measures for any expert witness should it deem it appropriate.

IV. ORDERS SOUGHT

35. In order to provide protection for witnesses called by the Prosecution during the trial, the Prosecution requests the Trial Chamber to issue the following orders:

a. All witnesses shall be referred to by pseudonyms at all times during the course of their testimony or whenever referred to in the course of proceedings whether during the hearing or in documents, including the transcript of the proceedings.

b. The names, addresses, whereabouts or and any other identifying information of witnesses shall be sealed and not included in any of the public records of the Special Court.

c. To the extent that the names, addresses, whereabouts or other identifying data concerning witnesses is contained in existing public documents of the Special Court, that information shall be expunged from those documents.

d. Documents of the Special Court identifying witnesses shall not be disclosed to the public or media.

e. All witnesses shall testify with the use of screening from the public.

f. The public and the media shall not photograph, video-record, sketch or in any other manner record or reproduce images of any witness while he or she is in the precincts of the Special Court.

g. Witnesses in Category A shall testify with the use of voice distortion.

h. Witnesses in Category B shall testify with the aid of closed circuit television.

i. Witnesses in Category C shall testify with the use of voice distortion.

j. The Defence shall refrain from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

k. The Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

l. The Defence shall provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 35(f) above, have access to any information referred to in

paragraphs 35(a) through 35(d) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

m. The Defence shall ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

n. The Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

o. The Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any Prosecution witness who is a protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

36. The Prosecution reserves its right to apply to the Trial Chamber to amend the protective measures sought or to seek additional protective measures in relation to each Prosecution witness called to be testified. Further, the Prosecution reserves its right to apply for specific protective measures for individual witnesses prior to or at the time of testimony.

V PRAYER

37. The Prosecution prays that the Trial Chamber grants this motion and issues the orders set out above in paragraph 35.

Done in Freetown, on this 4th May 2004.

Luc Cote
Chief of Prosecutions

Robert Petit
Senior Trial Attorney

ANNEX A

CATEGORY A WITNESSES: VICTIMS OF SEXUAL VIOLENCE

1. TF1-023
2. TF1-092
3. TF1-119
4. TF1-026
5. TF1-029
6. TF1-085
7. TF1-281
8. TF1-303
9. TF1-195
10. TF1-017
11. TF1-198
12. TF1-302
13. TF1-016
14. TF1-218
15. TF1-076
16. TF1-028
17. TF1-155
18. TF1-267
19. TF1-269
20. TF1-196
21. TF1-213
22. TF1-138
23. TF1-205
24. TF1-094
25. TF1-209
26. TF1-064
27. TF1-282
28. TF1-093
29. TF1-308
30. TF1-270
31. TF1-132
32. TF1-027
33. TF1-264

CATEGORY B WITNESSES: CHILDREN

1. TF1-225
2. TF1-143
3. TF1-271
4. TF1-180
5. TF1-317
6. TF1-323
7. TF1-211
8. TF1-309
9. TF1-110
10. TF1-057
11. TF1-142
12. TF1-223
13. TF1-026
14. TF1-328
15. TF1-251
16. TF1-140
17. TF1-141
18. TF1-013
19. TF1-157
20. TF1-158
21. TF1-020
22. TF1-225
23. TF1-199
24. TF1-117
25. TF1-131
26. TF1-130
27. TF1-357
28. TF1-024

CATEGORY C WITNESSES
INSIDERS

1. TF1-189
2. TF1-045
3. TF1-151
4. TF1-153
5. TF1-033
6. TF1-168
7. TF1-139
8. TF1-184
9. TF1-325
10. TF1-276
11. TF1-275
12. TF1-167
13. TF1-138
14. TF1-036
15. TF1-274
16. TF1-187
17. TF1-182
18. TF1-334
19. TF1-046
20. TF1-337
21. TF1-347
22. TF1-352
23. TF1-354
24. TF1-356
25. TF1-030
26. TF1-093

ANNEX B

EXPERT WITNESSES

1. TF1-150
2. TF1-272
3. TF1-296
4. TF1-301
5. TF1-332
6. TF1-348
7. TF1-351

ANNEX C

DECLARATION

I, Brima Acha Kamara, Inspector General of the Sierra Leone Police declare:

1. I assumed the position and duties of Inspector General of the Sierra Leone Police on 1 June 2003. For two years prior to that, I held the position of Senior Assistant Commissioner in Charge of Change Management, prior to which I was the Head of the Criminal Investigations Department (CID) for the Sierra Leone Police for approximately one year.

2. As the Inspector General of the Sierra Leone Police and member of the National Security Council of Sierra Leone, I am required to conduct ongoing assessments of the security situation in Sierra Leone and in surrounding countries.

3. Overall, the security situation in the country since the civil war in January 2002 has improved, largely due to attempts to strengthen the Police Force and the presence of UNAMSIL troops in the country. However, UNAMSIL troops are scheduled to leave Sierra Leone by December 2004. In spite of the overall security improvement in the country, security conditions remain precarious.

4. Whilst attempts to strengthen the police force have continued, many areas in Sierra Leone still lack strong police presence and some remote areas have none at all. Along the Guinean and Liberian borders of Sierra Leone, arms trafficking is an issue of concern.

5. According to information I have received in the context of my work as Inspector-General from mid-2003 through to present, CDF loyalists in parts of the southern and eastern provinces, particularly in Bo and Kenema, continue to organise themselves, hold meetings, and discuss plans to undermine the Special Court. They were also reported to be planning in a non-specific way to prevent the prosecution of accused persons, particularly CDF members, and other potential ways to disrupt the work of the Court.

6. Based upon the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have adequate capacity to guarantee the safety of witnesses or prevent them from injury or intimidation.

7. The contents of this declaration are true to the best of my knowledge, information, and belief.

Done in Freetown, Sierra Leone
On 3 May 2004

Brima Acha Kamara
Inspector General of the Sierra Leone Police

ANNEX D

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

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DECLARATION

I, Alan W. White, Ph.D., Chief of Investigations for the Office of the Prosecutor of the Special Court for Sierra Leone (SCSL) do declare that the foregoing facts are true and accurate to the best of my knowledge.

I have served as Chief of Investigations for the Office of the Prosecutor of the SCSL since July 15, 2002. I have over 30 years of law enforcement experience both in and outside the United States, most of which has been spent conducting criminal investigations involving major crimes, such as homicide, rapes, sexual assault, white collar crime, and most recently crimes against humanity and violations of international law. I hold a bachelors degree in Criminal Justice, a master's degree in Management, and a Ph.D. in Criminal/Social Justice.

I have been working with confidential informants and witnesses for over 25 years, routinely conducting threat assessments of confidential informants and witnesses. As a result, I have extensive experience in providing security for witnesses and confidential informants, which in many cases required some sort of protection measures, including physical relocation. Immediately prior to my current assignment I served as the Director, Investigative Operations, and a Senior Executive Service member within the U.S. Government for the Defense Criminal Investigative Service (DCIS), the executive law enforcement agency within the U.S. Department of Defence. In addition to being responsible for the overall supervision of all DCIS criminal investigations worldwide, I was specifically responsible for the worldwide witness protection program within the DCIS.

In my current position as the Chief of Investigations for the Special Court for Sierra Leone, I have travelled throughout Africa and Europe conducting investigations involving crimes against humanity and international humanitarian law. During my travels I have spent a great deal of time in the West African Region conducting investigations and relocating witnesses, two of whom have already had their lives, and their families lives physically threatened through attempts carried out by some of the defendants who are either indicted or under investigation by the Office of The Prosecutor.

Among the duties of Chief of Investigations I am required to monitor and assess security developments in Sierra Leone and the neighbouring countries as they impact upon SCSL investigations and witness protection generally. In connection with my responsibilities with respect to security in Sierra Leone, I routinely discuss the local and regional security situation with the SCSL Chief of Security Bob Parnell, as well as with the Inspector General, Sierra Leone Police. Also, I am in constant contact with numerous other confidential sources of information within the region, which provide current security and threat information.

I have credible information from the Government of Liberia and other reliable sources that as recent as March 2004, supporters of Charles Taylor made attempts to disrupt the

activities of the work of the Special Court for Sierra Leone, both in Liberia and in Sierra Leone. Sam Bockarie, who was indicted by the Special Court and based in Liberia at the time he was indicted, was killed shortly after the release of his indictment in March 2003. Another indictee of the Special Court, Johnny Paul Koroma, known to be in Liberia after fleeing from Sierra Leone in February 2003 has mysteriously gone missing. Witnesses in Liberia have expressed fear of violent attacks against them or family members if they were to cooperate with investigators of the Office of the Prosecutor for the Special Court.

Based upon the information provided to me by various sources, I have learned that the current security situation in Sierra Leone and the neighbouring countries remain fragile. The perpetrators and/or their supporters, the victims and the witnesses are not separated. They are co-habitants of the same communities. They live and work in a closely-knit setting. Throughout the investigations of the Office of the Prosecutor, instances involving interference with and intimidation of Prosecutor's witnesses continue to arise. The situation ranges from witnesses having experienced actual attempts upon their lives and threats thereof, either individually or by group, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or will otherwise suffer if they testify or co-operate with the Court. This situation is due to the presence throughout West Africa of large numbers of members of the armed factions involved in the conflict that happened in Sierra Leone or their supporters, including the National Patriotic Front of Liberia (NPFL), Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC) or other people who collaborated with such factions. Additionally, there are numerous members within the Republic of Sierra Leone Army and Sierra Leone Police, who are sympathizers and supporters of Johnny Paul Koroma, an indicted war criminal. Further, I have first hand information that supporters and sympathizers of Samuel Hinga Norman, former Chief of the CDF, continue to actively attempt to identify and intimidate witnesses of the Special Court. Therefore, witnesses living in Sierra Leone, and also those living in other countries in West Africa, are directly affected by this situation and feel threatened.

Signed at Freetown

The 4th day of May 2004

Alan W. White, Ph.D.
Chief of Investigations
Special Court for Sierra Leone

Annex E

INVESTIGATOR'S STATEMENT

30 April 2004

I, THOMAS LAHUN, Investigator in the Office of the Prosecutor, Special Court for Sierra Leone at 128 Jomo Kenyatta Road, Freetown, in the Western Area of the Republic of Sierra Leone affirmatively state as follows:

1. I work as an Investigator in the Office of the Prosecutor and I have due authority to make this statement.

2. I am also a professionally trained Policeman of the rank of Superintendent in the Sierra Leone Police Force where I have been working as a Policeman since 24 August 1970.

3. I have had considerable experience in detecting and investigating crimes having worked in the Criminal Investigations Department of the Sierra Leone Police Force for about 24 years during my career as a policeman.

4. Since 14th August 2002, I have been working in the Office of the Prosecutor, Special Court for Sierra Leone, where my duties include investigating crimes against international humanitarian Law and Sierra Leonean Law committed within the territory of Sierra Leone from 30th November 1996, during the period of armed conflict in Sierra Leone. My investigative duties include conducting interviews of persons who may appear as witnesses before the Special Court, and reviewing investigator notes and statements of such persons taken by other investigators in the Office of the Prosecutor.

5. Since October 2003, I have been attached to the Witness and Victims Unit of the Office of the Prosecutor. In this capacity, I have travelled to various regions in the country, meeting with witnesses and assessing their needs and concerns.

6. I provide the following facts based on my duties as an investigator and witness management support staff for the Office of the Prosecutor, Special Court for Sierra Leone, and on my previous experience as a Sierra Leonean police officer. These facts reveal as follows:

6. Witnesses who have given statements to the Office of the Prosecutor and who may be called upon to appear as witnesses before the Special Court have expressed various concerns about testifying before the Special Court and having their identities revealed to the general public and to the Accused.

7. Victims of gender violence who are potential witnesses have expressed great discomfort about talking openly about their experience in court. From my experience as a police officer, I am aware that victims of sexual violence quite often feel ashamed to talk about their ordeal and fear being stigmatized by their communities if it becomes known that they were sexually violated. Thus in Sierra Leone, occurrences of rape and other acts of sexual violence often go unreported.

8. Potential witnesses who are ex-combatants and who are trying to re-integrate into society and live normal lives also harbour fears of stigmatization within their communities once the extent of their participation in the war becomes highlighted through their court testimony.

9. In addition, potential witnesses in general have expressed fear of reprisals not only in the foreseeable future, but in the distant future as well, from those who actually carried out the crimes, as well as from relatives and friends of the Accused, from those who are associated with the Accused, and from those who support the causes or factions the Accused represent. This is particularly the case for witnesses who are ex-combatants. This fear is heightened by the fact that witnesses live together in the same communities with former members of the factions to which the Accused belonged and by the fact that many of the perpetrators of the offences committed during the civil war in this country now serve as members of the security forces in Sierra Leone.

9. The fears expressed are genuine and, in my opinion, are well founded, especially considering that many of the potential witnesses live in remote areas without any police presence or other semblance of security.

10. I believe that it is essential for the general well-being, safety and security of these potential witnesses, their family members and for the work of the Special Court that these witnesses receive some form of protection.

I, THOMAS LAHUN, affirm that the information contained herein is true and accurate to the best of my knowledge and belief. I understand that wilfully and knowingly making false statements in this statement could result in proceedings before the Special Court for giving false testimony. I have not wilfully or knowingly made any false statements in this statement.

Thomas Lahun
Investigator, Task Force 1
Office of the Prosecutor
Special Court for Sierra Leone

ANNEX F

SPECIAL COURT FOR SIERRA LEONE
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DECLARATION

I, Saleem Vahidy, Chief of the Witness and Victims Unit of the Special Court for Sierra Leone (SCSL) solemnly declare that the following facts are true and accurate to the best of my knowledge:

I have been serving as the Chief of the Witness and Victims Unit at the SCSL since 6 January 2003. I am a Police Officer from Pakistan with over 23 years of policing experience, and held several important and sensitive postings there, including Chief of Police of Karachi, a city of over ten million inhabitants and Provincial Chief of the Anti-Kidnapping for Ransom Unit. I also investigated and prosecuted several high profile cases and established a Witness Protection Unit to look after threatened witnesses. From 1998 to December 2002, I was Chief of the Witness and Victims Support Section (Prosecution) at the International Criminal Tribunal for Rwanda (ICTR), and dealt with over 500 protected witnesses and with all witness management issues, including threat assessments and relocations. I have also written a number of reports on protection issues at the request of the various Trial Chambers of the ICTR.

As Chief of the Witness and Victims Unit of the SCSL, I am required to conduct ongoing assessments of the general security situation in Sierra Leone and security threats to witnesses in particular. In carrying out these responsibilities, I regularly consult with Sierra Leone Police officials, Sierra Leone attorneys, the Security Section of SCSL, NGOs and UNAMSIL. The opinions expressed below are based on these consultations, the threats assessments relevant to particular potential witnesses, conversation with potential witnesses and other reports of threats against witnesses.

The 10 years of civil war in Sierra Leone damaged the justice system and the overall level of protection available to the citizens is, generally speaking, less than what it should be. The public's trust and confidence in the police and the armed forces in Sierra Leone was seriously weakened owing to the perception that these Government institutions took sides with various parties to the conflict, and their impartiality became questionable. Although the Government is making every effort to revamp the Army, Police and the Court system, the effectiveness of these organs is yet to be proved.

Since the trials at the SCSL are taking place in the country where the offences took place, in my opinion, the issue of protection of witnesses takes on further dimensions. Witnesses and their family live in small communities in Sierra Leone. They live and work with those who perpetrated the crimes and often times in remote areas where they can be easily identified. Because of this physical proximity a witness always includes the family and even the extended family as being at risk, and expects the Court to provide protection. Thus the most important issue for a witness becomes one of NOT being identified as a witness for the Special Court. Therefore the best protection sought by a witness is complete anonymity; the longer no one knows a person is a witness the more secure the witness will be. Finally, there only has to be a 'perception' of a threat to adversely affect a witness, and to serve as a deterrent to testifying. It should be borne in mind that witnesses either for the Prosecution or the Defence are always a delicate resource and always need reassurances and at times persuasion before they are willing to testify.

At present, the Unit is already looking after numerous witnesses. Several assessments have been carried out and the level of protection needed varies from witness to witness. The assessments indicate that witnesses such as children, victims of gender violence, and ex-combatants or insiders require specialized care. The Unit continues to concentrate its efforts in putting in place appropriate measures to allay the fears of witnesses and to respond to the sensitive needs of respective witnesses. This ranges from concealing the names of witnesses from the public to relocation of witnesses.

The number of witnesses who need protection is increasing significantly as a consequence of current events and some specific threats made against witnesses. Given the resources at the disposal of the Unit and the overall financial constraints of the SCSL, it is not possible for the Unit to implement effective protective measures for all witnesses, such as relocation to safe premises, change of identity and other similar methods.

In light of these factors, we take the utmost efforts to keep the identity of a witness secret and confidential. The longer the witness' identity is withheld, the safer he or she is going to remain. Further, the act of testifying in court and re-living the painful experience encountered as a victim may be traumatizing for some witnesses. Extreme caution must be taken in and out of court to minimize the risk of re-traumatization of such vulnerable witnesses.

Saleem Vahidy
Chief, Witness and Victims Unit

30 Apr 04
Date

ANNEX G

SPECIAL COURT FOR SIERRA LEONE
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DECLARATION

I, An Michels, Psychologist of the Witness and Victims Section (WVS) of the Special Court of Sierra Leone (SCSL) solemnly declare that the following facts are true and accurate to the best of my knowledge.

I am a clinical psychologist and a family therapist. I started working for the WVS at the SCSL on 15 September 2003. I gained experience in trauma and other psychopathology during the years I was a clinical psychologist in a mental hospital in Antwerp, Belgium. I have worked in conflict and post-conflict areas for the past 4 years. As a project coordinator and psychologist for Médecins sans Frontières (MSF), a medical NGO, I was assisting victims of war, especially women, victims of sexual violence, in Rwanda, Burundi and Indonesia. While in Rwanda I was involved in providing psychological support to women who were witnesses for the Gacaca tribunals. I also was a researcher for MSF on the subject of war-related trauma, have published several articles on this subject and taught in different training programs and seminars.

As the Psychologist of the WVS, I regularly carry out psychosocial vulnerability assessments of witnesses in Freetown and in the field, provide counselling and ensure relevant psychosocial support, all this with the assistance of a Sierra Leonean psychosocial assistant. I consult and cooperate closely with several NGO's who provide psychosocial support and with UNICEF. The opinions expressed below are based on my experiences with witnesses and the contacts with these organisations.

The psychosocial support is focused on witnesses who are considered as being particularly vulnerable with regard to their mental state: children, victims -especially victims of mutilation or sexual assault- and other witnesses who show signs of emotional distress.

The majority of the vulnerable witnesses assessed so far show symptoms of Post Traumatic Stress as a consequence of exposure to the recurrent and long-lasting traumatic events during the war in Sierra Leone. They suffer from feelings of anxiety, anger, hopelessness or lack of control; nightmares and intrusive thoughts; sleeping problems, increased irritability or a lack of emotional responsiveness; they often isolate themselves and tend to avoid places, people or activities that are associated with the events. The trauma has an important impact on their daily occupation and ability to cope with the extensive poverty in Sierra Leone, the relations with their families and communities and their vision on the future.

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It is known that vulnerable witnesses, while testifying in Court, face the risk of being 'retraumatised': recalling traumatic events in a stressful environment can cause an exacerbation of symptoms during and after testimony. It can also lead to more severe mental problems like depression in the months after the testimony.
Increased stress or the resurfacing of traumatic stress can affect the ability to communicate. Nervousness, stuttering, confusion, intense emotions, black outs and difficulties to recall information instantly could occur and influence the capacity to talk.

In order to minimise the risk for this retraumatisation and to prevent that the testimony results in further psychological harm or suffering for vulnerable witnesses it is crucial that witnesses have a feeling of safety and control over the situation throughout the process. It is therefore of great importance to use all means possible to create a safe and protective environment in the period before, during and after the testimony. Protection of privacy and anonymity can ensure safety and the perception of safety by the witness. It will also avoid potential disturbance in the family relationships or even rejection by the community.

Giving vulnerable witnesses the possibility to choose as much as possible the circumstances under which they want to testify will help them in gaining a sense of control over the process and will reduce the stress significantly.
Only if vulnerable witnesses can testify in a safe and protective environment can their testimony be a positive and rehabilitative experience.

Child witnesses, often child ex-combatants, are particularly vulnerable and demand special attention and care. Their traumatic experiences have a deep mental impact that can affect them until and throughout adulthood. Most of the child witnesses I assessed show symptoms of behavioural disorders and affect-deregulation, they suffer from intrusive thoughts and nightmares; in a few cases, they told me about suicidal thoughts.

Most child ex-combatants, carry a double burden : they were both victims and perpetrators and have to deal with the complex mental and moral consequences of that fact. The process of emotional attachment to parents and other relatives -crucial in the psychological development of a child- is often severely disturbed. During the war, rebel leaders often became attachment figures for these children. In spite of the suffering and the abuse, they developed an ambiguous loyalty as 'insiders'. Testifying in Court against these leaders could be

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experienced, even at a unconscious level, by these child witnesses as a form of disloyalty towards primary attachment figures. Especially a public and direct confrontation could be very disruptive to the children and can resurface attachment problems towards their parents, other relatives and caretakers. The stress during testimony could increase significantly.

Child ex-combatants tell me that the stigmatisation as a "rebel" by the community is often an obstacle to develop normal social contacts and reintegration in the society. Some of them fear rejection and threat by the community if it is known that they are testifying and if the content of the testimony becomes known. They are worried that their newly re-established relationships with family and the community and their education would be disrupted by this knowledge or as a result of being forced to leave for security reasons.

The increased risk for retraumatisation of children due to their higher vulnerability makes the creation of a safe and protective environment before, during and after testimony extremely important. All means should be used to protect the child witnesses in order to ensure privacy and anonymity, to minimise their direct confrontation with the accused and to prevent disruptions in their social environment (family, Child Protection Agency, school). Younger children in particular, whose mental development is more immature and whose understanding of the process is limited, need maximum protection.

Women and girls, victims of sexual assault, form another group of witnesses who are particularly vulnerable and therefore require special protection. The victims of sexual assault have to live with the physical and psychological consequences of extremely brutal and humiliating acts, often carried out in public. Almost all women show symptoms of post traumatic stress and report strong feelings of shame. Some of them experience feelings of guilt. Some of these women I would describe as severely traumatised. Talking about these experiences, even in a safe counselling setting, provokes in many cases intense emotions. The idea of publicly testifying in Court is for many of these women something very difficult and fearful. This feeling is worsened by the fact that in Sierra Leone, victims of sexual violence are still often stigmatised by the communities or even rejected by their families. In many cases the sexual violence was never reported to family: some victims told me that even their partner does not know what happened to them.

For some witnesses testifying directly against their perpetrator could be extremely stressful. The direct confrontation can be very emotional and even psychologically disturbing for the women. Seeing and being

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in the presence of the perpetrator could trigger traumatic memories and feelings of fear. The stress during testimony could increase significantly.

Girls who were abducted by fighting forces told me stories of repeated and long-lasting sexual abuse. They suffer not only from the consequences of the sexual acts but also from the psychological impact of the relationship with commanders and the power they had over the girls, including over their fate and life.

All these facts make it clear that women, victims of sexual assault, are particularly vulnerable and need privacy and anonymity to testify, in order to prevent retraumatisation and social rejection. Direct confrontation with the accused should be avoided as much as possible for some women who are testifying directly against their perpetrator. In particular women and girls who suffered from long-lasting sexual abuse should have as much choice possible about the way they testify. This will help them regain some feeling of power.
In case the testimony can take place in a secure and protective environment, it can be a positive and strengthening experience for these women.

An MICHELS
Psychologist,
Witnesses and Victims Section

30 April 2004

PROSECUTION BOOK OF AUTHORITIES

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Bagosora, Nsengiyumva, Kabiligi and Ntabakuze*, ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001.

2. *Prosecutor v. Bradnin & Talic*, IT-99-36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.

3. *Prosecutor v. Tadic*, IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

4. *Prosecutor v. Tadic*, IT-94-1, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

5. *Prosecutor v. Blaskic,* IT-95-14, Decision of Trial Chamber I on the Prosecutor's Request of 5 and 11 July 1997 for Protection of Witnesses, 10 July 1997.

6. *Prosecutor v. Muvunyi and others*, ICTR-2000-55-I, Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 25 April 2001.

7. *Prosecutor v. Musabyimana*, ICTR-2001-62-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 19 February 2002.

8. *Prosecutor v. Kamuhanda*, ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defense Witnesses, 22 March 2001.

9. *Prosecutor v. Kajelijeli,* ICTR-98-44-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 6 July 2000.

10. *Prosecutor v. Delalic,* IT-96-21, Decision on the Motion by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" trough "M", 28 April 1997.

PROSECUTION AUTHORITIES

1. *Prosecutor v. Bagosora, Nsengiyumva, Kabiligi and Ntabakuze*, ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER III

Original: English

Before:
Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: 5 December 2001

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
ANATOLE NSENGIYUMVA
GRATIEN KABILIGI and
ALOYS NTABAKUZE

Case No. ICTR-98-41-I

DECISION AND SCHEDULING ORDER ON THE PROSECUTION MOTION FOR HARMONISATION AND MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor:
Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichman

Defence Counsel:
Mr. Raphael Constant
Mr. Jean Yaovi Degli
Mr. Clemente Monterosso
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'omanwa

The International Criminal Tribunal for Rwanda (the "Tribunal"), sitting today as Trial Chamber III

composed of Judges Lloyd George Williams, Presiding, Yakov Ostrovsky, and Pavel Dolenc (the "Chamber");

BEING SEISED OF the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses dated 5 July 2001 and filed on 10 July 2001 (the "Motion");

RECALLING the Chamber's Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures issued on 29 November 2001 in which the Chamber indicated that it would make a scheduling order no later than 11 December 2001 specifying a deadline by which the Prosecutor is to disclose unredacted statements and other identifying data for her protected witnesses pursuant to Rule 69 (C) of the Tribunal's Rules of Procedure and Evidence (the "Harmonisation Decision");

RECALLING the Chamber's consultation with the Chief of the Witnesses and Victims Support Section for the Prosecution ("WVSS-P") pursuant to Rule 69(B) on 26 November 2001;

NOW DECIDES THE MATTER IN ACCORDANCE WITH THE FOLLOWING DELIBERATIONS AND FINDINGS.

DELIBERATIONS AND FINDINGS

1. In the Harmonisation Decision, the Chamber reserved making a specific order indicating a deadline by which the Prosecutor was to disclose copies of unredacted statements and other witness-identifying data to the Defence pursuant to Rule 69(C) of the Tribunal's Rules of Procedure and Evidence (the "Rules"). In the instant decision the Chamber answers the question it reserved in the Harmonisation Decision: Which method of calculating the disclosure period of unredacted witness statements and other identifying data is most consonant with the letter and spirit of Articles 20 and 21 of the Statute and Rule 69 -- one measured from the date of the commencement of trial or one measured from the date a particular protected witness is to give *testimony* before the Trial Chamber? After resolving the foregoing question, the Chamber will address itself to the task of determining what length of non-disclosure is strictly necessary to facilitate the protection of victims and witnesses while respecting the rights of the Accused to receive identifying-data in sufficient time to mount an effective cross-examination of the witnesses against them.

2. In fashioning an order that is consistent with Rule 69(C), the Chamber must first interpret the Rule, employing well settled and widely recognised canons of construction in national jurisdictions practising under the common law and the civil code. The starting point of all interpretation of rules and statutes is the language of the rule or statute itself. Moreover, when interpreting the words of a rule a court is charged with according the words their common and ordinary meaning to give full effect to its provisions. In addition, proper interpretation mandates that a court must never construe words of a rule in isolation nor must it interpret a rule apart from its place within the regulatory scheme. *See*, by analogy, the Vienna Convention on the Law of Treaties Article 31, U.N. Doc. A/CONF. 39/97 (indicating that treaties are to be interpreted according to the plain meaning of words employed within the context of the object and purpose of the treaty). Finally, where the words of a rule or statute are unambiguous, a court may look beyond the plain language of the rule only if application of its plain meaning would lead to an absurd result or one which is contrary to a clear legislative intent.

A. The Plain Language of Rule 69(A) and Rule 69(C)

3. Any principled analysis of a rule must commence with an interpretation of the plain words of the rule, according them an ordinary meaning. Thus, the point of departure is Rule 69, which provides:

Rule 69: Protection of Victims and Witnesses

(A)In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the *non-disclosure of the identity* of a victim or witness who may be in danger or at risk, *until the Chamber decides otherwise.*

(B)In the determination of protective measures for victims and witnesses, the Trial Chamber may consult with the Victims and Witnesses Support Unit.

(C)Subject to Rule 75, the identity of the victim or witness shall be *disclosed in sufficient time prior to the trial* to allow adequate time for preparation of the prosecution and the defence.

(Emphasis added).

4. First, it is important to note that Rule 69(A) contains in substance, if not verbatim, the words of our previous order derived from the Bagosora Decision. Thus, we ordered that the Prosecutor not disclose the identity of her protected witnesses "until further order." In this manner, the previous order is eminently consistent with the letter and spirit of Rule 69(A). Whereas Rule 69(A) permits the Chamber to exercise its discretion to delimit a proper deadline for the disclosure of witness identities, Rule 69(C) restrains the Chamber's discretion in this regard by mandating that the identity of witnesses must be disclosed in sufficient time *prior to trial* to permit an accused a fair opportunity to adequately prepare his defence.

5. All of the Defence teams indicated that the Rule 69(C) obligates the Prosecutor to disclose *all* unredacted witness statements and other witness-identifying data before the commencement of trial. The Prosecutor, however, stressed that disclosure should be made on a rolling basis, measured from the date that a particular witness is scheduled to testify.

6. The plain language of Rule 69(C) calls upon the Chamber to make an order requiring the Prosecutor to disclose all protected witnesses' identifying data before the commencement of trial. Such an application of the strict letter of the Rule, without regard for its object and purpose, however, would render nugatory the remainder of the provisions of Rule 69(C), which provides the "*raison d'être*" of the provision, i.e., "to allow adequate time for preparation of . . . the defence". It is this purpose that drives the provision and which must guide the Chamber in assessing what amount of advance disclosure of witness-identifying data is necessary to fulfil its obligations to assure and make effective the Accused's statutorily guaranteed right to cross-examination and the Chamber's statutory mandate to protect victims and witnesses. Neither of these mandates can be sacrificed in service of the other. Rather, a proper balance must be struck to determine what amount of advance disclosure is strictly necessary to serve the twin aims of Rule 69.

7. More important, an interpretation according force to the letter of Rule 69(C) would divest the Chamber of the broad discretion at its disposal pursuant to Rule 69(A).

B. Legislative History of Rule 69

8. The jurisprudence of the Yugoslavia Tribunal interpreting the Rules and Statute is instructive to this Tribunal.[1] *See Prosecutor v. Tadic*, (IT-94-1-I), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, at paras. 23, 24. (August 10, 1995); *Prosecutor v. Tadic*, (IT-94-1-T) Judgement (7 May 1997).

9. In light of the existence of the exceptional circumstance, the Chamber finds that it is necessary to prevent the wholesale disclosure of witnesses names and addresses before trial because to do otherwise

would be against the intent of the drafters of Rule 69 and the other Rules aimed at providing protection to victims and witnesses. Moreover, since it was the generally declared intent of the drafters that the Rules have some elasticity to permit the Chambers to make determinations, where warranted, on a case-by-case basis to address specific concerns, the Chamber believes that it is unreasonable under the particular circumstances of this case to give effect to the literal words of Rule 69(C) which require disclosure of all protected witness identities *before trial*. To make an order effectuating the letter of Rule 69(C) is ill advised because it would unnecessarily tax any real notion of witness protection without advancing the Accused's right to effective cross-examination in any meaningful way.

C. Rule 69 Within the Overall Scheme of the Statute and Rules

10. The exegesis of the overall scheme of the Statute and of the Rules makes plain the intent of the Judges who drafted the Rules regarding protection for victims and witnesses. There are no less than four rules and an article in the Statute specifically aimed at facilitating the appearance and testimony of witnesses before the Tribunal. The analysis of the International Tribunal for the Former Yugoslavia in the matter *Prosecutor v. Tadic* (IT-94-1-T) in its Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) is instructive in this regard

> 24. In drafting the Rules . . . the Judges of the International Tribunal endeavoured to incorporate rules that addressed issues of particular concern, such as the protection of victims and witnesses, thus discharging the mandate of Article 22 of the Statute. (Annual Report, *supra*, para. 75). Provision are made for the submission of evidence by way of deposition, i.e., testimony given by a witness who is unable or unwilling to testify in open court (Rule 71). Another protection is that arrangements are made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness is brought under the protection of the International Tribunal (Rule 69). Additionally appropriate measures for the privacy and protection of victims and witnesses may be ordered including, but not limited to, protection from public identification by a variety of methods (Rule 75). Also relevant is the establishment of the Victims and Witnesses Unit within the Registry to provide counselling and recommend protective measures (Rule 34).

11. So significant was the concern for the protection of witnesses that it is specifically mentioned in Article 14 of the Statute which engages the Judges of the Tribunal to adopt Rules of Procedure and Evidence for the conduct of all proceedings, including rules governing the protection of victims and witnesses. Moreover, Article 19(1) of the Statute, which governs the commencement and conduct of trial proceedings provides:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that the proceedings are conducted in accordance with the [Rules], with full respect for the rights of the accused and *due regard for the protection of victims and witnesses*.
>
> (Emphasis added).[2]

12. Article 21 of the Statute of this Tribunal, which is identical to Article 22 of the Yugoslavia Tribunal's Statute, provides:

> The [Tribunal] *shall provide* in its Rules of Procedure and Evidence for the *protection of victims and witnesses*. Such protection shall include, but shall not be limited to, the conduct of in camera proceedings and the *protection of a victim's identity*.

13. Read together the various articles of the Statute and the Rules charge the Chamber with assuring the protection of victims and witnesses and vest it with broad discretionary authority in discharging this momentous mandate. *See* Rule 69(A).

14. This mandate to protect witnesses does not stand alone; rather it stands along side the Tribunal's

obligation to ensure fair proceedings, in conformity with the rights of the accused. *See* Article 20. Among the rights which the accused enjoys is a minimum guarantee "[t]o examine, or have examined the witnesses against him or her . . . " as provided under Article 20(4)(e). However, this right seemingly unfettered and absolute at first blush has an explicit limitation in the form of Article 20(2) which provides: "In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject *to Article 21 of the Statute*." The Statute and the Rules envisioned therefore that the rights of the accused to a fair trial included the right of the Chamber to control the exercise of that right to a certain prescribed degree in service of the obligation to provide protection to victims and witnesses.

15. No one questions the potential value of unredacted statements and other witness-identifying data in the preparation of a defence. The point of departure for an effective cross-examination often involves asking the witness questions about his or her identity and where she or he lived or lives. Thus, if the Accused is to make effective use of his or her right to cross-examine witnesses against him he must be aware of the identity of the person he seeks to question, otherwise he is deprived of the very facts that would enable Defence Counsel to demonstrate that a witness is hostile, prejudiced, or otherwise unreliable so as to impugn the witness's credibility. All of this identifying data opens valuable avenues for in-court cross-examination and out-of-court investigation before the witness is to appear to testify.

16. The question remains therefore, what amount of advance disclosure is strictly necessary to serve the rights of the defence and preserve protection of victims and witnesses. What is truly in the balance is not the Accused's right to a fair trial against the safety of victims and witnesses. There is nothing within the Statute that indicates that an accused's right to a fair trial is somehow hampered or compromised in service of witness protection. The concepts of protective measures for witnesses, including delayed disclosure of identity, did not streak like a meteor across the existing statutory and regulatory landscape of the accused's right to a fair trial and effective cross-examination. Rather, it was an integral part of this Tribunal's procedures from its inception. Both concepts, fair trial for the accused and witness protection, were preoccupations of equal importance in the minds of the drafters of the Statutes and Rules. *See Tadic*, Protective Measures Decision, *supra*, at para. 25. It is not surprising therefore that several of the Tribunals Statutes and Rules speak of witness protection and the rights of the accused in the same breath. For example, Article 20(2) of the Statute contains a significant "subject to" clause: "In determination of the charges against him the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute". Similarly, Rule 75 which deals with the measures aimed at protecting the disclosure of witness-identifying data to the public and media, is bounded by the explicit requirement that any measures imposed pursuant must nevertheless be "consistent with the rights of the accused".

17. To give effect to only that part of the provisions of Rule 69(C) which indicates that disclosure is be to made *before trial*, without consideration of the object and purposes of such advance disclosure would do violence to the very intent of the drafters in making the provision: (i) to provide witness protection in "exceptional cases" and (ii) to provide sufficient notice to the accused so that he may effectively exploit his right to cross-examination of the witnesses against him.

D. Caveat: Must Avoid Results Repugnant to Intent of Rulemakers: Some Practical Considerations

18. On 26 November 2001, the Chamber consulted with the WVSS-P pursuant to Rule 69(B) to learn about the limits, if any, on its capacity and resources to place witnesses under the protection of the Tribunal. During our consultation, we learned that the WVSS-P lacks the capacity and resources to place under its protection more than 200 witnesses before the commencement of the trial proceedings in the instant case under logistical time constraints imposed by the workings of the Office of the Prosecutor. The manner in which the WVSS-P must operate permits it to place under protection only a

limited number of witnesses at any given time. In addition, this capacity is further limited by the fact that each of the three Trial Chambers is engaged in at least two trial requiring the protection and subsequent production of a large number of protected witnesses. For example in the so-called Butare Case, *Prosecutor v. Nyramasuhuko* et al., ICTR-98-42-T, the Prosecutor intends to call more than 100 witnesses, each of whom must be placed under the Tribunal's protection before his or her identification data is disclosed to the Defence. It is also critical to recall in this regard that once a witness comes under the protection of the Tribunal he or she continues to be under protection until the conclusion of the mandate of this Tribunal. The list of witnesses that the WVSS-P must maintain under its protection is therefore growing with the commencement of each new trial. Against such a factual backdrop, any order requiring the Prosecutor to disclose the identity of the more than 200 protected witnesses expected to testify in her case-in-chief in this case, would place an untenable burden on the already strained resources of the WVSS-P.

19. It is not desirable for a Chamber to make an order that cannot effectively be implemented. Consequently, the Chamber refrains from making an order as proposed by the Defence, directing the Prosecutor to make one single omnibus disclosure of unredacted witness statements and other identification data sixty days before the commencement of trial. Although such an order would track the letter of Rule 69(C), it neglects to respect the spirit of Article 21 of the Statute, which mandates that the Chamber provides witness protective measures.

20. In addition, even if the WVSS-P had the capacity to place under its protection all the witnesses in advance of trial, the Chamber would nevertheless be constrained not to make an order requiring disclosure of all unredacted statements and identities before trial. In this respect, the Chamber is mindful that the trial of this matter may take a year or more. If the names of all witnesses, irrespective of the anticipated date of their testimony, were revealed to the Defence, such unwarranted advance disclosure may severely compromise the safety and security of protected witnesses who may in the interim become targets for coercion or other threats which would prevent or at least discourage them from testifying at trial. Moreover, the Chamber gives due regard to the fact that the WVSS-P is not equipped to provide full-fledged witness protection on the order of what is available in some more developed national jurisdictions. As such, temporary anonymity is a critical measure used by the WVSS-P to maintain the confidentiality and safety of the protected victims and witnesses. No one can justifiably argue that an effective defence requires the disclosure of unredacted statements a year or more in advance of the date of a particular witness's testimony.

21. Were the Chamber to grant the measure advocated by the Defence, i.e., sixty day in advance of trial, which in effect might amount to one year or more before a particular witness might be called to testify, it would be abdicating its statutory duty to provide measures for the protection of witnesses and victims with no corresponding advancement of the Defence's right to a fair trial and effective cross-examination. More important, an order requiring wholesale disclosure of unredacted statements and other identifying data would result in an absurd and unintended compromise of the safety of the overwhelming majority of the protected victims and witnesses. Such an eventuality could not be more repugnant to the intent of the drafters of the Statute and Rules of the Tribunal. Rule 69 exists because it was anticipated that there are potential sources of risk to the safety of prosecution witnesses. It is for this reason that the Rule permits the temporary non-disclosure of witness identities to the defence upon a finding of the existence of exceptional circumstances.

22. Giving due consideration to the particular facts of this case, the Chamber is persuaded by the arguments of the Prosecutor that the deadline for disclosure of witness statements should be done on a rolling basis measured from the anticipated date a particular witness is expected to testify. The Chamber does not, however, subscribe to the notion that twenty-one days under the particular circumstances of this case is a sufficient period of advance disclosure to provide the Defence with a fair opportunity to

effectively exploit the witnesses' unredacted statements and identification data to formulate an effective cross-examination. The exigencies of this particular case require that the Prosecutor make the relevant disclosures at least thirty-five days before the testimony of a given witness. Recalling the manner in which the Defence described it would use the data, the Chamber believes that the rights of the accused to a fair trial, complete with the right tools for effective cross-examination, will be adequately served.

E. Conclusion

23. For all the foregoing reasons, the Chamber concludes that the terms "sufficient time prior to trial" must be informed and interpreted through the filter of the main object and purpose of Rule 69 and of the overall scheme of the Tribunal's Statute to equally serve the rights of the accused to a fair trial, including the right to be provided information for effective cross- examination of the witnesses against him, and the mandate of the Tribunal to provide meaningful protection for vulnerable victims and witnesses. Deference to the fundamental rules of statutory construction requires that the Chamber refrain from making an order, which although consistent with the unambiguous letter of Rule 69 (C), does violence to its spirit by resulting in a practical situation that is repugnant to the object and purpose of the relevant Statutes and Rules of the Tribunal.

24. Accordingly, the Prosecutor shall be required to disclose unredacted statements and other witness-identifying data, including name, address, age, ethnicity, etc., on a rolling basis to be measured from the date of the scheduled date on which a witness is to appear before the Tribunal to testify. The Prosecutor shall provide such information no later than thirty-five days before the date of testimony of a particular witness, or when the witness comes under the protection of the Tribunal, whichever is earlier.

25. In making this order, where disclosure is done on a rolling basis measured from the date of testimony rather than in advance of trial, the Chamber is acutely aware that it has departed from the strict letter of Rule 69(C). Such a departure is eminently justified when it is done to avoid a result that is repugnant to the intent of providing meaningful protection for victims and witnesses, which intent was the subtonic of the drafters of the Statute and Rules of the Tribunal concerning witness protection. Such an order in no way abrogates the Accused's right to a fair trial. Rather, it invigorates the Chamber's broad discretion under Rule 69(A) to strike the right balance, respecting the right of the accused to effective cross-examination of the witnesses against him, while providing protection to vulnerable witnesses, some of whom might not testify absent this very limited protection in the form of delayed disclosure of their identities.

26. Accordingly it is

27. **ORDERED** that the Prosecutor disclose to the Defence the identity of her protected victims and witnesses as well as their non-redacted statements, no later than thirty-five days before the protected witness is expected to testify at trial, or until such time as the said protected victims or witnesses are brought under the protection of the Tribunal, whichever is earlier.

28. The foregoing constitutes the decision and order of the Chamber.

29. Judge Dolenc dissents from the decision and order of the Chamber and appends his separate opinion.

Arusha, 5 December 2001

Lloyd George Williams, Q.C. Judge, Presiding	Yakov Ostrovsky Judge	Pavel Dolenc Judge

Seal of the Tribunal

[1]. From its very earliest days this Tribunal has relied upon the jurisprudence of the Yugoslavia Tribunal to inform its analysis and decisions on matters concerning witness protection. *See e.g. Prosecutor v. Rutaganta* (ICTR-96-3-T), Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses (26 September 1996) (including in the recitation the following: "TAKING INTO CONSIDERATION the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, notably its decisions of 10 August 1995 and 14 November 1995 . . .").

[2]. The French version of Article 19 is slightly different in a very important way. In its French incarnation Article 19(1) provides:

> La Chamber de première instance veille à ce que le procès soit équitable et rapide et à ce que l'instance se déroule conformément au Règlement de procédure et de preuve, les droits de L'Accusé étant pleinement respectés et *la protection des victimes et des témoins dûment assurée.*
> (Emphasis added).

When translated into English, the relevant portion of the French version provides: "the rights of the accused being fully respected and the *protection of victims and witnesses duly assured.*" In its French incarnation Article 19 places even more emphasis on the need to assure protection of victims and witnesses.

PROSECUTION AUTHORITIES

2. *Prosecutor v. Bradnin & Talic*, IT-99-36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.

4958

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
3 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. On 10 January 2000, the Prosecutor filed a motion seeking orders directed to the two accused (Radoslav Brdanin and Momir Talic) and their legal teams – collectively described as the "Brdanin and Talic Defence" – in the following terms:

> (1) The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.
>
> (2) Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:

(a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor;

(b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony;

(3) If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case;

(4) With regard to (3) above, the Brdanin and Talic Defence shall maintain a log indicating the name, address and position of each person or entity receiving such information and the date of disclosure. If there is a perceived violation of the orders described herein, the Prosecutor shall notify the Trial Chamber which may either review the alleged violations or may refer the matter to a designee, such as a duty Judge. If the Trial Chamber refers the matter to a duty Judge, the duty Judge shall review the disclosure log, make factual determinations, and report back to the Trial Chamber with a recommendation as to whatever action seems appropriate .

(5) If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel. The Brdanin and Talic Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record.

(6) The Prosecutor may make limited redactions to witness statements or prior testimony concerning the identity and whereabouts of vulnerable victims or witnesses. The identities of such persons shall be disclosed to the Brdanin and Talic Defence within a reasonable period before commencement of trial, unless otherwise ordered.(1)

Paragraph 2 of the Motion defines, in wide terms, the expressions "the Prosecutor ", "Brdanin and Talic Defence", "the public" and "the media".(2) The Motion was filed on a confidential basis.

2. The orders sought numbered (1), (2) and (3) were not opposed. The others were opposed.

2 The Statute and the Rules

3. There are three provisions of the Tribunal's Statute which are relevant to this application. Article 20 ("Commencement and conduct of trial proceedings") provides , so far as is here relevant:

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence , with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21.2 ("Rights of the accused") provides:

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

Article 22 ("Protection of victims and witnesses") provides:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include , but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

4. There are also a number of the Rules of Procedure and Evidence ("Rules") which are relevant to the application. Rule 66(A)(i) ("Disclosure by the Prosecutor") is in the following terms:

Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; [...]

Rule 53(A) ("Non-disclosure") provides:

In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

Rule 69 ("Protection of Victims and Witnesses") provides:

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Section.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 75(A) ("Measures for the Protection of Victims and Witnesses") provides:

A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of witnesses, provided that the measures are consistent with the rights of the accused.

3 The redactions made by the prosecution

5. On 11 January, the prosecution purported to comply with its obligation under Rule 66(A)(i) by serving on counsel for the two accused copies of the supporting material which had accompanied the indictment when confirmation was sought. *Every* statement served had been redacted to remove the name and any other material which would identify either the persons who had made the statements or their whereabouts , notwithstanding the references in par (6) of the orders presently sought to "limited redactions" and "vulnerable victims or witnesses". The documents were accompanied by a letter which requested counsel to respect the protective measures sought in the Motion until such time as the Trial Chamber had ruled upon it. (3)

6. It was conceded by the prosecution that this redaction had been effected without having first obtained an order pursuant to Rule 69, but it was said that the redaction had been carried out in advance of such an order "for safety's sake".(4) The first issue to be determined in the Motion is, therefore, whether pursuant to Rule 69(A) the prosecution is entitled to the redaction of the name and identifying features of *every* person who has made a statement until "a reasonable period before [the] commencement of [the] trial", as sought by the Motion.(5)

7. In relation to the power to provide appropriate protection for victims and witnesses in the Statute and Rules, it was held by the Trial Chamber in the *Prosecutor v Tadic*(6) that:

> [...] in the fulfilling of its affirmative obligation to provide such protection, [the Tribunal] has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access of information and the protection of victims and witnesses. How the balance is struck *will depend on the facts of each case.* (7)

The balance between the right of the accused to a fair and public trial and the protection of victims and witnesses within its unique legal framework had also been referred to in earlier decisions in the same case.(8)

8. The prosecution, however, relies not only upon the facts of this particular case but also upon "the facts and circumstances concerning Tribunal cases generally" to justify the redaction of all identification of *every* person who had made the relevant statements and their whereabouts. It says that Bosnia and Herzegovina continues to be a dangerous place, where each ethnic or political group is viewed as the enemy of another, and where –

> [...] much of the war is still being fought, with indictees [sic] or suspects and their supporters (as well as supporters of those detained in The Hague) still at large and where witnesses against them are considered "the enemy".(9)

The Motion proceeds:

> 10. In the past two years, there have been increasing instances involving interference with and intimidation of Tribunal witnesses, including breaches and violations of witness protection orders (including non-disclosure orders) and other security measures . The situations range from witnesses having their lives threatened, to repeated instances of witness statements that have been disclosed to accused and their counsel being published in the media or otherwise made public (despite the existence of non-disclosure orders), to numerous threatening telephone calls, to loss of jobs or job opportunities, to witnesses'

> general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Tribunal.
>
> 11. In light of these past breaches of confidentiality and other serious problems , and their effect on victims and witnesses, the Prosecutor has grave concerns that the safety of witnesses, their willingness to testify and the integrity of these proceedings will be substantially jeopardised if witnesses' identities, whereabouts and statements are prematurely disclosed in circumstances where they cannot be protected . The Prosecutor submits that the requested protective measures greatly assist in minimising these concerns.

9. The prosecution submits that the future of this and all other Tribunal cases depends upon the ability and willingness of witnesses to give evidence. Absent evidence, there will be no trials, or no trials which accomplish justice. It says :(10)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

10. It was frankly conceded by the prosecution that the basic argument underlying its submissions was that the requirements of Rule 69(A) – that "exceptional circumstances " must be shown before protective measures will be ordered by the Trial Chamber – are satisfied in relation to *every* witness in *every* case "at this stage" (that is, at the time for service on the accused of the supporting material which accompanied the indictment when confirmation was sought).(11) It was also frankly conceded by the prosecution that it is difficult to argue that *every* witness must be vulnerable.(12)

11. In the opinion of the Trial Chamber, the prevailing circumstances within the former Yugoslavia *cannot by themselves* amount to exceptional circumstances . This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives.(13) Accordingly, the use by those judges of the adjective "exceptional" in Rule 69(A) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing (or normal) circumstances – in the former Yugoslavia. As was made clear by the Second *Tadic* Protective Measures Decision, the circumstances of each case must be examined.

12. The prosecution submits that the Second *Tadic* Protective Measures Decision should no longer be followed, as it was the Tribunal's first case, and that there had been numerous documented instances of interference since that time.(14) Even if the situation *has* changed since the Second *Tadic* Protective Measures Decision – and the Trial Chamber is not satisfied that there has been any *significant* change – the wording of Rule 69(A) has nevertheless remained the same, and the phrase "exceptional circumstances" in its ordinary usage does not permit any interpretation which equates it with what is now said to be the rule in the former Yugoslavia.

13. The action of the prosecution in redacting the name and identifying features in *every* statement, although no doubt administratively convenient, was both unauthorised and unjustified on the basis which the prosecution has now put forward .

4 An alternative procedure?

14. During the course of the oral hearing of the Motion, on 24 March 2000, there was discussion as to whether a procedure could be devised which would avoid the need for a witness-by-witness application by the prosecution to the Trial Chamber for protective measures before complying with its obligation under Rule 66(A)(i) to serve copies of its supporting material upon the accused.

15. The prosecution proposed a procedure whereby –

> (i) it would take it upon itself to redact the identity of every witness who has asked for his or her identity not to be revealed and who, in its judgment, is a vulnerable witness,
>
> (ii) the accused could make a "reasonable" request to it for the identity of particular victims and witnesses to be revealed, giving reasons why their identity was required at an earlier stage than (say) thirty days before the commencement of the trial, and
>
> (iii) if that request were refused, the accused could then seek relief from the Trial Chamber. (15)

Should the accused require the name of a witness because there are, for example, features directly implicating the accused, the name would be supplied unless there is a very good reason why the prosecution wished to withhold it.(16)

16. Such a proposal, however, has two basic defects. First, it continues to assume that *every* witness (or at least those who ask for their identity not to be disclosed) is in fact "in danger or at risk" (as Rule 69 (A) describes them), or "vulnerable" (as the Motion describes them). As already decided, that is not so . Secondly, the proposal completely reverses the appropriate onus. Rule 69(A) places the onus upon the prosecution to demonstrate the exceptional circumstances justifying an order for non-disclosure, whereas this proposal places the onus upon the accused to justify disclosure.

17. There is another problem. The prosecution asserted that, as it has a responsibility to ensure that the accused is given a fair trial, it should be trusted in effect to perform the role which the Rules give to the Trial Chamber in determining which victims and witnesses are vulnerable.(17) It asks the accused "to accept that there are very good reasons why the identity is not being provided".(18) This does not even begin to discharge the onus which the prosecution bears under Rule 69(A). One of the supporting documents served on the accused in the present case consists of the transcript of evidence which a proposed witness gave in open session in another case before the Tribunal, with all material identifying the witness redacted. As it would be a simple thing for the accused to find the relevant transcript and thus to identify the witness in question, there could be no exceptional circumstances warranting a redaction of that witness's name. This example suggests a perhaps less than dispassionate approach by the prosecution to its task.(19)

18. The proposal was opposed by both accused, and the Trial Chamber accepts that its implementation would be contrary to both the Statute and the Rules.

5 A conflict between the Rules?

19. The prosecution claims that there is a conflict which needs to be resolved between the obligation placed upon it by Rule 66(A)(i) to disclose the supporting material to the accused within thirty days of his initial appearance and the protection afforded to victims and witnesses provided by Rule 69(A).(20)

20. The Trial Chamber does not accept that there is any such conflict. As already decided, Rule 69(A) does *not* provide the blanket protection asserted by the prosecution. Before protective measures will be granted, Rule 69(A) requires the prosecution first to establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1: that "proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". As the prosecution correctly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one.(21) The reference to "proceedings" in Article 20 is not limited to the actual trial; it includes every phase of the litigation which affects the determination of the matter in issue.(22)

21. If the prosecution is able to demonstrate exceptional circumstances justifying the non-disclosure of the identity of any particular victims or witnesses at this early stage of the proceedings, then its obligations of disclosure under Rule 66 (A)(i) will be complied with if it produces copies of the statements with the names and other identifying features of only *those* witnesses redacted.

6 Rule 69(A)

22. It is necessary initially to say one thing about Rule 69(A) if only for the purpose of putting it on one side. The Rule expresses the power to make a non-disclosure order in relation to a victim or witness who may be in danger or at risk "until such person is brought under the protection of the Tribunal". This rather curious wording appears to assume that the Tribunal has a witness protection program or scheme which will render the non-disclosure order no longer necessary once it comes into operation. In fact, the Tribunal does not have any such program or scheme.(23) The Rule has always been interpreted as including the power to make non-disclosure orders which continue throughout the proceedings and thereafter. If necessary, such a power is justified by Rule 53(A), which permits a non-disclosure order (so far as the public is concerned) to be made in relation to any document or information until further order – but, again, only "[i]n exceptional circumstances". So far as the accused is concerned, Rule 69(C) requires the identity of the victim or witness to be disclosed to him "in sufficient time prior to the trial to allow adequate time for preparation of the defence".(24)

23. There is therefore clear power to make what may be described as the usual non -disclosure orders in relation to particular victims and witnesses once exceptional circumstances have been shown. That, however, is not what is sought by the prosecution in the present motion. In substance, the present motion seeks only to justify the prosecution's right to make the blanket redactions already made. In that endeavour , the prosecution has been unsuccessful, and it will be necessary to file a fresh motion in which it seeks to justify a non-disclosure order in relation to particular victims and witnesses.(25) As some of the issues which will arise in relation to such a fresh motion have been debated in relation to the present motion, it is appropriate to express the views of the Trial Chamber in relation to those issues at this stage.

24. The first issue concerns the likelihood that prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel , but not to the public. The prosecution says, and the Trial Chamber accepts, that the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.(26) Paragraph 10 of the Motion makes the general allegation that there has been an increasing number of instances in which there have been breaches and violations of witness protection orders, thus justifying grave concerns that such instances will increase further if the identity of the witnesses is disclosed earlier than is necessary.

25. The prosecution subsequently gave four examples of these instances.(27) In the first, counsel for an accused was charged (with his client) with contempt arising from alleged interference with a prospective

witness for that client. The charge of contempt has been dismissed upon the basis that the Trial Chamber was not satisfied beyond reasonable doubt that the interference had occurred.(28) In the second example, counsel in one case named in open session a person as having been a witness in an associated case who had been granted protective measures in that other case. When charged with contempt, Counsel claimed that he had drawn the inference that that person had given evidence in the associated case from the fact that it was known that he had been in The Hague at the time. The prosecution did not assert that this knowledge had been gained as a result of a breach by anyone bound by the protective measures order in the associated case.(29) In the third example, a witness list was published in a newspaper in Sarajevo. In the fourth example, a witness statement was published in a newspaper in Croatia . The prosecution asserted that:(30)

> As a result of these actions, Prosecution witnesses who had previously agreed to appear before the Tribunal refused to testify.

The reference to "these actions" appears to be limited to the third and fourth examples .

26. It is, however, important to recall the terms of the rule under which the prosecution seeks a non-disclosure order. Rule 69(A) applies only to "the non-disclosure of the identity of a victim or witness who may be in danger or at risk". Any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent. Most judges can identify cases in which it is obvious that witnesses have been interfered with, but it is by no means so obvious that this has resulted from breaches by defence team members of witness protection orders. The examples of violations in the four cases following (in a temporal sense only) the disclosure of the identity of the witnesses to the defence are accompanied by the prosecution's assertion that they show "a history of violations in virtually every case that has been brought before this Tribunal".(31) This piece of hyperbole does not assist.

27. Counsel for the accused have, with some justification, complained that their integrity has been impugned by these assertions. Such an intention has been denied by the prosecution, which has attempted to explain the relevance of its assertions in this way:(32)

> It is submitted that if, before an order is to be made, the Prosecutor is required to demonstrate that there are grounds for believing that a particular defence counsel would behave improperly and/or until interference with witnesses or improper disclosure of confidential material has taken place, then the purpose of the order (which does no more than comply with the statutory obligation to protect victims and witnesses), has been negated.

This was expanded at the oral hearing:(33)

> We're suggesting that the interference may and has in the past come from persons who have a vested interest in, whether actively sought by the accused or no, helping them. And one of the foolish ways which they see help being given is by interference with witnesses.

These explanations do not entirely eradicate the suggestion by the prosecution that there is a presumption that impropriety will occur, particularly when the terms of Order (4) are considered.(34)

28. The Trial Chamber accepts that, once the defence commences (quite properly) to investigate the

background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the defence has spoken may reveal to others the identity of those witnesses, with the consequential risk that the witnesses will be interfered with. But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.

29. A second issue which arose relates to the extent to which the power to make protective orders can be used not only to protect individual victims and witnesses in the particular case but also to assist the task of the prosecution to bring other cases against other persons in the future. This issue arises from the prosecution's assertion quoted earlier:(35)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

That is a statement which could easily be misunderstood. In the view of the Trial Chamber, when the required balancing exercise is undertaken before protective measures are ordered, a clear distinction must be drawn between measures to protect individual victims and witnesses in the particular trial and measures which simply make it easier for the prosecution to present its other cases against other persons.

30. Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia* , interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration . It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases.

31. The Trial Chamber accepts that the need to carry out *any* balancing exercise which limits the rights of the accused necessarily results in a less than perfect trial. On the other hand, it also accepts that such a result does not necessarily mean that the trial will not be a fair one. Those propositions were stated by the majority of the Trial Chamber in the First *Tadic* Protective Measures Decision ,(36) and they have never been disputed . The question here is whether the extent to which it is necessary to deny the rights of the accused in order to assist the prosecution to have indeterminate victims and witnesses testify on its behalf in future cases tilts the balance too far. The right to a fair trial holds so prominent a place in a democratic society that it cannot be sacrificed to expediency.(37)

32. That said, however, the Trial Chamber accepts that, where the likelihood that a particular victim or witness may be in danger or at risk has *in fact* been established, it would be reasonable, for the reasons already given, to order non -disclosure of the identity of *that* victim or witness until such time that there is still left, in the words of Rule 69(C), "adequate time for preparation of the defence" before the trial. Counsel for Brdanin in the end realistically accepted that the real issue was "when".(38) Counsel for Talic did not accept the right of the prosecution to have *any* documents redacted,(39) although his co-counsel emphasised the requirement of Rule 69(A) that redaction be allowed only in exceptional circumstances.(40)

33. A third issue which arose relates to the *length* of that time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. The prosecution accepts that, although the greater the length of time between the disclosure and the time when the witness is to give evidence, the greater the potential for interference with that witness, the time to be allowed for preparation must be

time before the trial commences rather than before the witness gives evidence .(41)

34. The prosecution has also very realistically conceded that what is a reasonable time will depend upon the particular category in which the witness in question falls .(42) For example, where (as in the present matter) the case against the accused does not suggest that either of the accused personally did the acts in question, the witnesses who are to prove the basic facts for which the accused is said to be responsible (either as a superior or by way of aiding and abetting) do not themselves directly implicate the accused , and knowledge of their identity would do little to assist the defence in its preparation for the trial.(43) The witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who directly implicate the accused as having superior authority or as aiding and abetting.(44) The distinction is a valid one, but the problem is that it is in relation to the witnesses who fall into the second category that the prosecution has the greater concerns and whom it seeks to keep anonymous until the last moment.

35. All three of these issues will be relevant to the determination of the fresh motion which the prosecution must now file in which it seeks to justify a non-disclosure order in relation to particular witnesses.

36. The prosecution has suggested that a disclosure of its witnesses' identity thirty days before the trial would be sufficient to allow the accused to be ready for trial . The prosecution asserts that the name of the witness is –

> [...] normally only relevant to issues of credit and is, therefore, generally only a small part of any case preparation that the Defence may undertake.(45)

The prosecution asked rhetorically:(46)

> [E]ven if [the defence] have the name of a witness, how would this assist them preparing the defence of either of the two accused?

These statements are quite unrealistic when applied to those witnesses who fall within the category of giving evidence which directly implicates the accused. There can be no assumption by counsel for the accused that these witnesses will be telling the truth.(47) There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were,(48) or have subsequently retracted their evidence.(49) The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence.(50) Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

37. One difficulty which is said by both accused to have arisen in the present case results from the fact that the indictment was sealed, and has remained sealed except in relation to these two accused. Persons whom the defence teams wish to interview have declined to co-operate for fear that they are also named in that indictment , or perhaps in another sealed indictment. This difficulty was said to arise in relation to prospective witnesses for the *defence* whom the defence teams wish to interview, which is hardly relevant to the present issue, which concerns *prosecution* witnesses.(51) However , the Trial Chamber recognises that such a difficulty may well arise also in relation to those from whom the defence teams

seek information in relation to the prosecution witnesses.

38. The Trial Chamber does not believe that it is possible to lay down in advance any particular period which would be applicable to all cases. Everything will depend upon the number of witnesses to be investigated, and the circumstances under which that investigation will have to take place. Some accused may have better resources of their own than others, depending upon their position prior to their arrest. That period can only be determined after the protective measures are in place. However, from evidence given in other cases,(52) the Trial Chamber accepts that the pre-trial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial.

7 Return of documents

39. Order (5), if made, would oblige counsel for the accused to return all statements of witnesses to the Registry "at the conclusion of the proceedings". It is said that, as the statements were provided to the accused only to enable him to prepare for the trial, they should be returned to the Registry – thus ensuring that what may be described as the non-public information which the statements contain can never be disclosed to the public.(53) The prosecution would not have access to the documents when they are returned.(54)

40. It was argued on behalf of Talic that the documents became the property of the accused as soon as they are provided to him, and that he should be entitled to keep them "so that he could use them properly in the future".(55) The prosecution replied that property in the documents does not pass to the accused . (56) The Trial Chamber does not find it necessary to determine this issue, as it accepts the alternative submission made on behalf of Brdanin, that the "work product" of counsel (being the notations inevitably made by counsel on those documents during the preparation and the course of the trial) does become the property of the accused and that it is of a confidential nature.(57) It is unnecessary to determine whether that confidentiality stems from the legal professional privilege which arises (at least in the common law systems) between attorney and client; it is sufficient to say that the "work product" is confidential, and that the accused should not ordinarily be required to divulge it. The issue therefore becomes whether the risk of disclosure is of such a nature that the documents ought nevertheless be returned .

41. When pressed as to how realistic the risk was that the non-public material in these statements would be disseminated if the documents were kept by counsel after the case has been concluded (when the protective measures still operate), the prosecution first referred to the refusal by one defence counsel in another case to return his papers at the conclusion of the trial, and then suggested that:(58)

> One keeps papers in one's office, people wander in and out of the office, or one leaves papers somewhere, and unless they're returned and accounted for, [...] there's always that risk. That's the difficulty.

If there is a deliberate refusal by counsel to return the documents when ordered to do so, he or she would be subject to punishment for contempt. Such a refusal does not lead inevitably to a deliberate disclosure of the documents; however, even punishment for contempt would not cure the damage should there be a deliberate disclosure. But what realistically is the likelihood of a repeat of an event such as this? And what realistically is the likelihood that counsel who has kept the statements *after the conclusion of the case* would leave them in a situation where there would be an unintentional disclosure to somebody who has wandered into his or her office? All but one of the documented disclosures to which the prosecution

has referred in the Motion occurred either during the pre-trial phase or during the trial itself. The exception occurred when counsel in one completed case provided an unredacted statement of a witness to counsel in an associated case who had at that time received from the prosecution only a redacted statement of that witness .(59)

42. The Trial Chamber does not accept that the risk is of such significance as to warrant the concern which the prosecution has expressed. There is in any event some difficulty in determining the exact time when the proceedings have concluded , which the prosecution has proposed as the time for the statements to be returned . It was agreed at the oral hearing that, if such documents were to be returned to the Registry at the conclusion of the trial, they would for practical reasons be destroyed, rather then stored.(60) Whether an appeal is to be lodged would be known fairly quickly, and counsel could perhaps be permitted to keep the statements until the time for filing an appeal has expired and, if an appeal is filed, until the appeal is disposed of. But what if, at some later stage, an application is made for a review pursuant to Rule 119 ? Counsel retained for the accused in that procedure would have lost a very valuable resource if the work product on the statements has been destroyed. This would be unfair to the accused. It was suggested by the prosecution that the answer would be for defence counsel to keep his or her work product separately from the statements supplied. The Trial Chamber regards that submission as quite impractical.

43. The Trial Chamber does not accept that the likely risk of either deliberate or unintentional disclosure after the conclusion of the case is of such significance as to justify the unwieldy and possibly unfair consequences of an order that the documents be returned in every case. The fact that orders for the return of statements have been made in similarly general terms in other cases does not impress the Trial Chamber,(61) as the present case appears to be the first in which objection has been taken to orders of the nature sought in this case, and the first in which there has been any examination of what is involved in those orders.

44. The Trial Chamber is prepared to make an order in the terms of the first part of Order (5) – that, if a member of the Brdanin and Talic Defence team withdraws from the case, all the material in his or her possession shall be returned to the lead defence counsel. Such an order is justified as that member of the team no longer has any need for the documents. But the Trial Chamber is not prepared at this stage to make any further order in relation to the return of documents. It accepts that such orders may be warranted in a particular case. Counsel for Brdanin suggested that an order may be warranted where a document was "akin to a national security document",(62) but the Trial Chamber would not limit the occasions when an order may be appropriate to that class of case. Such orders are better considered at the end of the trial, when the risk involved may more easily be identified. The risk has not been identified in the present case at this stage. The order is therefore otherwise refused, without prejudice to any further application at a later stage.

8 Maintaining a log

45. The accused have not objected to Order (3), which obliges their Defence team (as defined) to inform each person among the public to whom they find it directly and specifically necessary to disclose confidential or non-public materials that such person is not to copy, reproduce or publicise the information disclosed, is not to show or disclose that information to any other person, and is to return the original or any copy of such material provided to that person. Order (4), if made , would oblige counsel to maintain a log indicating the names, addresses and position of each person or entity receiving any of the non-public information in the materials provided by the prosecution. The prosecution points out that similar statutory requirements exist in relation to statements, photographs and medical reports in sexual cases in the United Kingdom.(63) Such a regime was said to be necessary in Tribunal cases as the "only way of tracing these things".(64) An expanded explanation was given in these terms:(65)

> [...] if there is a leak of confidential material, and the Trial Chamber has to conduct an investigation, the only way they can properly do so is by a log being kept. And that's the reason that we are asking for that [...]

The procedure laid down by Order (4) is that, if a "perceived violation" of the non-disclosure order occurs, the Trial Chamber, or a designee [sic] such as a duty judge, may review the disclosure log so that "appropriate" action may be taken. The prosecution asserts that the log will not be disclosed to it..(66)

46. The accused Talic objects to such an order upon the basis that it infringes the confidentiality of his defence team's investigations,(67) in that (a) it will permit both the prosecution and the Tribunal to know those whom his defence team is meeting in order to organise his defence,(68) and (b) it will permit the prosecution to prosecute those persons "secretly".(69) The prosecution denies that legal professional privilege applies to that information . Again, it is unnecessary for the Trial Chamber to determine whether the confidentiality as to the identity of persons to whom the defence team have spoken in the preparation of the case for the accused stems from legal professional privilege, as it is sufficient to say that such information *is* confidential, and the accused should not ordinarily be requested to divulge it.

47. It is significant, in the view of the Trial Chamber, that the review of this log is contemplated only in the event of a "perceived violation" of the non-disclosure order. As that order is binding only upon the Brdanin and Talic Defence (which term is limited by its definition to the accused themselves, their counsel and all staff assigned to them by the Tribunal), Order (4) appears to be intended specifically to provide the basis for "appropriate" action against only those persons responsible for maintaining the log. The "appropriate" action could well include prosecution for contempt of the Tribunal.

48. If, however, any member of the defence team is to be prosecuted for contempt , it is perhaps disingenuous of the prosecution to assert that the log will not be disclosed to it, as it would be the prosecution to which the Trial Chamber would necessarily have to turn for assistance in proceedings for contempt pursuant to Rule 77. Again, if any member of the defence team is to be prosecuted for contempt , he or she is entitled to the same presumption of innocence and right to silence which any other accused person has. The obligation to keep the log upon which such a prosecution is to be based would require that accused person to provide evidence against him or herself, contrary to Article 21 of the Tribunal's Statute. Such a procedure could be justified only where the situation were so grave that substantial damage was being caused by improper disclosures.(70) The Trial Chamber is not satisfied that such a situation exists here.

49. A requirement that such a log be kept so that any improper disclosure could be traced to a person to whom the defence team has quite properly disclosed the identity of the witness (in its investigation into the background of that witness) would not give rise to these problems, but the non-disclosure order is not binding upon those other persons, and the Tribunal is powerless to take any action against them if such a disclosure by them does occur. The Trial Chamber does not accept that it is appropriate to require such a log to be maintained by the defence team for the purpose contemplated by Order (4). The order is refused.

9 Confidential filings

50. An issue was also raised by the Trial Chamber itself as to the action of the prosecution in filing its Motion on a confidential basis. At the time when the Motion was filed, a Scheduling Order was made which, *inter alia*, lifted its confidentiality.(71) An informal request was made by the prosecution to rescind that order,(72) but the order was merely stayed until further order, so that both the

confidentiality of this document and the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential" could be argued at the oral hearing.(73) The Registrar was also invited to make representations pursuant to Rule 33(B) upon the second of those issues, as well as upon the issue as to whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis .(74) A submission of the Registrar was filed.(75)

51. The purported basis for filing the Motion as a confidential document was the fear that, if the material contained in par 10 of the Motion – which is quoted in par 8 of this Decision – could be read by anyone, including those who are potential witnesses and those who have an interest in preventing such witnesses from giving evidence, it could well lead to those witnesses refusing to co-operate,(76) and to the possibility of interference with witnesses being planted in the minds of those who have a vested interest in ensuring that evidence which implicates these two accused is not given.(77)

52. The Trial Chamber repeats what it said earlier,(78) that the issue is the likelihood that prosecution witnesses may be interfered with or intimidated, and that any fears expressed (or held) by potential witnesses themselves that they may be approached are not in themselves sufficient to establish the likelihood that they may be interfered with or intimidated. The Trial Chamber regards the suggestion that those already minded to prevent evidence being given against these two accused would, by reading a publicly filed document such as this Motion, be incited to interfere with or intimidate witnesses as merely fanciful.(79) The reality is that there have already been serious allegations made publicly that witnesses in other cases have been interfered with. In one case, the allegations were upheld in proceedings for contempt against the counsel concerned.(80) In another case, the allegations against other counsel and the accused for whom he appeared were dismissed.(81) Both judgments are public documents, and may be read by anyone. The second was given only recently, but no-one has suggested that there has been an upsurge of interference with witnesses in the period since the first of those judgments was given. Nor could they.

53. There was no justification for filing the Motion on a confidential basis. Article 20.4 of the Tribunal's Statute provides:

> The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Pursuant to that Article, Rule 79 provides that a Trial Chamber may exclude the press and the public from the proceedings only for one of three specified reasons (one being the safety, security or non-disclosure of the identity of a victim or witness as provided by Rule 75). Both these provisions make it clear that the proceedings must be in public unless good cause is shown to the contrary.(82)

54. The prosecution has submitted that these provisions relate only to hearings, and not to the filing of motions. That is strictly true, but they indicate a intention that *everything* to do with proceedings before the Tribunal should be done in public unless good cause is shown to the contrary. As a matter of general policy , this must be so. A necessary consequence of the filing of this Motion on a confidential basis has been that the oral argument upon the Motion – which dealt with matters of great importance – took place in closed session, although it was subsequently conceded by the prosecution that nothing said during that oral hearing other than the references to par 10 of the Motion was confidential in nature.(83) If par 10 of the Motion did not justify it being filed on a confidential basis, then the public has been denied its right of access to a hearing, a right which both the prosecution and the Tribunal should have been anxious to enforce.

55. The prosecution also asked rhetorically:(84)

> [W]hat interest can the public have in [...] unnecessarily knowing that there's an application for protection of witnesses and/or that there have been successful attempts in the past?

The answer is that there is a public interest in the workings of courts generally (including this Tribunal) – not just in the hearings, but in everything to do with their working – which should only be excluded if good cause is shown to the contrary . The attitude displayed by the prosecution in the present case appears to be part of an unfortunately increasing trend in proceedings before the Tribunal for matters to be dealt with behind closed doors. When the prosecution seeks to have anything dealt with confidentially, the accused does not usually object because it is in his interest that the less that is made public concerning his case the better.(85) This trend is a dangerous one for the public perception of the Tribunal, and it should be stopped.

56. The stay on the order lifting the confidentiality of the Motion is removed, and the filings by the parties in relation to the Motion, and the transcript and video-recording of the oral hearing on the Motion, will also be made public.

57. The remaining issues concerning confidentiality were the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential ", and whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis.

58. The parties made no specific submissions in relation to these issues, although the prosecution did identify some convenient categories into which its "confidential " filings fall, to which reference will be made later.

59. The Registrar has identified as being relevant to this issue Article 12.1 of the Directive for the Registry–Judicial Department–Court Management and Support Services ("Directive"),(86) which provides :

> Documents which are confidential in whole or in part, or which include words or phrases which should not be disclosed to the public, are filed and classified in accordance with the procedure described in Article 11 herein. These documents remain a part of the relevant case file, but they are placed in a distinct folder which is not accessible to the public.

The classification of documents described in Article 11 of the Directive makes no reference to the classification of documents as confidential. The Registrar has submitted that, as it is her view that "her Office is not in a position to make decisions that affect the judicial rights of the parties",(87) and "in accordance with the current practice of the Registry", the parties *do* have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".(88) Such a practice, she says (89) –

> [...] is the most appropriate mechanism for satisfying the dual objectives of maintaining the security of each party's documents, and maintaining a transparent and impartial filing system.

60. The Trial Chamber respectfully takes issues with a number of these assertions . First, Article 12

makes it clear that the documents to which it relates are those which are *in fact* confidential, not those which are merely claimed to be so, and to documents which "should" not be disclosed to the public. On the face of it, the Article *does* require the Registry staff to make a determination . Secondly, it is by no means the universal practice of the Registry to leave it to the parties to nominate whether they wish to have the documents filed on a confidential basis, and decisions *are* made by Registry staff on occasions as to whether a document should be filed on a confidential basis.(90) Thirdly, the Directive cannot be interpreted according to the ability of the Registrar to provide staff who are able to apply it. And, lastly, the argument that, by making a determination as to whether a document should be filed on a confidential basis , the Registry staff will no longer be seen as impartial is illogical. The Trial Chamber does not accept the Registrar's conclusion that the parties have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".

61. In relation to the suggested requirement that a party seeking to file a document on a confidential basis must first obtain leave to do so, the Registrar asserts that it would be contrary to the Directive, which can only be amended by the Registrar after consultation with the judges and the Prosecutor.(91) As the parties require documents to be filed on a continuous basis throughout the day, and in some cases after hours, she also asserts that any requirement of leave could potentially result in delays because of the unavailability of the Pre-Trial Judge or the Trial Chamber.(92)

62. Once again, the Trial Chamber respectfully takes issue with these assertions . The contents of the Directive are irrelevant to the suggested requirement of leave. The Directive does not impinge upon the power of a Trial Chamber to control the particular proceedings before it. The Trial Chamber may direct the parties to file certain documents, without infringing the Directive. It may equally direct the parties not to file certain documents without first obtaining leave, again without infringing the Directive. The suggested requirement of leave does not *require* the Registry staff to act in any particular way. If a party seeks to file a document merely labelled "Confidential" on such a basis without leave to do so, and if the Registry staff does not draw the party's attention to that requirement , then the Trial Chamber will exercise its power to order that its confidentiality be lifted, a power which the Registrar recognises.(93) The requirement that leave be obtained in advance will merely ensure that usually this power will not have to be exercised after the filing has been accepted.

63. In relation to the argument of inconvenience, the prosecution informed the Trial Chamber that its confidential filings fell into the following categories:(94)

(i) witness protection measures,

(ii) ongoing investigations, pending indictments and sealed indictments, and

(iii) responses to confidential motions filed by the defence and to Trial Chamber decisions which relate to confidential hearings or motions.

Filings in the second category are almost inevitably *ex parte* in nature and so are almost inevitably also confidential in nature. Filings in the third category would also appear to be necessarily confidential in nature. It is therefore with filings in the first category that the issue of inconvenience principally arises , although the Trial Chamber recognises that there may well be other categories in which it would be appropriate to file a document on a confidential basis.

64. If the requirement that leave be sought prior to filing were couched in terms which excluded –

(a) all *ex parte* applications, whatever their nature,

(b) all *inter partes* applications for witness protection which relate to specific persons, and

(c) all applications which fall within the second and third of the prosecution's categories,

there are few documents which would require leave. The prosecution was unable to supply figures,(95) but it was not suggested that there were many such documents. There would be no significant inconvenience ; rather, there will be an opening up of the proceedings to public scrutiny in every case except where confidentiality is really warranted. The Trial Chamber proposes to give such a system a trial in particular cases.

10 Disposition

65. For the foregoing reasons, Trial Chamber II makes the following orders:

1. For the purposes of these orders:

(a) "the Prosecutor" means the Prosecutor of the Tribunal and her staff;

(b) "Brdanin and Talic Defence" means only the accused Radoslav Brdanin and Momir Talic and such defence counsel and their immediate legal assistants and staff, and others specifically assigned by the Tribunal to Radoslav Brdanin and Momir Talic's trial defence teams and specifically identified in a list to be maintained by each lead counsel and filed with the Trial Chamber *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily and properly involved in the preparation of the defence shall be notified to the Trial Chamber in similar fashion within seven days of such additions or deletions ;

(c) "the public" means all persons, governments, organisations, entities, clients , associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), and the Prosecutor, and the Brdanin and Talic Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the accused, the co-accused, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal; and

(d) "the media" means all video, audio and print media personnel, including journalists , authors, television and radio personnel, their agents and representatives.

2. The Prosecutor is to comply, on or before 24 July 2000 at 4.00 pm, with her obligation under Rule 66 (A)(i) of the Rules of Procedure and Evidence to supply to each of the accused copies in unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by her from that accused;

provided that, in the event that the Prosecutor files a motion within that period for protective measures in relation to particular statements or other material or particular victims or witnesses (which shall be identified in such motion by a number or pseudonym), she need not supply unredacted copies of those statements or that other material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the terms of any order made upon that motion .

3. The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.

4. Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:

(a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor; or

(b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony.

5. If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case.

6. If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel.

7. The stay imposed by the Variation of Scheduling Order of 27 January 2000 dated 2 February 2000, which lifted the "confidentiality" of the Motion for Protective Measures dated 10 January 2000, is removed.

8. The "confidentiality" of the filings in response to the Motion for Protective Measures dated 10 January 2000, of the filings in reply to those responses and of the oral hearing of the Motion on 24 March 2000 is lifted.

9. The remaining orders sought by the Motion for Protective Measures dated 10 January 2000 are refused.

10. Nothing herein shall preclude any party or person from seeking such other or additional protective orders or measures as may be viewed as appropriate concerning a particular witness or other evidence.

Done in English and French, the English text being authoritative.

Dated this 3rd day of July 2000,
At The Hague,
The Netherlands.

Judge David Hunt
|Presiding Judge

[Seal of the Tribunal]

1. Motion for Protective Measures, 10 Jan 2000 ("Motion"), par 14.

2. Those definitions formed the general basis for the definitions given in par 65.1 of this Decision. The prosecution also seeks to preserve the right of the parties and any other person to seek such other or additional protective orders or measures as may be appropriate concerning a particular witness or other evidence.

3. Transcript, 11 Jan 2000, p 40.

4. Transcript, 24 Mar 2000, p 77.

5. Motion, par 14(6).

6. Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996 ("Second Tadic Protective Measures Decision"), at 4.

7. The emphasis has been added.

8. Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (1995) I JR ICTY 123 ("First Tadic Protective Measures Decision"), at 151 (par 30). See also Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, (1995) I JR ICTY 307 at 318-319 (par 11).

9. Motion, par 9.

10. Ibid, par 4.

11. Transcript, p 78.

12. Ibid, p 88.

13. First Tadic Protective Measures Decision, at 145-147 (par 23).

14. Transcript, p 135.

15. Ibid, p 84, 87-88, 92.

16. Ibid, p 86.

17. Ibid, p 86-87, 93-94.

18. Ibid, p 140.

19. Whatever fears that witness may have in being identified as one who is going to give evidence in this trial, it is difficult to see how the prosecution, having used the transcript as supporting material when the indictment was confirmed, could argue that there were exceptional circumstances justifying a non-disclosure in relation to that witness.

20. Transcript, p 140.

21. Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000 ("Further Particulars"), par 4; Transcript, p 83. See also First Tadic Protective Measures Decision, at 215.

22. First Tadic Protective Measures Decision, at 157 (par 38), citing Axen v Federal Republic of Germany, ECHR decision of 8 Dec 1983, Series A, no 72 (see at par 27).

23. First Tadic Protective Measures Decision, at 175 (par 65), 201.

24. This is subject to Rule 75, which permits appropriate measures to be ordered for the privacy and protection of witnesses unlimited in time, but only if the measures are "consistent with the rights of the accused". No issue arises in the present motion in relation to that power, which is discussed in the First Tadic Protective Measures Decision, by the majority at 169-175,179 (pars 53-66, 71) and by Judge Stephen, dissenting, at 221, 225-235.

25. It was submitted by the prosecution that such a motions should proceed ex parte (Transcript, p 86). That would be appropriate only if the identity of the particular witnesses would otherwise be identified: Prosecutor v Simic, Case IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000, pars 40-41. Whether ex parte or inter partes, it would nevertheless be appropriate for the application to be made on a confidential basis.

26. Further Particulars, par 12; Transcript, pp 78-79.

27. Further Particulars, par 8.

28. Prosecutor v Simic, Case IT-95-9-R77, Oral Judgment, 29 Mar 2000, Transcript, pp 904-905.

29. Prosecutor v Zlatko Aleksovski, Case IT-95-14/1-T, Finding of Contempt of the Tribunal, 11 Dec 1998.

30. Further Particulars, par 8

31. Ibid, par 9.

32. Ibid, par 10.

33. Transcript, p 90.

34. This provides for a log to be maintained by counsel of those to whom they have disclosed the non-public information in the material provided by the prosecution, and which may be reviewed by the Trial Chamber in the event of a "perceived violation" by counsel or others within the defence team. See Section 8 of this Decision.

35. Paragraph 9 of this Decision.

36. At 179 (par 72). It is perhaps instructive that the authority upon which the majority relied – a decision of the Appellate Division of the Supreme Court of Victoria (Australia), in Jarvie v Magistrates Court of Victoria [1994] VR 84 at 90, delivered by Mr Justice Brooking on behalf of the Court – involved a witness who had been well known to the accused, although only by a pseudonym and not his real name (he was an undercover police officer): First Tadic Protective Measures Decision, per Judge Stephen, at 233.

37. Kostovski v Netherlands, ECHR decision of 20 Nov 1989, Series A, no 166, at 21 (par 44).

38. Transcript, p 115.

39. Transcript, p 123.

40. Transcript, pp 126-128. This is more consistent with the written response filed on behalf of Talic: Response of General Talic to the Further Particulars Provided by the Prosecutor Relating to the Motion for Protective Measures, 10 Feb 2000, par 5.

41. Transcript, p 81.

42. Ibid, p 80.

43. Ibid, pp 83-84. In other words, it is unlikely that there will be any real dispute about their evidence: Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18(A).

44. Transcript, p 89.

45. Further Particulars, par 13.

46. Transcript, p 84.

47. Counsel for Brdanin quoted Lord Owen: "Never before in over thirty years of public life have I had to operate in such a climate of dishonour, propaganda and dissembling. Many of the people with whom I have had to deal in the former Yugoslavia were literally strangers to the truth." (Balkan Odyssey, David Owen, 1996, Indigo Edition, p 1.)

48. See, for example, Prosecutor v Tadic, Case IT-94-1-T, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 Dec 1996, par 4; Prosecutor v Tadic, Case IT-94-1-A, Judgment, 15 July 1999, pp 26-28 (pars 57-65).

49. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, pars 46, 136.

50. Prosecutor v Aleksovski, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 18.

51. So far as defence witnesses are concerned, the attention of defence counsel is directed to the provisions of Article 29 of the Tribunal's Statute.

52. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000.

53. Motion, par 13.

54. Transcript, p 134.

55. Ibid, p 120.

56. Ibid, p 142.

57. Ibid, pp 131, 133-134.

58. Ibid, p 97.

59. Further Particulars, par 15

60. Transcript, p 94-95.

61. Further Particulars, par 16.

62. Ibid, p 133. See also a reference by the prosecution to such documents, at Transcript, pp 99-100.

63. Sexual Offences (Protected Materials) Act 1997, which contains elaborate provisions to prevent disclosure of such material to any person (including the accused person, even if unrepresented) in such a way which permits that person to retain possession of it at any time or to make a copy of it: Further Particulars, par 18.

64. Transcript, p 97.

65. Ibid, p 134.

66. Ibid, p 134.

67. Response [by Talic] to Prosecutor's Motion, 31 Jan 2000, par 3.

68. Transcript, p 130.

69. Ibid, p 130-132.

70. Such a situation has been justified in some domestic jurisdictions – for example, where lorry drivers are required to keep log books as to their working hours and rest periods.

71. Scheduling Order, 27 Jan 2000, p 3.

72. Letter from James Stewart, Chief of Prosecutions, to the Pre-Trial Judge, 31 Jan 2000 ("Stewart letter"). The prosecution was subsequently required to file the letter: Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

73. Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

74. Scheduling Order, 29 Feb 2000, p 4.

75. Submission of the Registrar on the Confidential Filing Issue in Accordance with Rule 33(B), 7 Mar 2000 ("Registrar's Submission").

76. Stewart letter, par (a).

77. Ibid, par (b); Transcript, p 102.

78. Paragraph 26 of this Decision.

79. The Trial Chamber has not overlooked that publicity may be given to such documents when publicly filed, although none was in fact given to this Motion notwithstanding its public release when its confidentiality was lifted. In any event, so far as the point made by the Trial Chamber is concerned, it does not matter how the allegations in the filed document might become known to those persons already minded to prevent evidence being given against these two accused.

80. Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, a judgment of the Appeals Chamber.

81. Prosecutor v Simic, Case IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000.

82. See also Article 21.2 of the Tribunal's Statute.

83. Transcript, p 148.

84. Ibid, p 104.

85. One example of the approach of the parties to hearing matters in closed session may be seen in Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, at par 11. In Prosecutor v Kunarac, Case IT-96-23-T, Order on Defence Motion Pursuant to Rule 79, 22 March 2000, the defence has sought a closed hearing for the evidence of all the prosecution witnesses who had accused the defendant of rape. The application was refused.

86. IT/121, 1 March 1997, as approved by the Judges sitting in Plenary Session on 25 June 1996.

87. Registrar's Submission, par 3.

88. Ibid, par 4.

89. Ibid, par 4.

90. A recent example was the wise decision within the Registry to file a document on a confidential basis, notwithstanding the absence of any label of confidentiality, because it included references to the transcript of evidence given in closed session: Prosecutor v Delalic, Case IT-96-21-A, Order Relating to Appeal Brief Filed on Behalf of Zegnil Delalic, 26 May 2000. There have been many other such occasions.

91. Registrar's Submission, par 5.

92. Ibid, par 6.

93. Ibid, par 4.

94. Ibid, p 100.

95. Transcript, p 99.

PROSECUTION AUTHORITIES

3. *Prosecutor v. Tadic*, IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

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Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

DECISION ON THE PROSECUTOR'S MOTION REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Krstan Simic

DECISION

Pending before the Trial Chamber is the Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor on 18 May 1995, which contains thirteen separate prayers for relief in respect of seven alleged victims or witnesses who are referred to by the pseudonyms A, F, G, H, I, J and K and one prayer concerning all witnesses who may testify in this case. The Defence has filed a Response objecting in part and agreeing in part to the protective measures sought. Two briefs have been submitted by *amicus curiae*, one by Professor Christine Chinkin, Dean and Professor of International Law, University of Southampton, United Kingdom ("Brief of Professor Chinkin") and a joint brief filed by Rhonda Copelon, Felice Gaer, Jennifer M. Green and Sara Hossain, all of the United States of America, on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, New York; the Center for Constitutional Rights, New York; the

International Women's Human Rights Law Clinic of the City University of New York, New York; and the Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services, both of Cambridge, Massachusetts ("the Joint U.S. Brief").

At the request of the Prosecutor, which was not opposed by the Defence, the motion was heard *in camera* on 21 June 1995. Since that date, additional confidential filings giving details of prior media contact, if any, with the pseudonymed witnesses have been made by both parties pursuant to an Order of this Trial Chamber of 23 June 1995. In that same filing, the Prosecutor has amended two of his prayers for relief. The Prosecutor has also withdrawn the request for relief in respect of the witness pseudonymed A and now seeks only delayed disclosure to the accused of the identity of the witness pseudonymed F, not non-disclosure, based on evidentiary issues surrounding the testimony of that witness.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties, and the written submissions of the *amicus curiae*,

HEREBY ISSUES ITS DECISION

DISCUSSION

I. Factual Background

1. Dus ko Tadic ("Tadic") is the first accused to appear before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"). Tadic was surrendered to the jurisdiction of the International Tribunal by the Federal Republic of Germany in April 1995, pursuant to an indictment and warrants of arrest issued by the Tribunal in February 1995. Tadic made his initial appearance before this Trial Chamber on 26 April 1995 when he was formally charged and pleaded not guilty to all charges against him.

2. Tadic is charged with crimes arising out of six separate incidents which are alleged to have occurred at the Omarska camp in the Opstina of Prijedor between June and August 1992, an incident arising out of the surrender of the Kozarac area in May 1992 and a further set of charges in connection with events in the villages of Jaskici and Sivci in June 1992. The charges involve the commission of serious violations of international humanitarian law including, *inter alia*, forcible sexual intercourse or rape, wilful killing or murder, wilfully causing grave suffering or serious injury, torture, cruel treatment and the commission of inhumane acts and are alleged to constitute grave breaches of the Geneva Conventions of 12 August 1949 as recognized by Article 2 of the Statute of the International Tribunal ("the Statute"), violations of the laws or customs of war as recognized by Article 3 of the Statute and crimes against humanity as recognized by Article 5 of the Statute.

II. The Pleadings

3. The Prosecutor seeks fourteen separate protective measures for the protection of alleged victims and witnesses, as follows (after amendment of Prayers 3 and 11, and withdrawal of the request in respect of the witness pseudonymed A):

Prayer (1) : that the names, addresses, whereabouts and other identifying data concerning persons given

pseudonyms F, G, H and I, being victims and/or witnesses of the crimes alleged in Charges 4.1 to 4.4, 5.1 and 5.29 to 5.34 of the indictment against the accused shall not be disclosed to the public or to the media;

Prayer (2): that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms J and K, witnesses who will testify concerning Charge 11 of the indictment against the accused shall not be disclosed to the public or to the media;

Prayer (3): that all hearings to litigate the issue of protective measures for pseudonymed witnesses shall be in closed session;

Prayer (4): that the names, addresses, whereabouts and other identifying information concerning F, G, H, I, J and K shall be sealed and not included in any of the public records of the International Tribunal;

Prayer (5): that, to the extent the names of, or other identifying data concerning, any of these victims and witnesses are contained in existing public documents of the International Tribunal, those names and other identifying data shall be expunged from those documents;

Prayer (6): that documents of the International Tribunal identifying these witnesses shall not be disclosed to the public or the media;

Prayer (7): that testimony of these witnesses shall be given by one-way closed circuit television;

Prayer (8): that testimony of these witnesses may be given using voice and image altering devices or by not transmitting the image to the accused and the defence;

Prayer (9): that the testimony of these witnesses be heard in closed session;

Prayer (10): that the pseudonyms F, G, H, I, J and K be used whenever referring to these witnesses in proceedings before the International Tribunal and in discussions among parties to the trial;

Prayer (11): In the alternative: (a) that the prosecution may withhold from the defence and the accused the names of, and other identifying data concerning witnesses G, H, I, J and K. The prosecution shall disclose to the defence and the accused the name and complete statement of witness F in sufficient time to allow the defence to prepare for trial, but no earlier that one month in advance of the firm trial date. The Prosecution may redact from witness F's statement witness F's current address and whereabouts, and information disclosing the present address and whereabouts of the witness' relatives.

or (b) that the prosecution shall disclose to the defence and the accused the names and the complete statements of witnesses F, G, H, I, J and K in sufficient time to allow the defence to prepare for trial, but no earlier than one month in advance of the firm trial date. The prosecution may redact from the statements the witnesses' current addresses and whereabouts and information disclosing the present addresses and whereabouts of the witnesses' relatives;

Prayer (12): that the accused, the defence attorneys and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of these victims and witnesses or other identifying data concerning these witnesses to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to adequately investigate the witnesses. Further order that such necessary disclosure be done in such a way as to minimize the risk of the victims' and witnesses' names being divulged to the public at large or to the media;

Prayer (13): that the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall notify the Office of the Prosecutor of any requested contact with prosecution witnesses or the relatives of such witnesses and that the Office of the Prosecutor shall make arrangements for such contact;

Prayer (14): that the public and the media shall not photograph, video record or sketch witnesses who are victims of the conflict in the former Yugoslavia when these witnesses are entering the International Tribunal building, exiting from the International Tribunal building or while they are in the International Tribunal building.

4. The protective measures sought fall into five categories: those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media (Prayers 1 - 6, 9, 10 and 12); those seeking protection from retraumatization by avoiding confrontation with the accused (Prayer 7); those seeking anonymity, whereby the victims and witnesses would not be identified to the accused and his counsel (Prayers 8 and 11 (a)); miscellaneous measures for certain victims and witnesses (Prayers 11 (b) and 13); and, finally, Prayer 14 seeks general measures for all victims and witnesses who may testify before the International Tribunal in the future. The Prosecutor has served the Defence with redacted statements of the pseudonymed witnesses.

5. The Prosecutor contends that the protective measures sought are necessary to allay the fears of the victims and witnesses that they or members of their family will suffer retribution, including death or physical injury, if they testify before the International Tribunal and that unless they receive the protection sought, the witnesses will not testify. The measures are also said to be necessary to protect the privacy of the victims and witnesses. The Prosecutor asserts that the measures sought are authorized by the Statute and the Rules of Procedure and Evidence adopted by the International Tribunal ("the Rules").

6. The Defence agrees to the granting of the measures requested in Prayers 1, 3 (as amended), 4, 5, 6, 9, 10, 12, 13 and 14. However, the Defence seeks dismissal of Prayers 2, 7, 8 and 11 (as amended), and contends that these measures would deny the accused his right to a public hearing and would infringe his right to a fair trial.

7. The Defence argues that the right to a fair trial, as protected by Article 20 of the Statute, evokes certain minimum standards which, as the Statute is silent on the point, can only be understood by reference to decisions in other jurisdictions, in particular, the European Court of Human Rights. One of these minimum standards is the right for the accused to examine, or have examined, the witness under the same conditions as witnesses against him. The Defence contends that this means that the accused must be in a position to understand what the witness is saying and be able to assess and challenge that evidence. It is argued that this can only be done if the accused is not limited as to the questions he puts and is able properly to prepare for the examination of the witness. Therefore the Defence asserts that the identity of the witness must be disclosed to the accused in advance of the trial.

8. In its subsequent filings, the Defence has stated that the release of the nicknames used to refer to the pseudonymed witnesses while in the Omarska camp will be sufficient in respect of witnesses F, G, H and I and that all it requires in respect of witnesses J and K is their address at the time of the alleged offence. The Defence asserts that it has no interest in knowing the present whereabouts of any of the pseudonymed witnesses.

9. The Defence further argues that there are only very limited circumstances in which the identity of the witness can be withheld from the accused and still permit the accused a fair trial, with the proper exercise of the right to examine the witnesses against him. Those circumstances arise in the situation

where the witness is not a victim of the alleged offence but a fortuitous bystander and there is no other relationship between the witness and the accused. The actual identity of the witness is then irrelevant.

10. The briefs submitted by the two *amicus curiae* generally support the position of the Prosecutor. The Brief of Professor Chinkin recognizes the right of the accused to a fair trial and addresses the question of how to balance this right with the rights of private individuals, the public interest in the proper administration of justice and the interests of the international community in seeing those accused of violations of international humanitarian law brought to trial. Professor Chinkin addresses both non-disclosure to the public (confidentiality) and to the accused (anonymity), and discusses how non-disclosure to the accused can be made compatible with the right to a fair trial and is justified by policy considerations in sexual assault cases.

11. The Joint U.S. Brief also addresses these issues and supports most of the relief sought by the Prosecutor, although in some cases the Trial Chamber is invited to extend its protection even further. The brief also urges the International Tribunal to establish a process whereby victims and witnesses can be consulted about their concerns and the dangers they face, especially in view of the ongoing conflict, and advised as to the protection available, and thus give fully-informed consent.

III. The Powers of the International Tribunal

12. The International Tribunal was established by the Security Council in the first half of 1993 as a measure to maintain or restore international peace and security pursuant to Chapter VII of the Charter of the United Nations. Resolution 827, containing the Statute of the International Tribunal, was adopted in May 1993, giving the International Tribunal jurisdiction "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", in accordance with the provisions of the Statute.

13. The power of the Trial Chamber to grant measures for the protection of victims and witnesses arises from the provisions of the Statute and of the Rules. Article 20 of the Statute provides in paragraph (1) that the Trial Chamber shall ensure that a trial is fair and expeditious, with "due regard for the protection of victims and witnesses". Article 22 of the Statute, entitled *Protection of victims and witnesses*, reads as follows:

> The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

14. Measures for the protection of victims and witnesses are provided for in a number of places in the Rules, in particular, in Rules 69, 75, 79 and 89. The main provision is in Rule 75, as amended in June 1995. This Rule, *Measures for the Protection of Victims and Witnesses,* reads as follows:

> (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
>
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a

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victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chamber's public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) giving of testimony through image- or voice- altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

15. Rule 69, *Protection of Victims and Witnesses*, as amended in June 1995, provides for protective measures at the pre-trial stage as follows:

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

16. Rule 79, *Closed Sessions*, provides in Sub-rule (A) that:

(A) The Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

Finally, Rule 89, entitled *General Provisions*, provides guidance to the Trial Chamber as to the rules of evidence it should apply, in particular, in Sub-rules (B), (C) and (D):

(A) . . .

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) . . .

IV. Sources of law that the International Tribunal should apply in interpreting its Rules and Statute

17. A fundamental issue raised by this motion is whether, in interpreting and applying the Statute and Rules of the International Tribunal, the Trial Chamber is bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context. The Defence argues that the case law of other international judicial bodies interpreting the right of an accused to a fair trial establishes the minimum standard which must be preserved in all judicial proceedings, including those of the International Tribunal. In contrast, the Prosecutor argues that while the case law of other international bodies is relevant for interpreting this right, its application must be tailored to the unique requirements mandated by the Statute of the International Tribunal.

18. Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant. Article 31 of the Vienna Convention states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27.) The object and purpose of the International Tribunal is evident in the Security Council resolutions establishing the International Tribunal and has been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace. (First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/150 (1994) at para. 11 ("Annual Report").) In the case of the International Tribunal, the context of the Statute is indicated by the Report of the Secretary-General of 3 May 1993 (U.N. DOC S/25704), which contained a draft statute adopted by the Security Council without amendment.

19. The Report of the Secretary-General gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal. Although the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies. *(Id.* para. 17.) This lack of guidance is particularly troubling because of the unique character of the International Tribunal. It is the first international criminal tribunal ever to be established by the United Nations. Its only recent predecessors, the International Military Tribunals at Nuremberg and Tokyo, were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature. *(Id.* para. 3.) In addition, the Nuremberg and Tokyo Tribunals were multinational but not

international in the strict sense as only the victors were represented. (*Id.* para. 10.) By contrast, the International Tribunal is not the organ of a group of States; it is an organ of the whole international community. (*Id.* para. 10.)

20. As a body unique in international law, the International Tribunal has little precedent to guide it. The international criminal tribunals at Nuremberg and Tokyo both had only rudimentary rules of procedure. The rules of procedure at Nuremberg barely covered three and a half pages, with a total of 11 rules, and all procedural problems were resolved by individual decisions of the Tribunal. At Tokyo there were nine rules of procedure contained in its Charter and, again, all other matters were left to the case-by-case ruling of the Tribunal. *(Id.* para. 54.) Both tribunals guaranteed certain minimum rights to the accused to ensure a fair trial. These rights included: (1) the right to be furnished with the indictment in a language which the defendant understands; (2) the right to a translation of the proceedings in a language which the defendant understands; (3) the right to assistance of counsel; and (4) the right to present evidence and to cross-examine witnesses called by the prosecution[1].

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[1] Art. 24(g) of the Charter of the International Military Tribunal at Nuremberg provides that "[t]he Prosecution and the Defense shall interrogate and may cross-examine any witness and any defendant who gives testimony," while art. 9(d) of the Charter of the International Military Tribunal for the Far East states that "[a]n accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine."

21. Although the Judges of the International Tribunal looked to the Nuremberg and Tokyo tribunals when drafting the Rules, these tribunals provided only limited guidance. In addition to the lack of detail, the Judges were conscious of the need to avoid some of the flaws noted in the Nuremberg and Tokyo proceedings. *(Id.* para. 71.) The Nuremberg and Tokyo trials have been characterized as "victor's justice" because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war. *(See* Röling and Cassese, *The Tokyo Trial and Beyond* 50-55 (1993).) Therefore, the International Tribunal is distinct from its closest precedents.

22. Another unique characteristic of the International Tribunal is its utilization of both common law and civil law aspects. Although the Statute adopts a largely common law approach to its proceedings, it deviates in several respects from the purely adversarial model. (Annual Report, *supra*, para. 71.) For example, there are no technical rules for the admission of evidence and the Judges are solely responsible for weighing the probative value of evidence. Secondly, a Chamber may order the production of additional or new evidence *proprio motu*. Thirdly, there is no plea-bargaining. (*Id.* paras. 72-74.) As such, the International Tribunal constitutes an innovative amalgam of these two systems.

23. A final indication of the uniqueness of the International Tribunal is that, as an ad hoc institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand. *(Id.* para. 75.) The International Tribunal therefore decided, when preparing its Rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. Among these is the fact that the abuses perpetuated in the region have spread terror and anguish among the civilian population. The Judges feared that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives. This was particularly troubling given that, unlike Nuremberg, prosecutions would, to a considerable degree, be dependent on eyewitness testimony. (Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* at 242.)

24. In drafting the Rules, therefore, the Judges of the International Tribunal endeavored to incorporate rules that addressed issues of particular concern, such as the protection of victims and witnesses, thus discharging the mandate of Article 22 of the Statute. (Annual Report, *supra*, para. 75.) Provisions are made for the submission of evidence by way of deposition, i.e., testimony given by a witness who is unable or unwilling to testify in open court (Rule 71). Another protection is that arrangements may be made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness is brought under the protection of the International Tribunal (Rule 69). Additionally, appropriate measures for the privacy and protection of victims and witnesses may be ordered including, but not limited to, protection from public identification by a variety of methods (Rule 75). Also relevant is the establishment of a Victims and Witnesses Unit within the Registry to provide counselling and recommend protective measures (Rule 34). Additionally, the Judges recognized that many victims of the conflict in the former Yugoslavia are women and have therefore placed special emphasis on crimes against women in the Rules. (Annual Report, *supra*, para. 82.) The Rules make special provisions as to the standard of evidence and matters of credibility of the witness which may be raised by the defence in cases of sexual assault (Rule 96). In particular, no corroboration of a victim's testimony is required and the victim's previous sexual conduct is inadmissible. Additionally, if the defence of consent is raised, the Trial Chamber may consider factors that vitiate consent, including physical violence and moral and psychological constraints.

25. In drafting the Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights. The Report of the Secretary-General emphasizes the importance of the International Tribunal in fully respecting such standards. (Report of the Secretary-General, *supra,* para. 106.) The drafters of the Report recognized that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future. *(See* Morris and Scharf, *supra*, at 175.) In response to these concerns, the drafters adopted a liberal approach in procedural matters. Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). In fact, the Statute provides greater rights than the ICCPR by extending judicial guarantees to the pre-trial stage of the investigation.

26. Although Article 14 of the ICCPR was the source for Article 21 of the Statute, the terms of that provision must be interpreted within the context of the "object and purpose" and unique characteristics of the Statute. Among those unique considerations is the affirmative obligation to protect victims and witnesses. Article 22 provides that such measures shall include the protection of the victim's identity. Article 20 (1) of the Statute requires: "full respect for the rights of the accused and due regard for the protection of victims and witnesses." Further, Article 21 states that the right of an accused to a fair and public hearing is subject to Article 22. Pursuant to those mandates, Rules were promulgated which relate to the protection of victims and witnesses, as referred to above.

27. This affirmative obligation to provide protection to victims and witnesses must be considered when interpreting the provisions of the Statute and Rules of the International Tribunal. In this regard it is also relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses. These considerations are unique: neither Article 14 of the ICCPR nor Article 6 of the European Convention of Human Rights ("ECHR"), which concerns the right to a fair trial, list the protection of victims and witnesses as one of its primary considerations. As such, the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their

provisions in the context of their legal framework, which do not contain the same considerations. In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.

28. The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence. This is evident in the case law of those countries which have conducted their own war crimes trials. For example, much reliance has been placed during war crimes trials on affidavits, i.e., signed statements by a witness made before trial. Defence counsel have often objected to the use of such evidence, mainly on the ground that, unlike a witness appearing in court, affidavits cannot be cross-examined. However, it has been noted that: "there can be no doubt as to their admissibility under the laws governing at least most of the countries which have conducted trials of offences under international criminal law." *(Law Reports of Trials of War Criminals*, vol. XV, 198 (1949).) A further example of the more elastic rules of evidence permissible before those courts which have tried war criminals is found in the greater frequency with which hearsay evidence is admitted, when compared to proceedings before most courts dealing with offences purely under national law. *(Id.* at 199.)

29. In addition, the rights for the accused provided by the International Tribunal clearly exceed those contained in Article 105 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, which provides for the rights of a prisoner of war in criminal proceedings. Article 105 includes only the right to counsel, the right to be informed of the charges, and the rights of the accused to receive relevant documents, to have adequate time and facilities to prepare the defence, to have access to an interpreter, to confer privately with counsel, and to call witnesses.

30. As such, the Trial Chamber agrees with the Prosecutor that the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses within its unique legal framework. While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as "fair trial", whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied.

V. Confidentiality

A. Public Hearing

31. Several of the Prosecutor's requests have direct implications for the accused's right to a public hearing. Although in this case the Defence has agreed to these requests for most witnesses, Article 20 of the Statute obligates the Trial Chamber to ensure that the trial is fair and conducted in accordance with the Rules. The Trial Chamber is cognizant that, in many respects, it is establishing legal precedents in uncharted waters. The Prosecutor has advised that he may seek protective measures for other witnesses and the Defence, if it chooses, may also apply for protection. Therefore, it is important that the Trial Chamber's interpretation and application of the Statute and Rules be explained with some specificity.

32. The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair. As the European Court of Human Rights noted: "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of . . . a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ." *(Sutter v. Switzerland*, decision of 22 February 1984, Series A, no. 74, para. 26.) In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal. As such, the Judges of this Trial Chamber are, in general, in favour of an open and public trial. This preference for public hearings is evident in Article 20 (4) of the Statute, which requires that: "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." Also relevant is Rule 78, which states that: "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."

33. Nevertheless, this preference for public hearings must be balanced with other mandated interests, such as the duty to protect victims and witnesses. This balance is expressly required in Rule 79, which provides that the press and public may be excluded from proceedings for various reasons, including the safety or non-disclosure of the identity of a victim or witness. As such, in certain circumstances, the right to a public hearing may be qualified to take into account these other interests.

34. These qualifications on the right to a public hearing are permitted under the Statute and Rules. Article 20 (4) of the Statute provides for the possibility of closed hearings and Article 20 (1) requires that due regard be given for the protection of victims and witnesses. Article 21 (2) provides that the accused is entitled to a fair and public hearing "subject to Article 22", which requires that provisions be made for the protection of victims and witnesses, including *in camera* proceedings and the protection of the identity of the victim or witness.

35. Several of the Rules relate to the balance between the protection of victims and witnesses and the accused s right to a public hearing. Rule 69 allows for the non-disclosure at the pre-trial stage of the identity of a victim or witness who may be in danger until the witness is brought under the protection of the International Tribunal. This non-disclosure applies to the press and public as well as to the accused. Rule 75 allows for the taking of appropriate measures to protect victims and witnesses, provided such measures are consistent with the rights of the accused. As already noted, Rule 79 provides that the press and public may be excluded from proceedings for reasons of public order or morality; the safety or non-disclosure of the identity of a victim or witness; or the protection of the interests of justice.

36. Measures to protect the confidentiality of victims and witnesses are also consistent with other human rights jurisprudence. Article 21 of the Statute states that the accused shall be entitled to a fair and public hearing subject to Article 22 (the protection of victims and witnesses, including *in camera* proceedings and protection of the victim's identity). The Defence argues that Article 22 should not be construed as an exception to the right of a public hearing contained in Article 21 as, in the perception of the ICCPR and the ECHR, the protection of victims and witnesses is not sufficient to set aside the right of the accused to a fair and public hearing. What is essential to recognize, however, is that the Statute of the International Tribunal, which is the legal framework for the application of the Rules, does provide that the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial. As noted above, the Trial Chamber must interpret the provisions of the Statute and Rules within the context of its own unique framework. Therefore, just as the ICCPR and ECHR provide for the limitation of the right to a public trial to protect public morals, the Statute authorizes limits to the right to a public trial to protect victims and witnesses. This is explicit in Rule 75.

37. Even if the rulings of other international judicial bodies were binding on the Trial Chamber, they would not necessarily prohibit measures to protect the confidentiality of victims and witnesses, as these

bodies tend to balance the interests of the victims and witnesses with the rights of the accused without the affirmative duty to do so. Article 14 (1) of the ICCPR and Article 6 (1) of the ECHR state that everyone is entitled to a fair and public hearing. Nevertheless, both articles provide that the press and public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice.

38. In construing Article 6 (1) of the ECHR, the European Court of Human Rights has noted that the publicity requirement in Article 6 (1) applies to any phase of a proceeding which affects the determination of the matter at issue. *(Axen v. Federal Republic of Germany*, decision of 8 December 1983, Series A, no. 72.) Nevertheless, this case held that the proceedings as a whole must be examined to determine whether the absence of certain public hearings is justified. (*Id.* para. 28.) The Court has also held that the right to publicity may not necessarily be violated if both parties to a proceeding consent to it being held *in camera. (Le Compte, Van Leuven and De Meyere v. Belgium*, decision of 23 June 1981, Series A no. 43, para. 59.) In general, the Commission and the Court consider whether one of the specific conditions listed on Article 6 (1) prevails before accepting that a given *in camera* proceeding has not been conducted in violation of that article. In a similar vein, this Trial Chamber must determine if one of the specific interests it has an obligation to consider, such as the protection of victims and witnesses, mandates a limitation on public access to information.

39. Measures to prevent the disclosure of the identities of victims and witnesses to the public are also compatible with principles of criminal procedure in domestic courts. There is a growing acceptance in domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved. Several common law countries allow for the non-disclosure to the public of identifying information relating to certain victims and witnesses. The United Kingdom prohibits disclosure to the public of identifying information of a complainant in a sexual assault case, including any still or moving pictures, except at the discretion of the court. (The Sexual Offences (Amendment) Act 1976 s. 4.) Canadian legislation guarantees anonymity from the public upon application to the court. (Canadian Criminal Code s. 442(3).) In Queensland, Australia, the Evidence Act (Amendment) 1989 (Queensland) allows additional protection during the testimony of a "special witness" including the exclusion of the public and or the defendant or other named persons from court. (Brief of Professor Chinkin at 4 - 6.) South African law also provides for the non-disclosure for a certain period of time of the identity of a witness in a criminal proceeding if it appears likely that harm will result from the testimony (Criminal Procedure Act of South Africa 51/1977, sec. 153(2)(b)) and has provisions for closing the courtroom during the testimony of victims in cases of sexual assault.

40. Even the United States of America, with its constitutionally-protected rights to a public trial and free speech - which thus places great importance on the right of public disclosure - is more amenable than in the past to measures to protect victims and witnesses. The Supreme Court of the United States has held that state sanctions imposed on the press for disclosing the identities of sexual assault victims before trial may be constitutional, and three state statutes provide for such sanctions.[2] *Florida Star v. BJF*, 491 U.S. 524 (1989). Other United States courts have also noted that the accused's right under the Sixth Amendment to a public trial is not absolute and must, in some cases, give way to other interests essential to the fair administration of justice. *(Waller v. Georgia*, 467 U.S. 39, 46 (1984).) In this regard, courts have been willing to close certain proceedings to account for the concerns of witnesses. If a partial closure is requested, i.e., excluding only certain spectators, there must be a "substantial reason" for such closure, whereas a full closure to the public and press requires an "overriding interest." (For partial closure see *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied* 469 U.S. 1208 and for total closure see *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and *Waller*, 467 U.S. 39 (holding that tests set out in *Press-Enterprise* govern total closures).) Partial closures of the courtroom have been justified on the grounds of a witness' fear of retribution from perpetrators still at large (*Nieto*

v. Sullivan, 879 F.2d 743 (10th Cir.), *cert. denied*, 110 S. Ct 373 (1989)); to protect the dignity of an adult witness during a rape trial (*United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), *cert. denied* 434 U.S. 1076 (1977), *see also Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir.), *cert. granted* 468 U.S. 1206 (1983), *vacated* and *remanded*, 739 F.2d 531 (1984), in which protection of an adult prosecution witness from embarrassment was held to be sufficient for partial closure of a rape trial); and to protect a minor rape victim from fear of testifying before disruptive members of the defendant's family (*U.S. v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989) *see also Geise v. United States*, 262 F.2d 151, 155 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) in which the reluctance and fear of a child witness in a rape case to testify in the presence of a full courtroom justified closure of the courtroom to all but press, members of the bar, and close friends and relatives of the defendant). Complete closure for a limited time has been justified to protect the safety of a witness and his family (*United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)); to preserve confidentiality of undercover agents in narcotics cases (*United States ex. rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975)); and to protect disclosure of trade secrets (*Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974)). Twenty-six state statutes allow for closure of trials to protect witnesses.[3]

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[2] Florida, Georgia and South Carolina have statutory prohibitions of disclosure by the media. *See* Brief of Professor Chinkin 5.

[3] State statutes that allow for closure of trials include: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Carolina, North Dakota, South Dakota, Utah, Vermont, Virginia and Wisconsin.

41. States following the civil law model also provide for measures to prevent the disclosure of identity of certain victims and witnesses from the public and press. For example, Swiss law provides that, in cases of sex crimes, the authorities and private persons are not permitted to publicize the victim's identity if it is necessary to protect the interests of the prosecution or if the victim requests non-disclosure. The possibility also exists to close the courtroom during the victim's testimony. (Bundesgesetz Über die Hilfe an Opfer von Straftaten, art. 5, *and see* Joint U.S. Brief 29.) In Denmark, if a victim in an incest or rape case so requests, the trial must be held *in camera*, in which case no publicity of the proceedings is allowed. In certain cases the press is allowed access to the courtroom but is prohibited from reporting identifying information. (Administration of Justice Act, sec. 29 and 31.) In Germany, publicity can be restricted or even excluded in order to protect the accused and witnesses. (Gerichtsverfassungsgesetz sec. 170.) In Greece, the Constitution provides for an exception to the principle that the trial must be held in public in cases where publicity is deemed to cause prejudice to morals or to the private lives of the parties. Particularly in cases of rape, members of the public may be excluded if their presence might cause grievous suffering or defamation of the victim. (Code of Criminal Procedure art. 30. *See* Christine van den Wyngaert, *Criminal Procedure Systems in the European Community* (1993).)

42. In these jurisdictions confidentiality is justified if special considerations exist, such as in cases involving sexual assault. In the context of the conflict in the former Yugoslavia, even in cases not concerning sexual assault, sufficient considerations to justify confidentiality may be found in the fear of reprisals during an ongoing conflict, particularly given the mandated duty of the International Tribunal to protect victims and witnesses and the inability of the International Tribunal to guarantee the safety of the victim or witness due to the lack of a fully-funded and operational witness protection programme at this moment in time.

43. The Trial Chamber has also considered in this respect the confidential submissions by the Prosecutor and the Defence concerning prior media contact with the witnesses for whom this protection is sought.

Of the six witnesses, three are stated to have had no media contact, two have given interviews in which the name and identity of the witness has been withheld or disguised and one, who had previously given interviews in which the identity was disclosed, is now in a national witness protection programme.

44. The Trial Chamber therefore accepts the arguments of the Prosecutor and grants the relief sought in Prayers 1, 2, 3, 4, 5, 6, 9, 10 and 12 in respect of witnesses F, G, H, I, J and K.

B. Victims and Witnesses in Cases of Sexual Assault

45. Four of the witnesses who are sought to be protected by the confidentiality measures ordered by the Trial Chamber are allegedly victims of, or witnesses to, cases of sexual assault. The Prosecutor has requested, in Prayer 7, pursuant to Rule 75 (B)(i)(c), that all of the pseudonymed witnesses be permitted to give testimony through closed circuit television and thereby be protected from seeing the accused. This is intended to protect them from possible retraumatization. The Trial Chamber regards such measures as particularly important for victims and witnesses of sexual assault.

46. The existence of special concerns for victims and witnesses of sexual assault is evident in the Report of the Secretary-General, which states that protection for victims and witnesses should be granted, "especially in cases of rape or sexual assault." (Report of the Secretary-General, para. 108.) It has been noted that rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim. *(See* Marcus and McMahon, *Limiting Disclosure of Rape Victims' Identities* 64 S. Cal. L.Rev. 1019, 120 (1991) and sources cited therein.) It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim s family and community. (Brief of Professor Chinkin at 4.) In addition, traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time. (Judith Lewis Herman, M.D., *Trauma and Recovery* (1991) 72, cited in the Joint U.S. Brief.)

47. The need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognized in the domestic law of some States. *(See id.* at 22-28, *and see* Brief of Professor Chinkin at 5-6.) As noted above, several states limit the public disclosure of identifying information about victims and witnesses of sexual assault and provide for the full or partial closure of the courtroom during the victims' testimony. Several other methods are utilized to accommodate the special concerns of these victims while testifying, such as the use of one-way closed circuit television. South Africa allows the use of closed circuit television in cases of sexual offences where a child witness is involved. *(See* Joint U.S. Brief at 23.) In the United States, several of the constituent states allow closed circuit television in the courtroom, and the Supreme Court held in *Maryland v. Craig* that one-way closed circuit television can be used without violating the Sixth Amendment right to confrontation when the court finds it necessary to protect a child witness from psychological harm. (497 U.S. 836 (1990).)

48. Another such method is the use of depositions and video conferences. For example, in the United States thirty-seven constituent states permit the use of videotaped testimony of sexually abused children.[4] In Queensland, Australia, state law provides that when certain witnesses, including victims of sexual assault, testify the court may take measures to protect the witness, such as the use of videotaped evidence in lieu of direct testimony or obscuring the witness' view of the defendant. (The Evidence Act (Amendment) 1989 (Queensland).) Other mechanisms utilized to accommodate victims of sexual assault include image- and voice-altering devices, screens and one-way mirrors.

[4] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. Cited in *Maryland v. Craig,* 497 U.S. 836, n.2 (1990).

49. In consideration of the unique concerns of victims of sexual assault, a special Rule for the admittance of evidence in cases of sexual assault was included in the Rules of the International Tribunal. Rule 96 provides that corroboration of the victim's testimony is not required and consent is not allowed as a defence if the victim has been subject to physical or psychological constraints. Finally, the victim's prior sexual conduct is inadmissible.

50. In determining where the balance lies between the right of the accused to a fair and public trial and the protection of victims and witnesses, consideration has been given to the special concerns of victims of sexual assault. These concerns have been factored into the balance on an individual basis for each witness for whom protection is sought. Witness F is an alleged victim of forcible sexual intercourse. Witnesses G, H and I are alleged victims of or witnesses to sexual mutilation. The measures sought by the Prosecutor are appropriate to protect the privacy rights of witnesses F, G, H and I. These measures in no way affect the accused's right to a fair and public trial. The protective measures sought pursuant to Rule 75 will afford these witnesses privacy and guard against their retraumatization should they choose to testify at trial. Given the individual circumstances of these four witnesses, the Trial Chamber has determined that protective measures are warranted, and are allowed by the Statute and Rules.

51. However, the Trial Chamber believes that adequate protection can be provided to certain of these witnesses without resort to closed circuit television, which involves removing the witness from the courtroom. Alternative methods such as the installation of temporary screens in the courtroom, positioned so that the witness cannot see the accused but the accused may view the witness via the courtroom monitors may also be suitable, depending upon the technical practicalities, for any witness for whom full anonymity is not ordered by the Trial Chamber and will give the Trial Chamber the benefit of observing directly the demeanour of the witness.

52. The Trial Chamber grants the relief sought in Prayer 7 or other similar protection as may be arranged by the Registry of the International Tribunal with the approval of the Trial Chamber in respect of witnesses F, G, H and I but denies the relief in respect of witnesses J and K.

VI. Anonymity

A. General principles and application

53. Two of the Prosecutor's requests relate to non-disclosure of the identities of certain witnesses to the accused. Prayer 11, as amended, and Prayer 8 are concerned with keeping the name, address, image, voice and other identifying data of witnesses G, H, I, J and K from the Defence. The Prosecutor is also seeking to keep the present address and whereabouts of witness F and relatives of witness F from the Defence. Furthermore, the Prosecutor requests that the identity of F and her complete statement, redacted only for the above stated purpose, be released to the Defence no earlier than one month in advance of the firm trial date.

54. The underlying reasons for the disclosure of the identity of witnesses are clear. As the European Court of Human Rights noted:

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.
>
> *(Kostovski*, paragraph 42, ECHR series A, Vol. 166, 23 May 1989.)

Therefore the general rule must be that: "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument." *(Id.* para. 41.)

55. However, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a "fair trial". A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses. In a case before the Supreme Court of Victoria, Australia, *Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others*, (1994) V.R. 84, 88, Judge Brooking, when pronouncing on whether anonymity of a witness is in conformity with the principle of a fair trial stated:

> The "balancing exercise" now so familiar in this and other fields of the law must be undertaken. On the one hand, there is the public interest in the preservation of anonymity . . . On the other hand, there is the public interest that . . . the defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to credit, as may assist in securing a favourable outcome to the proceedings. There is also the public interest in the conduct by the courts of their proceedings in public.

56. Similarly the European Court of Human Rights, when determining whether non-disclosure of the identity of a witness constitutes a violation of the principle of fair trial, looks at all the circumstances of the case. *(See Kostovski, supra* paras. 43, 45.) The Court identifies any infringement of the rights of the accused and considers whether the infringement was necessary and appropriate in the circumstances of the case. The Brief of Professor Chinkin suggests that it is in the public interest for the International Tribunal to discharge its obligation to protect victims and witnesses and the Trial Chamber so finds.

57. Under the Statute of the International Tribunal this balancing of interests is reflected in Article 20, which demands full respect for the rights of the accused and due regard for the protection of victims and witnesses to ensure a fair trial. The qualification of the rights of the accused to accommodate anonymity of witnesses is further elaborated in Article 21 (2) of the Statute, which provides that the accused is entitled to a fair and public hearing "subject to Article 22". Article 22, in turn, requires that provisions be made for the protection of victims and witnesses.

58. Within the context of the Rules, anonymity of witnesses at the trial stage is provided for in Sub-rules 75 (A) and (B)(iii). Measures granting anonymity to a witness pursuant to this provision remain subject to the requirement of Rule 75 (A) that they be "consistent with the rights of the accused."

59. In Rule 69 (C), the right of the accused to learn the identities of the witnesses against him in sufficient time prior to trial is made subject to a decision under Rule 75, thereby extending the power of the Trial Chamber to grant anonymity to a witness at the trial stage to the pre-trial stage.

60. In a leading opinion before the English Court of Appeal, *R. v. Taylor*, transcript of decision at 17

(Ct. App. Crim. Div. 22 July 1994), Lord Justice Evans stated that:

> Whether or not in a particular case the exception [to the right of a defendant to see and to know the identity of his accusers, including witnesses for the prosecution brought against him] should be made is pre-eminently a matter for the exercise of discretion by the trial judge.

Such discretion must be exercised fairly and only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined witnesses against him.

61. The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees. *(See* Article 15 of the ECHR, Article 4 of the ICCPR and Article 27 of the American Convention on Human Rights.) The fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification. Guidance as to which other factors are relevant when balancing all interests with respect to granting anonymity to a witness can be found in domestic law.

62. First and foremost, there must be real fear for the safety of the witness or her or his family: "[T]here must be real grounds for being fearful of the consequences if the evidence is given and the identity of the witness is revealed." (*R. v. Taylor, supra* at 17, 18.) Judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness, e.g., the family of the witness, the Prosecutor, the Victims and Witnesses Unit, as well as by the witness himself. In this case, the Defence has expressed concern that a subjective feeling of fear be allowed to satisfy this criterion. Insofar as the Defence means that there should always be an objective basis to underscore a feeling of fear, such as the horrendous nature and ruthless character of the alleged crimes, then that is a submission with which the Trial Chamber, by majority decision, agrees.

63. Secondly, the testimony of the particular witness must be important to the Prosecutor's case: "[T]he evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it." *(Id.* at 18.) In this respect it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical.

64. Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy. To this end the Prosecutor must have examined the background of the witness as carefully as the situation in the former Yugoslavia and the protection sought permit. There should be no grounds for supposing that the witness is not impartial or has an axe to grind. Nor can non-disclosure of the identity of a witness with an extensive criminal background or of an accomplice be allowed. Granting anonymity in these circumstances would prejudice the case of the defence beyond a reasonable degree. The report by the Prosecutor on the reliability of the witness would need to be disclosed to the defence so far as is consistent with the anonymity sought. *(See R. v. Taylor, supra* at 19.)

65. Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case. *(See Jarvie, supra* at 84, 88.) A number of the witnesses live in the territory of the former Yugoslavia or have family members who still live there and fear that they or their family members may be harmed, either in revenge for having given evidence or in order to deter others. Family

members may still be held in prison camps. Others fear that even as refugees in other countries they may be at risk. The International Tribunal has no police force that can care for the safety of witnesses once they leave the premises of the International Tribunal. The International Tribunal has no long-term witness protection programme nor the funds to provide for one. In any event, any such programme could not be effective in protecting family members of witnesses in cases in which the family members are missing or held in camps.

66. Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable. *(See R. v. Taylor, supra* at 19.)

67. The right of the accused to examine, or have examined, the witnesses against him, is laid down in Article 21(4) of the Statute of the International Tribunal. Anonymity of a witness does not necessarily violate this right, as long as the defence is given ample opportunity to question the anonymous witness. Witness anonymity will restrict this right to the extent that certain questions may not be asked or answered but, as noted above and as is evidenced in national and international jurisdictions applying a similar standard, it is permissible to restrict this right to the extent that is necessary.

68. The Defence concedes the fact that protective measures have to be balanced with the rights of the accused and that knowledge of the identity of a witness may not, in all circumstances, be essential for the concept of a fair trial. The Defence does contend, however, that there is a bottom line below which the rights of the accused may not be compromised. The Defence argues that this bottom line is best described in the *Kostovski* case before the European Court of Human Rights. The *Kostovski* case is not directly on point, as it does not relate to the testimony of unidentified witnesses who will be present in court, whose evidence will be subject to cross-examination, and whose demeanour is being observed by the Judges of the Trial Chamber. However, the *Kostovski* case does indicate that procedural safeguards can be adopted to ensure that a fair trial takes place when the identity of the witness is not disclosed to the accused.

69. In the *Kostovski* case the European Court of Human Rights, when determining whether there had been a violation of the Convention, "ascertained whether the proceedings considered as a whole . . . were fair." *(See Kostovski, supra* para. 39.) The Court concluded that "in the circumstances of the case the constraints affecting the rights of the defence were such that [the accused] cannot be said to have received a fair trial." *(Id.* para. 45.) It concluded, however, that the handicaps under which the defence has to labour when anonymity is provided can be counterbalanced by the procedures followed by the court. (*Id.* para. 43.) Thus, according to the European Court of Human Rights, certain safeguards built into the procedures followed by a court of law can redress any diminution of the right to a fair trial arising out of a res

PROSECUTION AUTHORITIES

4. *Prosecutor v. Tadic*, IT-94-1, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

5001

Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

SEPARATE OPINION OF JUDGE STEPHEN ON THE PROSECUTOR'S MOTION REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Krstan Simic

DECISION OF JUDGE STEPHEN

This Tribunal is faced, in this its first case, the prosecution of Dusko Tadic, with a problem posed for it by an interlocutory application by the prosecution seeking protective measures regarding the identity of certain prosecution witnesses.

Although the application is concerned only with the case of Dusko Tadic and this Chamber must decide it solely by reference to this case, it is clear that the problem which the Chamber confronts will not be unique to this case but is most likely to recur in many, if not most, cases that will come before it.

The problem concerns the extent to which, if at all, the identity of witnesses who fear for their safety or that of their family or associates should they give evidence can be kept from the public, from the

defence or from both. It is a problem inherent in the circumstances of the Tribunal. The Tribunal has no police force or protection service that can care for the safety of witnesses once they leave the precincts of the Tribunal. It has no witness protection programme nor the funds to provide one. A number of the witnesses live in the territory of former Yugoslavia or have family there and fear that they or their family may be harmed, either in revenge for having given evidence or in order to deter others. Other witnesses may fear that even as refugees in other countries they may be at risk. In the event, a number of witnesses in this case have sought anonymity, either as a condition of giving evidence or as a request that may mature into such a condition.

The problem is, of course, how to respond to the very natural concern of witnesses while at the same time according justice to the accused and ensuring a fair trial.

An understanding of the problem begins with an appreciation of the origins of this Tribunal. Earlier resolutions of the Security Council in 1991 and 1992 led to Resolution 808 (1993) which decided that an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in former Yugoslavia be established and requested the Secretary General to submit a report on all aspects of the matter. This the Secretary General did and in dealing with trials to be conducted by the Tribunal paragraph 99 of his Report reads:

> 'The Trial Chambers should ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence and with full respect for the rights of the accused. The Trial Chamber should also provide appropriate protection for victims and witnesses during the proceedings."

Paragraph 103 reads:

> "The hearings should be held in public unless the Trial Chamber decides otherwise in accordance with its rules of procedure and evidence."

> The report also deals with the "Rights of the accused" and with the "Protection of victims and witnesses". Paragraph 106 states:

> "It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such international recognised standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights."

> Then paragraph 108 reads:

> "In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault. Such measures should include, but should not be limited to the conduct of *in camera* proceedings, and the protection of the victim's identity."

Each of the four above paragraphs is followed by recommended Articles to give effect to them. On adoption by the Security Council , these became Articles 20, 21 and 22 of the Statute of the Tribunal.

Article 20(1) and (4), parts of Article 21 and the whole of Article 22 are of direct relevance to this

application. Indeed they set the scene for the problem raised by the application. They read as follows:

Article 20(1): Commencement and Conduct of Trial Proceedings

> "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

Article 20(4):

> "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."

Article 21: Rights of the Accused

> 1. All persons shall be equal before the International Tribunal
>
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a)
>
> (b)
>
> (c)
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f)
>
> (g)

Article 22: Protection of Victims and Witnesses

> "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the

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conduct of *in camera* proceedings and the protection of the victim's identity."

In conformity with Article 15 of the Statute, the judges of the Tribunal have adopted rules of procedure and evidence. Relevant to the present application are the following rules which seek to give effect to the above Articles of the Statute:

Rule 66: Disclosure by the Prosecutor

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.

(B) The Prosecutor shall on request, subject to Sub-rule (C) permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused."

Rule 67: Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:
(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;"

(ii) .....

(B) .....

(C) .....

(D) If either party discovers additional evidence or material which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or material."

Rule 68: Disclosure of Exculpatory Evidence

"The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."

Rule 69: Protection of Victims and Witnesses

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit."

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Rule 70: Matters not Subject to Disclosure

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepa`red by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the Purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused."

Rule 75: Measures for the Protection of Victims and Witnesses

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chamber's public records;

(b) non-disclosure to the public of any records identifying the victim:

(c) giving of testimony through image- or voice- altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation."

Rule 79: Closed Sessions

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

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(iii) the protection of the interests of justice"

Beginning with the Report of the Secretary-General and carrying on through the above provisions of the Statute and the Rules there can be discerned an apparent concern for and, indeed, a degree of tension between what the Secretary-General calls the "axiomatic" need fully to respect "unconditionally recognised standards regarding the rights of the accused" and the quite distinct need "to ensure the protection of victims and witnesses." It is the reconciliation of these two needs that is the concern of this Chamber in this application.

Before turning to decided cases for whatever assistance they may provide, it is proper first to examine the terms of the Statute and Rules set out above. It is noteworthy that it was very much part of the prosecution case that it is the Statute and Rules that are determinative and that little is to be gained from case law because of the unique nature of this Tribunal.

Article 20(1) instructs Trial Chambers to ensure that a trial is "fair" and "that proceedings are conducted.....with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Then Article 21 sets out what are those rights of the accused that are to be given full respect, while Article 22 directs the Tribunal to make rules for witnesses' protection including but not limited to in camera proceedings and protection of identity.

There is a marked contrast, its significance conceded by the prosecution, to be seen in the language of Article 20(1) between what it says about ensuring that proceedings are conducted with full respect for the rights of the accused and what it then says about proceedings being conducted with due regard for the protection of victims and witnesses. This is, if anything, given more emphasis by the further contrast between the detailed and emphatic enumeration of distinct rights of the accused in Article 21 and the rule-making direction in Article 22, which does no more than direct that provision be made in the Rules for witness protection, in particular two specific forms of such protection, in camera proceedings and protection of identity.

While these Articles, rather than resolving the current problem, essentially lay the ground for it, they do at the same time provide some guidance towards its resolution. First are the contrasts noted above in both the tone and the substance of Articles 21 and 22; secondly there is the striking difference between the entitlement to a "fair and public trial" conferred by Article 21(2), expressly made "subject to article 22", and all the other rights of the accused specified in the remainder of Article 21, which are wholly unqualified by any reference to Article 22. The fact that Article 21(2) is made subject to Article 22 makes all the more significant the unqualified nature of the other rights conferred on the accused by Article 21. It surely is tantamount to an assertion that the remainder of Article 21 is not subject to Article 22; otherwise I find the confining of the reference to Article 22 solely to Article 21(2) as inexplicable.

That phrase "subject to Article 22" itself repays analysis. What it is in Article 21(2) that is to be subject to Article 22 can scarcely be the combined concept which precedes that phrase, the concept of "a fair and public hearing." It must rather be only one component of that concept, the public quality of the hearing and not its fairness, that is made subject to Article 22, and this for two reasons: first, because, while Article 22 specifically contemplates non-public hearings, it certainly does not contemplate unfair hearings; secondly, because Article 20(1) itself, unqualifiedly and quite separately from Article 21, requires a Trial Chamber to ensure that a trial is "fair." If this understanding of the phrase "subject to Article 22" be correct and it is primarily the public quality, not the fairness, of a hearing that may have to give way to the need to protect victims and witnesses, that in turn suggests that the kind of protection

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being thought of in Article 22 is essentially those measures that will affect the public nature of the trial, rather than its fairness.

Perhaps it is permissible to seek further guidance from the Secretary-General's Report and this in two ways; first, in paragraph 108, which introduces Article 22, he refers to the need for protection measures for victims and witnesses "especially in cases of rape or sexual assault." What is special about such witnesses is not, of course, that by giving evidence they or their family, more than other victims who give evidence, have reason to fear retaliation. What does make their case special is the combination of possible social consequences of it becoming generally known in communities in the former Yugoslavia that a woman has been a rape victim and also the often acute trauma of facing one's attacker in court and being made to relive the experience of the rape. The customary protection measures to guard against these two possible consequences are in camera proceedings, devices to avoid confrontation with the accused in court and careful control of cross-examination. That being so, it leads me to the conclusion that it is measures such as those, and not any wholesale anonymity of witnesses, that Article 22 primarily contemplates.

While no one of these several considerations is on its own conclusive as to the meaning of the Statute, their combined effect is, to me, convincing. Add to this the express and unqualified terms of Article 21 with its spelling out of specific rights of the accused, including the "minimum guarantees" in (4), as to all of which Article 20(1) requires the Trial Chamber to ensure that they are accorded full respect, and it seems clear that the according of anonymity to prosecution witnesses in the way proposed in the present application, which is likely substantially to disadvantage the defendant, is not a measure contemplated by the terms of the Statute.

The express terms of Article 21: that all persons shall be equal and that the accused shall have "the following minimum guarantees, in full equality" including a guarantee of being tried in his own presence and of having the right "to examine, or have examined, the witnesses against him....." is wholly consistent with this interpretation of the Statute and sits ill with any other view of it.

My conclusion therefore is that the Statute does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21 and in particular the "minimum guarantee" in (4). Of course, the Statute clearly mandates the protection of victims and witnesses, including protection of their identity. But this is not to say that it mandates unqualified anonymity of witnesses. Simple protection of identity is something that in appropriate cases, as with offences involving minors, in certain matrimonial cases and where gross indecency and rape are involved, has been habitually accorded by Courts in many jurisdictions for very many years but by recourse to in camera proceedings or restrictions on media reporting without involving the ultimate step of concealing the identity of a witness from the accused and his counsel.

Before leaving the Statute it should be appreciated what full anonymity of a witness could entail were all the relief sought by this application to be granted and fully availed of by the prosecution. The cumulative effect would permit, for the testimony of these important and vulnerable witnesses, hearings in camera, the name and other identifying data of a witness withheld from the defence and the testimony given from a special room linked to the courtroom by closed circuit television and the use of voice altering devices and the image of the witness either so distorted as to be unrecognisable or not transmitted at all to the defence. The consequence could be that to the defence the accuser would appear as no more than a disembodied and distorted voice transmitted by electronic means. Yet this could be the means of bringing before the Chamber evidence which the prosecution has described as either very important or important, evidence which could lead to the accused's conviction on very serious charges.

In view of my conclusion as to the Statute I need spend less time in examining the Rules. Those that I have set out above, which I believe to be the relevant Rules, largely speak for themselves. Rules 66, 67 and 68 are all concerned with ensuring full and early disclosure of all evidence, including details of witnesses to be called. They set the pattern for the rest of the Rules, a pattern concerned to ensure, in compliance with the Statute, a fair trial of an accused.

The only provisions at all dealing with anonymity of witnesses occur in Rules 69, 70 and 75. But Rule 69 is telling in the very partial nature of its exception to full disclosure; it is confined to "exceptional circumstances" and even then only permits of non-disclosure of identity until a victim or witness "is brought under the protection of the Tribunal." Rule 70 is inapplicable to the present case but its presence, like that of Rule 69, is significant, stressing as it does that it is a very limited exception to the general rule of full disclosure.

Rule 75(A) is made expressly subject to "the rights of the accused" and is not specifically concerned with anonymity but very generally with "the privacy and protection of victims and witnesses." In view of what I say below with regard to certain witnesses who were apparently in the role of mere bystanders, it has some present operation in their case but subject always to the observance of the "guaranteed" rights of the accused. Rule 75(B) is highly significant since it expressly provides for an application such as the present but, while being entirely precise as to what may be ordered, confines itself in para. (i) to preventing disclosure of identity of victims or witnesses "to the public or the media" There is thus in (i) no question of non-disclosure to the accused. The closest that Rule 75 comes to that is in (B) (iii) but that reference may refer to no more than relieving a witness from the ordeal of confrontation thus, as it says, facilitating the testimony of vulnerable victims and witnesses. Rule 75B (iii) would clearly cover the relieving of a witness from the ordeal of face to face confrontation and in the case of vulnerable witnesses it would also extend to non-disclosure of their names where this does not in a real sense affect the rights of the accused. But as to any general anonymity in the case of witnesses who have had dealings with the defendant and are known to him, I would regard it as curious indeed for the Rules, after such specific and elaborate provisions for full disclosure, to introduce so radical a concept of anonymity by such indirect and ambiguous wording.

That said, there are some of the witnesses for whom protection is sought by the prosecution with whom I deal below and to whom special circumstances apply. In discussing below the decided cases I refer to Jarvie's case and the concept of identity as known to the accused. That concept can be significant in two quite different ways. The first is the common case with under-cover police witnesses, as instanced in Jarvie, where the accused has known the witness in the past but only by a false name. In that case what justice may require, when protection of witnesses is important, is that only the false name should be revealed. The second significance of the concept is where the witness has been a mere chance observer who is not known to the accused by any name or at all, having had no direct contact with him but having seen occurrences involving the accused to which he can testify.

In the case of two witnesses, J and K, bystanders having no other involvement with the accused than as coincidental observers of alleged acts of his, on the information at present disclosed to the Chamber there would seem to be no question of their identity being either already known to him or possessing particular significance for his defence if revealed to him.

If, as rather appears from the material before the Chamber, witness J and K do fall into this category then different considerations apply to them from those affecting witnesses who have had direct prior dealings with the accused and whose identity as know to him seem to me to be essential so that he and his counsel can make sense of their evidence and place it in its contextual setting, thus allowing the defence to be conducted effectively.

This was a distinction acknowledged by defence counsel in his submission before us as possibly applying to witness J and K and it leads to different consequences in their case. True, to conceal the names and addresses of these two witnesses may prevent the making of prior enquiry, conceivably going to their credit, but in no way hinders the defence in understanding the role of the witness and what part, if any, he or she played as an observer of the events which the witness describes.

If it proves to be the case that witnesses J and K do, in fact, clearly fall into this category of mere chance observers then, having regard to all the circumstances of understandable fear of consequences that witnesses have, I would favour the non-disclosure of the name and address of such witnesses since knowledge of their identity would not add to the information which the defence needs to cross-examine them about the events to which they testify Such non-disclosure may, it is true, impede or perhaps prevent enquiries as to the past history of these witnesses, which might go to credit, but it will not obstruct cross-examination as to the matters observed by them and of which they give evidence. It therefore does not so hinder the defence as to deny that element of fairness stipulated for in Articles 20 (1) and Article 21(2) nor do violence to his guaranteed rights under Article 21(4); at the same time it gives effect to Article 22.

I can conclude my survey of the Rules by saying, in sum, that they give no support for anonymity of witnesses at the expense of fairness of the trial and the rights of the accused spelt out in Article 21. In this they are, in their entirety, consistent with the Statute

I turn now to the cases. They are, quite generally and in a variety of jurisdictions, in favour of allowing an accused and his counsel to see and hear the witnesses as they give their evidence and are cross-examined.

I begin with a general proposition, from English law, unaffected as it is by any special statutory or constitutional provision. In D v National Society for the Prevention of Cruelty to Children 1978 AC at p. 232 Lord Simon of Glaisdale said:

"The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged,.....:".

Then, in the leading case of Kostovski 1989 Series A no. 166, the European Court of Human Rights (the EC of HR) expressed general views on the question of anonymous witnesses. The background of the case is informative and emphasises its particular relevance.

The Dutch Supreme Court in Kostovski had given effect "with the increase in violent, organised crime" to a felt need "to protect those witnesses who had justification for fearing reprisals, by granting them anonymity." The Dutch Government had set up in 1984 a Commission on Threatened Witnesses which had reported that "In some cases one cannot avoid anonymity of witnesses.....at present there are forms of organised criminality of a gravity that the legislature of the day would not have considered possible." It added that "in a society governed by the needs of law.....the frustration of the course of justice resulting [from this situation] cannot possibly be accepted." The Commission accordingly recommended that, where a witness would run an unacceptable risk if his or her identity were known, an anonymous statement might be admitted in evidence if the witness had been examined by an examining magistrate, the accused being given a right of appeal against the latter's decision to grant anonymity. The Dutch Government decided to defer the enacting of legislation to implement these recommendations of the Commission pending the EC of HR's decision in Kostovski.

Kostovski relied on the European Convention for the Protection of Human Rights and Fundamental

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Freedoms, Article 6, paras. 1 and 3(d), which are the antecedent of and hence strikingly similar to Article 21 paras. 2 and 4(d) of our Statute, save that in our Statute para. 2 is made subject to Article 22; not so of course, as noted above, the detailed provisions of para. 4 of Article 21. It is noted that no equivalent of Article 22 appears in the European Convention; decisions on it must be read in the light of that fact.

What the EC of HR said in Kostovski about anonymity is of particular relevance to the present case. It said, at p. 21:

"The right to a fair administration of justice holds so prominent a place in a democratic society.....that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact the Government accepted that the applicant's conviction was based 'to a decisive extent' on the anonymous statements."

It is noteworthy that the relevant part of Article 6 of the European Convention is almost word for word the same as Article 21 (4) of the Statute of the Tribunal. The Court had earlier said, at p. 20, that:

"If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious."

Kostovski is a recent decision. It relied upon the Court's earlier decision in Unterpertinger 1986 Series A no. 110 where there had been a reading out in Court of statements made by witnesses to the police without any opportunity for cross-examination. In that case the EC of HR, at p. 11, said of this use of these statements that:

"the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of Article 6 to protect. This is especially so where the person 'charged with a criminal offence', who has the right under Article 6 para. 3(d) to 'examine or have examined' witnesses against him, has not had an opportunity at any stage in the earlier proceedings to question the persons whose statements are read out at the hearing."

The Court went on to say that the Austrian Court had treated these statements to the police:

"as proof of the truth of the accusations made by the women at the time. Admittedly, it was for the Court of Appeal to assess the material before it as well as the relevance of the evidence which the accused sought to adduce; but Mr. Uterpertinger was nevertheless convicted on the basis of 'testimony' in respect of which his defence rights were appreciably restricted.

That being so, the applicant did not have a fair trial and there was breach of paragraph 1 of Article 6 of the Convention, taken together with the principles inherent in paragraph 3(d)".

There are a number of recent decisions of the EC of HR which bear on the matter and which follow the decision in Kostovski and Unterpertinger and specifically cite with approval the decision in Kostovski -

Windisch v Austria (Case 25 of 1989) Delta v France (Case 26 of 1989) and Ludi v Switzerland, a 1992 decision of the Court. The first two of these cases found a violation both of the accused's right to a fair and public hearing and of his right to examine or have examined witnesses against him at trial, a right conferred by the European Convention. The relevant words of the Convention are, of course, very similar to the relevant Articles of our Statute; not suprisingly since the Convention formed a model on which these parts of the International Covenant on Civil and Political Rights was based. That Covenant in turn was the inspiration for much in the Statute of this Tribunal; thus the Secretary-General refers in paragraph 106 of his Report to Article 21 of our Statute as giving effect to those internationally recognised standards regarding the rights of the accused which are "in particular, contained in Article 14 of the International Covenant."

The 1992 case of Ludi v Switzerland distinguished on the facts the cases of Kostovoski and Unterpertinger but nevertheless held that the rights of the defence were so restricted as to violate the right to a fair trial. While acknowledging the absence from the Convention of an equivalent of Article 22 of our Statute, nevertheless there exists a solid body of decisions in the EC of HR which is consistent with the interpretation which I place upon the Statute and Rules of the Tribunal.

There are decision which have been able to take a different view by emphasising that admissibility and assessment of evidence is primarily a matter for regulation by national law and national courts - first Asch v Austria, 1990. in which the Court distinguished Unterpertinger and Delta on the very special facts present in Asch; it did not, in any event, concern an anonymous witness but, rather the case of hearsay evidence. Then in Hayward v Sweden 1990, a decision not of the Court but of the Commission, reliance was again placed upon admissibility of evidence being a matter for national Courts. This is not, however, a consideration of any relevance in the case of this Tribunal. In an interesting article by Osborne in [1993] Criminal Law Review p. 255 all these EC of HR cases are discussed and the conclusion is reached that Unterpringer, Kostovski and Windisch correctly state the effect of the European Convention. With respect, I am of the same view; the general principle enunciated by the EH of HR in those cases and in particular in Kostovski I regard as providing clear guidance as to what are internationally recognised standards regarding the rights of an accused.

In the United States the situation is affected by the 6th Amendment and its provision for confrontation of accusers. In the case of Delaware v Van Arsdall 1989 the Supreme Court, at p. 683, cited with approval Pointer v Texas 1965 380 US 400 to the effect that "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination" (the Court's own emphasis). After acknowledging that there might be imposed reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety and so on, the Court said that there was nevertheless a guarantee of an opportunity for effective cross-examination and by cutting off all questioning about a particular event that might have given a witness a motive for favouring the prosecution, the trial court had violated the accused's constitutional right of confrontation.

The Supreme Court, by a majority, did not in fact set aside the conviction because, under well established doctrine, the constitutional error was, in the particular circumstances of the case "harmless beyond a reasonable doubt" However it left no room for doubt that there is a violation of an accused's constitutional rights if he is:

"prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness".

Passing from the special case of the U.S. and its constitutional right of confrontation, other jurisdictions have dealt with the problem.

In Jarvie v Magistrates' Court of Victoria a 1994 decision of the Appeal Division of the Supreme Court of Victoria, the facts were very special. The identity as known to the accused of the undercover police witnesses was, of course, well known to the accused but not their true names. It was their true names that the Court held might be concealed. There was therefore no question of the defence not knowing who was testifying, only ignorance of their true identity. This is very different from the sort of anonymity in question in the present case, where, if granted, the defence would be left in ignorance of who it is who is giving evidence of dealings the accused is alleged to have had with the witness.

It was cross-examination as to credit, and only credit, not as to relevant facts, that was in issue in Jarvie. Hence the decision. Brooking J. in the leading judgment, while holding that the true identity could be withheld, said that:

"the overriding need for a fair trial must mean that in no circumstances can the identity of a witness be withheld from a defendant if there is good reason to think that disclosure may be of substantial assistance to the defendant in combating the case for the prosecution. ..... whatever the strength of the case in favour of non-disclosure, it cannot prevail. .....the right to a fair trial must not be substantially impaired."

Two English cases, R. v. Watford Magistrates [1992] TLR 285 and R. v. Taylor [1994] TLR 484, which might be thought to support the prosecution case, also turn on very special facts. The first related only to part-hear committal proceedings before a magistrate. The defendants were "a group of youths [who] rampaged through Watford city centre, violently attacking four persons", apparently total strangers to them. The Divisional Court upheld the magistrate, who had allowed the defendants' counsel but not the defendants to see the witnesses. However, it might well be, the Court said, that, when the matter came to trial, on substantial grounds being shown justice would require the witnesses' identity to be disclosed. The Court added that, were the accused in due course to be committed for trial, the question of the witnesses' anonymity would be for the trial judge to determine. From the scant report it seems that the matters of identity of the witnesses were irrelevant, they simply happened to be present when the rampage occurred. In this respect, the positions of witness J and K are, to a degree, comparable.

In R. v.Taylor again only counsel, but not the defendants, had been permitted to see a witness, whose name and address was not revealed, give her evidence in person and be cross-examined.

The Court of Appeal held that "the fundamental right of a defendant to see and know the identity of his accusers, including witnesses for the Crown" might only be denied "in rare and exceptional circumstances." The Court then specified various factors to which, in exercising his discretion, a trial judge should have regard. One was that "The Crown must satisfy the Court that the creditworthiness of the witness had been fully investigated" and the Court said that there were in that case no "grounds for supposing that the witness was not impartial or had an axe to grind." In the present case the prosecution has very frankly admitted that it cannot investigate creditworthiness since the enquiries in former Yugoslavia which that would necessitate would themselves result in wide disclosure of the identity of the witness in question. A special factor in Taylor was that the defendants could, in any event, see the witness giving evidence on a video screen. In all the circumstances the Court determined that it should not interfere with the exercise of discretion of the trial judge.

These cases of quite special circumstances apart, the authorities appear to me to provide strong support for the view that in this case to permit anonymity of witnesses whose identity is of significance to the defendant will not only adversely affect the appearance of justice being done, but is likely actually to interfere with the doing of justice.

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It should be added that Counsel for the defendant, a Dutch lawyer assigned by the Tribunal to act for the allegedly indigent defendant, has, very understandably, said that he cannot continue to represent the defendant if only he, and not the defendant, is made aware of witnesses' identities. He points out the effect that that would have on the relationship between him and his Yugoslav client and on his ability adequately to conduct the defence. Accordingly, even if it were thought proper to confine knowledge in this way only to counsel, that course is not open to this Chamber.

From my examination of the Statute, the Rules and such decided cases as we have been referred to, I conclude that the present motions should be disposed of by granting most of the relief sought by the prosecution, much of which is assented to by the defence, but stopping short of denying to the defence, including the accused, the right to see and hear witnesses give evidence before the Tribunal and know their identity as known to the accused, which may not always be their true identity. I would however, as explained above, not apply to J and K this requirement of disclosure if indeed J and K were, as I believe, mere bystanders at the events to which they will attest and were wholly unknown to the accused.

In the case of all vulnerable witnesses their present whereabouts, the name under which he or she presently goes and the whereabouts and present names of his or her family do not appear to me to be matters necessary to be disclosed in order to satisfy a fair trial and the rights of the accused.

Likewise, having regard to the quite special task of the Tribunal, to the express provisions of its Statute and Rules and to the very understandable concerns of certain witnesses regarding consequences for them should the evidence they give become public property, I have no difficulty in acceding to the Prosecutor's application for the evidence of all these vulnerable witnesses to be given in camera. The material that has been furnished to the Chamber in respect of such witnesses makes such an application entirely reasonable and appropriate and will in no way detract from the fairness of the trial.

Since the hearing of this motion memoranda have been received form the parties which somewhat alter details of the precise form of orders that are appropriate. First, it appears that in the case of some vulnerable witnesses their identity is already known to the accused as a result of past media statements made by them. This is so with witness G, probably also with witness H and perhaps, too, with witness I. In each case the defence has now named the person known to be, or thought to be, represented by each of those letters and seeks confirmation from the Prosecution, which the latter is not prepared to give for reasons of the security of witnesses.

An order for disclosure of names, as I would in any event have made, will either confirm or correct the belief of the accused as to the identity of these witnesses and I believe that the accused is entitled to be thus informed. Accordingly, in their case the memoranda occasions no change to the orders which I would have proposed.

In the case of witnesses F, J and K the accused remains in ignorance of their identity. The name of F as known in the Omarska camp, including any nickname applied to her in the camp, should be disclosed to the accused but there will, of course be no disclosure of her present name, if different, nor any past or present address. The nicknames applied in the Omarska camp to other vulnerable witnesses not already correctly identified by the accused should also be disclosed and if they were known only by nickname then their real names at that time need not be disclosed.

As to J and K, the two bystanders, the identity of neither is known to the accused, who seeks the address where they lived at the time of which they are to give evidence so that their then neighbours may be questioned about events to which these witnesses are to depose. I can well appreciate the very

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real need for such information to be available to the accused so that his defence may be properly conducted. Much depends upon facts as yet either unknown or imperfectly known to this Chamber, for instance, the significance of the evidence of J and K to the charge to which their evidence relates and the availability of alternative evidence of equal worth from witness who are less vulnerable for any of a number of reasons.

In the absence of real insight into such matters, and to ensure both the reality and the appearance of a fair trial of the accused, the general locality where each of the witnesses J and K saw what they did should be revealed. What "general locality" means can only be interpreted by the prosecution, which alone knows the facts. However it should be sufficiently precise as to allow the Defence to make enquiries of others in the vicinity as to what they saw of the incidents of which J and K speak, while not sufficiently precise as to disclose the addresses of J and K.

To the extent to which an order in the terms that I propose prevents the Defence from calling particular witnesses, that may simply be the price to be paid for ensuring a fair trial.

The form of order which I propose has made it unnecessary for me to investigate the extent to which vulnerable witnesses have already exposed their identity by means of media statements.

It follows that I would make the following orders on the prosecution's motions:

I would grant the orders sought in paragraphs (1), (2), (3) as amended, (4), (5), (6), (9), (10), (12), (13) and (14). In all these cases I would omit reference to witness A, in respect of whom the prosecution no longer seeks any order. There remain the orders sought in paragraphs (7) (8) and (11). I would refuse the order sought in paragraph (7) but would grant an order providing for the shielding of these vulnerable witnesses, if they so request it, from direct confrontation with the accused by providing a one-way shielding device permitting the accused to see the witness but not requiring the witness to see the accused. I would refuse the order sought in paragraph (8). It is implicit in all I have written that I would also refuse the order sought in alternative (a) of paragraph (11) as amended. I would instead make an order in the form sought in (11), alternative (b) including nicknames where applicable, but in the case of witness J and K and upon confirmation that they are indeed in the category of mere bystanders as described above, omitting their names from disclosure while providing a description of relevant "general localities"

Date: _____ Signed: _____

Judge Sir Ninian Stephen

PROSECUTION AUTHORITIES

5. *Prosecutor v. Blaskic,* IT-95-14, Decision of Trial Chamber I on the Prosecutor's Request of 5 and 11 July 1997 for Protection of Witnesses, 10 July 1997.

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IT-95-14

IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registry:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
10 July 1997

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION OF TRIAL CHAMBER I ON THE PROSECUTOR'S REQUESTS OF 5 AND 11 JULY 1997 FOR PROTECTION OF WITNESSES

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Counsel for the Accused:

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 5 June 1997, the Prosecution submitted to the Trial Chamber a motion "for protective measures" (hereinafter "the motion of 5 June 1997"). On 11 June 1997, the Prosecutor filed a second motion, "special request for hearing date" (hereinafter "the motion of 11 June 1997"). Defence counsel for General Blaskic (hereinafter "the Defence"), in its opposition of 13 June 1997 (hereinafter "the response"), responded to those motions. The Prosecutor replied to the opposition in a brief filed on 16 June 1997 (hereinafter "the reply). The Trial Chamber heard the parties during a hearing on 23 June 1997.

The Trial Chamber will first analyse the claims of the parties and then discuss all the disputed points of fact and law.

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I. ANALYSIS OF THE CLAIMS AND ARGUMENTS OF THE PARTIES

2. In her request of 5 June 1997, the Prosecutor requested that the Judges of this Trial Chamber take measures to ensure the protection of two witnesses who are "employees of a humanitarian organisation". The measures cover six points:

1) the two witnesses will testify in closed session, but counsel for the humanitarian organisation will be permitted in the courtroom to assist, if so required, the two witnesses and the Trial Chamber regarding questions of confidentiality (hereinafter "measure 1");

2) the witnesses' names and other identifying information, including their association past or present with the humanitarian organisation will not appear in any record of the Tribunal open to the public, including the transcripts of hearings (hereinafter "measure 2");

3) the motions of 5 and 11 June 1997, and any measure relating to these applications which identify the witnesses and the humanitarian organisation with which they are affiliated will be placed under seal and will not be mentioned in any index listing the sealed documents or proceedings (hereinafter "measure 3");

4) the accused, the Defence, the Prosecution and their representatives may not disclose to anyone (specifically to those who were - or will be- indicted by the Tribunal and to their counsel) the names, addresses and other identifying information of those witnesses, including their affiliation past or present with the humanitarian organisation (hereinafter "measure 4");

5) the two witnesses will not be required to disclose their employment or current domicile or the identity of the persons who are - or who were - affiliated with the humanitarian organisation and who reside in or are nationals of the countries of the former Yugoslavia (hereinafter "measure 5");

6) the words "members of a humanitarian organisation" will be used whenever reference is made to those witness in a decision rendered pursuant to Sub-rule 79(B) of the Rules of Procedure and Evidence (hereinafter "the Rules") or in any other decision or public judgement rendered in this case, and no information identifying them will appear in those documents "hereinafter "measure 6");

The Prosecutor emphasised that the objective of these provisions was to ensure the safety of all the staff of that organisation who might be placed into serious danger by the disclosure of the identify of the said witnesses.

3. In her motion of 11 June 1997, the Prosecution recalled that the decision of 6 June 1997 in respect of protection of witnesses[1] - which *inter alia* requested that the accused and his counsel not disclose to the public or the media the names or any identifying information about the witnesses from the former Yugoslavia - did not apply to the two witnesses who were "members of a humanitarian organisation" since they no longer resided on the territory of the former Yugoslavia.

Furthermore, the Prosecutor emphasised the fact that those witnesses had disclosed information to her on a confidential basis and that for this reason - pursuant to Sub-rule 70(B) of the Rules - she could disclose it to the Defence only after having received the consent of the person or organ concerned.

4. In its response of 13 June 1997, the Defence agreed to measures 1, 2, 3 and 6 which the Prosecution had proposed.

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In addition, the Defence challenged the application of Sub-rule 70(B) to the statements of the two witness who are "members of a humanitarian organisation" which had been taken by the Office of the Prosecutor. In fact, it considered that the Prosecutor had not provided proof that the said statements had been provided to her on a confidential basis.

The Defence also strongly objected to the application of protective measures 4 and 5 which it considered to be overly restrictive of the accused's rights.

Lastly, it stressed that the humanitarian organisation had "affirmatively prevented" one of its employees from testifying for it. It added that the Trial Chamber should therefore order the organisation "to refrain from instructing its employees to cooperate with one side and not the other".

5. In her reply, the Prosecutor asserted that the statements of the two witnesses had been communicated to her on a confidential basis pursuant to Sub-rule 70(B) of the Rules.

She also recalled that protective measures 4 and 5 not only fully complied with the rights of the accused, as secured by Article 21 of the Statute, but were also indispensable for the protection of the said witnesses.

Lastly, the Prosecutor noted that the Defence had not satisfied the procedures necessary for the concerned humanitarian organisation to authorise the examination of one of its employees.

6. During the arguments at the hearing at which two individuals were heard - one as a witness - after having emphasised that the safety of the two witnesses was truly in jeopardy, the Prosecutor submitted to the Trial Chamber a modified version of measure 4:

"I. As a general principle, the parties are prohibited from disclosing to anyone, including other witnesses and potential witnesses, the fact that:

A) the witnesses from the humanitarian organisation provided information to the Prosecutor;

B) the witnesses from the humanitarian organisation testified in closed session; and that

C) the Prosecutor intends to call or has called such witnesses to testify.

II. If the Defence determines that it is necessary to disclose the identify of a witness from the humanitarian organisation during the trial and during the course of its examination of a different witness, the following measures should apply:

A) that portion of the examination concerning the witness from the humanitarian organisation shall occur in closed session;

B) the questions shall be phrased so as to not disclose that the witnesses from the humanitarian organisation were employees of that humanitarian organisation;

C) the questions shall be phrased so as not to disclose that the witnesses from the humanitarian organisation testified at the trial or provided information to the Prosecutor;

D) counsel for the humanitarian organisation will promptly be provided with a transcript of the closed session referred to in paragraph A above.

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III. If the Defence determines that it is necessary to disclose the identity of a witness from the humanitarian organisation out of court to a witness or potential witness, the following measures should apply:

A) the Defence may apply to the Trial Chamber *ex parte* (with no notice to or participation of the Prosecutor), for permission to question a potential witness about a witness from the humanitarian organisation. Counsel for the humanitarian organisation shall be notified that such an application is being made and shall be entitled to appear in respect to the application;

B) in assessing the Defence application, the Trial Chamber shall consider the following:

i) whether the Defence has exhausted all other means of obtaining the information;

ii) whether the need to disclose the identity of the witness or witnesses from the humanitarian organisation relates to facts at issue and not to collateral issues.

In respect to the application described in III B) above, the burden shall be on the Defence to demonstrate that it is necessary to identify the witnesses from the humanitarian organisation."

The Defence objected to this measure and considered that it did not respect the rights of the accused and was impossible to implement. It also challenged the legality of Rule 70 of the Rules, considering that it did not place the parties on an equal footing because it could be invoked only by the Prosecution.

II. DISCUSSION

7. After having analysed the applicability of Rule 70 of the Rules to the statements of the two witnesses who are "employees of a humanitarian organisation", the Trial Chamber will consider protective measures 1, 2, 3 and 6 described in paragraph 2 of this decision. It will then review whether the provisions of 4 and 5 are compatible with rights of the accused specifically provided in Article 21 of the Statute. Lastly, the Trial Chamber will deal with the Defence motion to require that the organisation authorise one of its employees to testify on its behalf.

A. Rule 70 of the Rules: matters not subject to disclosure

8. As regards the application of Rule 70 of the Rules to this case, the Trial Chamber considers that at the hearing of 23 June 1997, the Prosecution provided the proof that the information which the two witnesses had supplied to it were confidential at the time it was provided. It notes, moreover, that, pursuant to Sub-rule 70(B) of the Rules, the information was used solely for the purpose of generating new evidence.

Furthermore, the Trial Chamber notes that, according to the provisions of Sub-rule 70(B) of the Rules, the use of that information as evidence is subject to the prior consent of the entity providing it - that is, in the present case, the humanitarian organisation of which the two witnesses are employees.

In view of the objectives of Rule 70 of the Rules, the Trial Chamber must also take into account the nature and functions of the humanitarian organisation as well as the harm to all its operations which might be caused by the information's being disclosed. In this respect, it considers that in light of the humanitarian organisation's current and future mission, it is fully entitled to seek the application of the provisions of Rule 70 of the Rules.

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The Judges also recall that the consent of the organisation was conditional on the Trial Chamber's ordering six protective measures which - as the Prosecutor noted in her motion of 5 June 1997 - must be examined in light of Article 22 of the Statute and Rules 54, 75 and 79 of the Rules.

The Trial Chamber must therefore analyse those measures and determine to what extent they are compatible with the rights of the accused.

B. The Protective Measures

1. General Principles

9. The Trial Chamber first recalls - as it did previously in its decision of 6 June 1997 - that it is extremely concerned that the witnesses who may be called to testify before it during the trial should be protected[2]. It stresses the fact that, in this respect, the Statute affirms the principle, and the Rules establish how this is to be organised. Article 20(1) of the Statute states that there must be "due regard for the protection of victims and witnesses", and Article 22 of the Statute invites the Judges to include this protection in their Rules. Sub-rule 75(A) of the Rules therefore provides that a Judge or Trial Chamber may "order appropriate measures for the privacy and protection of victims and witnesses", specifically, "expunging names and identifying information from the Chamber's public records" and "non-disclosure to the public of any records identifying the victim". Sub-rule 75(B)(ii) authorises the holding of *in camera* proceedings. Lastly, Sub-rule 79(A)(ii) of the Rules states that the press and the public may be "excluded from all or part of the proceedings" for various reasons, including, the need to avoid the disclosure of a victim's or witness' identity.

The Trial Chamber must also ensure that the rights of the accused enjoy "full respect" (Article 20(1) of the Statute). It must therefore guarantee that the protective measures are compatible with the right of the accused to a "fair and public hearing" (Article 21(2) of the Statute) and, more particularly, his right "to examine, or have examined, the witnesses against him" (Article 21(4) of the Statute).

The Judges also recall their sovereign power to evaluate the measures they deem most appropriate to ensure the protection[3] and emphasise - as did Trial Chamber II in the case *The Prosecutor v. Tadic*[4] - that the list of measures provided for in Rule 75 of the Rules is not exhaustive.

2. Protective measures 1, 2, 3, 6

10. The Trial Chamber emphasises that although protective measures 1, 2, 3 and 6 in no manner infringe on the accused's right "to examine, or have examined, the witnesses against him" (Article 21(4)(e) of the Rules), they do limit his right to a public trial, as provided in Article 20(4) of the Statute[5] and Rule 78 of the Rules[6].

The Trial Chamber does, however, recall that the Judges of Trial Chamber II - in the case *The Prosecutor v. Tadic*[7] - stated that the "preference for public hearings must be balanced with other mandated interests such as the duty to protect [...] witnesses"[8] and that the Judges needed to verify on a case by case basis whether the restrictions which the protection imposed on the rights of the accused were justified by real fear for the safety of the witnesses.

In this respect, the Judges consider that the Prosecutor sufficiently demonstrated - in her motion of 5 June 1997 and at the hearing of 23 June 1997 - that the safety of the two witnesses who are "employees of a humanitarian organisation" and its staff would be seriously threatened should their identity be

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disclosed to the public and the media. Furthermore, the Trial Chamber notes that the danger that much greater because some of the employees of that organisation are currently posted on the territory of the former Yugoslavia.

It also notes that the Defence did not challenge the application of measures 1, 2, 3 and 6 which the Prosecutor proposed.

11. The Trial Chamber therefore orders that the testimony of the two witnesses who are employees of a humanitarian organisation be heard *in camera*; that their names, addresses and other identifying information, including their association past or present with the humanitarian organisation, not appear in any of the Tribunal's records open to the public and that they be placed under seal; that the motions of 5 and 11 June 1997 which identify those witnesses, as well as the humanitarian organisation with which they are affiliated, be placed under seal; that the words "witnesses who are employees of a humanitarian organisation" be used whenever reference is made to those witnesses in the Tribunal's public records, and that no indication which would identify them appear in those documents.

3. Protective measures 4 and 5

12. In respect of the new version of protective measure 4 which the Prosecution presented at the hearing of 23 June 1997 and which was mentioned in paragraph 6 of this Decision, the Judges would first point out that Trial Chamber II[9] - basing itself on Articles 20 and 22 of the Statute as well as Sub-rules 69(C), 75(A) and (B)(iii) of the Rules and on a detailed analysis of national and international case-law, more specifically in the cases *R. v. Taylor* (Court of Appeals, Criminal Division 22, July 1994) and *Kostovski* (ECHR 20 December 1989) - had ordered that the names and addresses of four Defence witnesses not be disclosed and that their voices and images be distorted (anonymity). Five reasons justified such provisions: 1) the real fear for the safety of the witnesses and their families; 2) the importance of the testimonies for the Prosecution; 3) the lack of any serious indication that the said witnesses lacked credibility; 4) the ineffectiveness or lack of a witness protection programme; 5) the absolute necessity for the said measure. If a less restrictive measure can ensure the requested protection, it should be applied. The International Tribunal must be satisfied that the accused will not suffer any excessive prejudice which can be avoided, although some imbalance is inevitable.

In this respect, the Trial Chamber notes that protective measure 4 differs from the one considered in the case *The Prosecutor v. Tadic* insofar as it is less restrictive about the rights of the accused. In fact, although measure 4 limits the accused's right to "examine or have examined, the witnesses against him" (Article 21(4)(e) of the Statute) - by authorising the disclosure of the identity of the two witnesses only under limited conditions - the Defence knows the identity of the said witnesses.

Indeed, as the Prosecution underscored, the Defence will have "possession of [their] statements" and "the witnesses will testify in person at trial without voice or image distortion and will be subject to a face to face cross-examination."

Furthermore, the Trial Chamber notes - as the Prosecutor demonstrated in her motion of 5 June 1997 and at the hearing on 23 June 1997 - that, as regards witnesses whose safety must be particularly guaranteed, it is clear that any disclosure of their identity might be extremely prejudicial to them.

The Trial Chamber also considers that, given the positions the witnesses held at the time of the facts and circumstances about which they are being called on to testify, they are likely to provide significant clarification in respect of the charges against the accused.

The Judges also emphasise the fact that the Tribunal does not have a victims and witnesses protection programme and is therefore not in a position to guarantee their safety once they have left the confines of the Tribunal[10].

The Trial Chamber thus considers that, in view of these exceptional circumstances, it is perfectly justified that the accused, the Defence, the Prosecution and their representatives, be permitted to disclose the identity of the witnesses from the humanitarian organisation only in accordance with the stringent conditions provided in the modified version of measure 4.

Nonetheless, the Trial Chamber wishes to emphasise that, according to Rule 89(D), it "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".

13. As regards measure 5, the Trial Chamber first wishes to reiterate its concern for ensuring the safety of all the staff of the humanitarian organisation with which the two witnesses are affiliated and, first and foremost, of those currently posted on the territory of the former Yugoslavia.

The Trial Chamber also considers that the accused has not sufficiently demonstrated that the knowledge he might have about the domicile and current employment of these witnesses as well as the identity of the staff employed in that humanitarian organisation was indispensable for preparing his defence.

It therefore states that the said witnesses are authorised not to disclose their employment or current domicile or identity of the staff who are currently - or were formerly - employed by the humanitarian organisation and who are residents or nationals of the countries of the former Yugoslavia.

C. Equal access to the witnesses from the humanitarian organisation

The Trial Chamber takes note of the fact that, as a Prosecution witness stated at the hearing of 23 June 1997, each of the parties has equal access to the information in the possession of the said humanitarian organisation. It recalls, however, that, in order to obtain the information, both the Prosecutor and the Defence must comply with the procedures in force in that organisation.

As concerns the Defence assertion that Rule 70 of the Rules would not be applicable, the Trial Chamber recalls that the Rules were established by the Judges as part of the mission entrusted to them in Article 15 of the Statute. In this respect, the Rules were drafted in accordance with the letter and spirit of the Statute. The provisions of the Rules must, therefore, be interpreted within their general context and not within the context of one specific provision.

In fact, the provisions of the Rules seek to ensure a general balance between the protection of the rights of the accused, those of the victims and those of the Prosecution.

In that regard, insofar as necessary, the Trial Chamber should apply the provisions of Rule 70 of the Rules in respect of the Defence in the same manner as it does in respect of the Prosecution.

III. DISPOSITION

FOR THE FOREGOING REASONS,

Trial Chamber I,

RULING *inter partes* and unanimously,

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TAKES NOTE of the agreement between the parties in respect of protective measures 1, 2, 3 and 6;

As regards the modified version of measure 4,

ORDERS the parties not to disclose to anyone, including the other witnesses or potential witnesses the fact that: a) the witnesses from the humanitarian organisation supplied information to the Prosecutor; b) the witnesses from the humanitarian organisation testified *in camera*; and that c) the Prosecutor intends to call or called those witnesses to appear;

ORDERS that, should the Defence deem that it is necessary to disclose the identity of a witness from the humanitarian organisation during the trial or during the examination of a different witness, the following measures shall be applied: a) that portion of the examination relating to the witness from the humanitarian organisation shall take place *in camera*; b) the questions shall be phrased so as not to disclose the fact that the witnesses from the humanitarian organisation were its employees; c) the questions shall be phrased so as not to disclose the fact that the witnesses from the humanitarian organisation testified during the trial or provided information to the Prosecutor; d) counsel for the humanitarian organisation shall receive promptly the transcript of the *in camera* session mentioned in paragraph (a) above;

ORDERS that, should the Defence deem it necessary to disclose the identity of a witness from the humanitarian organisation to a witness outside the courtroom, or to a potential witness, the following measures shall be applied: a) the Defence may request the Trial Chamber *ex parte* (without so informing the Prosecutor and without her participation), for permission to examine a potential witness about a witness from the humanitarian organisation (counsel for the humanitarian organisation shall be informed of such a request and shall be permitted to appear to give an opinion about the said request); b) when it reviews the Defence request - which must demonstrate the need to identify the witnesses from the humanitarian organisation - the Trial Chamber must consider: i) whether the Defence has exhausted all its other methods for obtaining the said information; ii) whether the need to disclose the identity of the witness or witnesses from the humanitarian organisation relates to the facts under review and not to corollary facts;

As regards measure 5,

ORDERS that the two witnesses not be required to disclose their employment, current domicile or the identity of the persons who are - or were - employees of the humanitarian organisation and who are residents or nationals of the countries of the former Yugoslavia;

TAKES NOTE of the fact that each of the parties has equal access to the information in the possession of the humanitarian organisation, so long as the procedures in force in that organisation are respected.

Done in French and English, with the French version being authoritative.

Done this tenth day of July 1997
At The Hague
The Netherlands

(signed)

Claude Jorda,
Presiding Judge, Trial Chamber I

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(SEAL OF THE TRIBUNAL)

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1. Decision of Trial Chamber I on the Prosecutor's requests of 12 and 14 May 1997 for protection of witnesses, *The Prosecutor v. Blaskic,* 6 June 1997.
2. Decision of Trial Chamber I on the requests of the Prosecutor dated 12 and 14 May 1997 for the protection of witnesses, *The Prosecutor v. Blaskic*, 6 June 1997, p. 6, para. 10.
3. Article 22 of the Statute and Rule 75 of the Rules.
4. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, *The Prosecutor v. Tadic,* 10 August 1995.
5. Article 20(4) of the Statute states that "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence".
6. Rule 78 of the Rules reads: "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided".
7. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses *op. cit, 4.*
8. *ibid.,* p. 14, para. 33.
9. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses *op. cit, 4.*
10. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses *op. cit, 4.*

PROSECUTION AUTHORITIES

6. *Prosecutor v. Muvunyi and others*, ICTR-2000-55-I, Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 25 April 2001.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER II

Before: Judge Mehmet Güney
Sitting as a single Judge pursuant to Rule 73 of the Rules

Registrar: Mr. Adama Dieng

Date: 25 April 2001

THE PROSECUTOR
v.
THARCISSE MUVUNYI & OTHERS

Case No. ICTR 2000-55-I

DECISION ON THE PROSECUTOR'S MOTION FOR ORDERS FOR PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES TO CRIMES ALLEGED IN THE INDICTMENT

Counsel for the Prosecutor:
Silvana Arbia
Sola Adeboyejo
Jonathan Moses

Counsel for the Defence:
Michael Fisher

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal");

JUDGE MEHMET GÜNEY sitting as a single Judge designated pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules") on behalf of Trial Chamber II;

BEING SEIZED of the "Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" (the "first Motion") and the "Brief in support of the Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" with annexes, filed on 13 February 2001, subsequently replaced by the "Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" (the "first Motion") and the "Brief in support of the

Motion by the Office of the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment" (the "Brief") with annexes, filed on 15 February 2001 to correct errors in the first Motion;

CONSIDERING also the "Reply by the Defence to the Motion filed by the Prosecutor for orders for protective measures for victims and witnesses to crimes alleged in the Indictment", filed on 2 April 2001;

CONSIDERING the "Prosecutor's Response to Defence submissions in reply to Prosecutor's Motion for orders for protective measures for victims and witnesses to crimes alleged in the Indictment", filed on 9 April 2001 and the additional Prosecutor's response to Defence submissions in reply to the Prosecutor's Motion for protective measures for victims and witnesses to crimes alleged in the indictment, filed on 19 April 2001;

WHEREAS, acting on the Chamber's instruction, Court Management Section advised the Parties on 16 February 2001 that the Motion would be reviewed on briefs only pursuant to Rule 73 of the Rules;

CONSIDERING the Statute of the Tribunal (the "Statute") particularly Articles 19, 20 and 21 of the Statute and the Rules, specifically Rules 69 and 75 of the Rules;

SUBMISSIONS OF THE PARTIES

The Prosecutor

1. The Prosecutor requests orders for protective measures for persons who fall into three categories (paragraph 2 of the Motion):

> *a. Victims and potential prosecution witnesses who presently reside in Rwanda and who have not affirmatively waived their right to protective measures;*
>
> *b. Victims and potential prosecution witnesses who presently reside outside Rwanda but in other countries in Africa and who have not affirmatively waived their rights to protective measures; and*
>
> *c. Victims and potential prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.*

2. The Prosecutor requests that these persons be provided protection by the following orders (paragraph 3 of the Motion):

> *a. An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses described hereinafter, be sealed at the Registry and not included in any records of the Tribunal; that the said witnesses will bear the following pseudonyms: BW, AX, CE, ED, ZC, ZB, QBV, QM, CY, RU, QD, AA, CS, ZD, CP, QBG, ET, QL, RR, QB, NN, EI, BV, RA, QBU, QBX, QBY, QBC, QCC, GAH, QCD, QCM, QCQ, QCW, QCZ, QO, RJ, TQ, DBY, XS, QCY, QCL, QCP, QCO, QCV, QBN, QCS, TN, QBP, QDC, QCN, QX, QCT, QCU, QCR and any other additional witnesses will also be assigned pseudonyms, which will be used during the course of the trial.*

b. An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning potential prosecution witnesses described in the affidavit of the Commander of the Witness Management Unit hereinafter attached, be sealed at the Registry and not included in any records of the Tribunal; and that the said witnesses bear the following pseudonyms: RO, QAP, FAF, AEH

c. An Order that the names, relations, addresses and whereabouts of victims and other potential prosecution witnesses as well as any other identifying information, be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals.

d. An Order requiring that to the extent that any names, relations, addresses, whereabouts of or any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal, that such identifying information be expunged from those documents;

e. An Order prohibiting the disclosure to the public or the media, of the names, relations, addresses and whereabouts of these victims and potential prosecution witnesses as well as any other identifying data in the supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such victims and potential prosecution witnesses, and this order shall remain in effect until the termination of this trial;

f. An Order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or any other information contained in any documents, or any other information which could reveal or lead to the identification of victims and potential prosecution witnesses specified in Paragraph 2, to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team. Such persons so designated by the assigned Counsel or the Accused;

g. An Order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 2(e) above, have access to any information referred to in Paragraphs 2(a) through 2(d) above and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above.

h. An Order prohibiting the photographing, audio and/or video recording, or sketching of any victims and potential prosecution witness at any time or place without leave of the Trial Chamber and parties;

i. An Order prohibiting the disclosure to the Defence of the names, addresses, relations and whereabouts of, and any other identifying data which would reveal the identities of the victims and potential prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and in any event, that the Prosecutor is not

required to reveal the identifying data to the Defence sooner than 21 days before the victim or witness is likely to testify before the Trial Chamber, unless otherwise decided by the Trial Chamber, pursuant to Rule 69(A) of the Rules.

j. An Order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential prosecution witnesses or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;

k. An Order prohibiting the disclosure to the Defence of the names, addresses, relations and whereabouts of, and any other identifying data which would reveal the identities of the victims and potential prosecution witnesses in the exhibits and other such materials to be used by the Prosecution for the Trial, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any such materials provided to the Defence in a redacted form until such a mechanism is in place;

l. An Order prohibiting any member of the Defence team referred to in Paragraph 2f above, from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

m. An Order prohibiting the accused individually or any member of the Defence Team, from personally possessing any material which includes or might lead to discovery of the identity of any protected witness;

2. The Prosecutor submits two Affidavits, from Samuel Akorimo and Remi Abdulrahman respectively dated 8 January 2001 and 13 February 2001, and informative material annexed to the Brief to demonstrate that there is a substantial threat to the lives of potential witnesses to the crimes alleged in the Indictment if their identities were disclosed.

The Reply by the Defence

3. The Defence submits that the second motion filed on 15 February had a different list of annexes, that did not enclose the Affidavit of Samuel Akorimo Commander of the Witness Management Unit referred to as annex K in the first Motion.

4. The Defence alleges that they were served with excessively edited witness statements, and has not been served with the witness statements referred to at paragraph 3(b) of the second Motion.

5. The Defence submits that the supporting material provided by the Prosecutor is insufficient to establish the exceptional circumstances required by Rule 69(A) of the Rules.

6. The Defence submits in general that measures (a) to (m) are oppressive and unfair and violate the International Covenant on Civil and Political Rights.

7. The Defence objects to the disclosure of identifying material only 21 days before a witness is

likely to testify as being unfair as, *inter alia*, it is alleged that some prosecution witnesses will give false testimony against the Accused and that they will not have enough time to prepare thorough pre-trial investigation.

The Prosecutor's Response

8. The Prosecutor submits that the Motion was filed anew to correct errors present in the first Motion.

9. In reply to the alleged violation of the International Covenant on Civil and Political Rights, the Prosecutor submits that the orders sought do not prevent an accused from exercising the right to examine witnesses against him, but that this right has to be balanced against the recognised dangers in exceptional cases such as most cases before this Tribunal.

10. The Prosecutor justifies measure (g) by stating that, due to the specific nature of the documents provided to the Defence, it is appropriate to know the identity of all persons working on the immediate Defence team.

11. The Prosecutor alleged that measures (f), (l) and (m) do not impose a strict liability on the Accused and the defence team and are aimed at guaranteeing the protection of the witness's identity.

12. As regard measure (m), the Prosecutor notes that even if an expanded form of the measure not granted in the in the case of the *Prosecutor v. Nyiramasuhuko and Ntahobali,* case No. ICTR-97-21-I, (« Decision on the Prosecutor's Motion to re-file Motion to order protective measures for the victims and witnesses » rendered on 27 February 2001), the formulation of the measure in the current Motion is more specific as it prohibits the Accused or any member of the Defence team to possess any material that might lead to the identification of a protected witness, and should therefore be granted.

13. In relation to the alleged lack of disclosure of the content of the witnesses's statements on the one hand, and of the redacted Indictment on the other hand, the Prosecutor recalls that an Order rescinding the non-disclosure Order was issued on 6 February 2001, and that the unredacted Indictment containing the names of the massacre sites and other relevant places at which events took place has been available since then.

14. The Prosecutor recalls her obligation in accordance with Rule 66(A)(ii)of the Rules to provide, no later than 60 days before trial, a copy of statements of all witnesses whom she intends to call at trial. Consequently, if the Accused has not yet received a copy of witness statements for witnesses RO, QAP, FAF, and AEH, she is not in breach of any of her obligations in respect to those obligations.

15. The Prosecutor recalls the Tribunal's jurisprudence which provides the defendant with 21 days to make such enquiries about the witnesses as are necessary.

16 The Prosecutor further submits that the information annexed should not be considered as being outdated but simply highlights that there have been security issues throughout Rwanda for a long period, and until today. Concerning the Affidavit of Samuel Akorimo, the Prosecutor submits that it clearly indicates that four potential witnesses have already been threatened and that, moreover, a non-disclosure order may be based on fears expressed by others.

AFTER HAVING DELIBERATED

17. Pursuant to Article 21 of the Statute, the Tribunal shall provide in its Rules for the protection of victims and witnesses. Such protection measures shall include, without being limited to, the protection of the witness's identity. Rule 75 provides, *inter alia,* that a Judge or the Trial Chamber may *proprio motu,* or at the request of either party, or of the victims of witnesses or of the Victims and Witnesses Support Section, order appropriate measures for their privacy and protection, provided that these measures are consistent with the rights of the Accused.

18. According to Rule 69 of the Rules, under exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk, until the Chamber decides otherwise.

19. Article 20 of the Statute sets out the rights of the Accused including, *inter alia*, the right "[t]o have adequate time and facilities for the preparation of his or her Defence" and the right "[t]o examine, or have examined, the witnesses against him or her". The Chamber also recalls Rule 69(C) of the Rules whereby the identity of a witness shall be disclosed in sufficient time prior to trial to allow adequate time for the preparation of the Defence.

20. Mindful of guaranteeing the full respect of the rights of the witnesses and those of the Accused, the Chamber shall order any appropriate measures for the protection of the victims and witnesses so as to ensure a fair determination of the matter before it. The Chamber shall decide on a case-by-case basis and the orders will take effect once the particulars and locations of witnesses have been forwarded to the Victims and Witnesses Support Unit.

21. To determine the appropriateness of protective measures, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information annexed to the Brief. Having considered the Defence's objections, the Chamber has reviewed the Affidavit of Samuel Akorimo dated 8 January 2001, which tends to demonstrate the complexity of the security situation in Butare *préfecture*. The Chamber notes that it contains serious and detailed allegations of violence and threats against witnesses that could come to testify "in this present trial and other trials involving Butare *préfecture*". The affidavit by Remi Abdulrahman emphasises the level of threat in several regions of Rwanda due to attacks by infiltrators from the DRC that can also spread in Butare *préfecture*. The Chamber is convinced, on the basis of these documents, that a volatile security situation exists in Rwanda and neighbouring countries, which could endanger the lives of the witnesses who may be called to testify at trial.

22. In relation to documents in support of threats for witnesses residing outside Africa, the Chamber considers that the Prosecutor has not provided evidence of threats to the lives of witnesses residing outside of that region. However, the Chamber concurs with its finding in the "Decision on Pauline Nyiramasuhuko's motion for protective measures for Defence witnesses and their family members" filed on 20 March 2001. In that instance, the Chamber held that, although the Defence had not demonstrated the existence of threats or fears as regards potential witnesses residing outside Rwanda and the region, it decided that the present security situation "would affect any potential witness even if residing outside the region".

23. In relation to the need for the protection of witnesses' identities, having reviewed the supporting documents, the Chamber holds that, in the present case, exceptional circumstances do warrant non-disclosure orders based on the fears expressed by these witnesses.

24. The measures requested by the Prosecutor have been examined in accordance with the current practice of the Tribunal. The Chamber deems justified the measures seeking to protect the identity of

the witnesses and pursuant to Rule 75(B) of the Rules, grants measures (a), (b), (c), (d), (e), (f), (h), (i), (j), (k) and (l).

25 As for measure (g), the Chamber grants the measures requested by the Prosecutor, but for practical reasons, modifies the measure which provides that any member leaving the Defence team remits "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted. (*See the Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, Decision of 3 March 2000), in which the Trial Chamber substituted the words "all materials" in place of "all documents and information."

26. In relation to measure (i) of the Motion, the Chamber concurs with the Tribunal's jurisprudence according to which the deadline for disclosure should be set at least twenty-one days prior to the day in which the witness is to testify at trial. (*See* "Decision on the Prosecutor's Motion for protective measures for witnesses", filed on 6 July 2000, in *the Prosecutor v. Karemera*).

27. As to measure (m) opposed to by the Defence, the Chamber denies it and concurs with the finding of the "Decision on the Prosecutor's Motion for protective measures for victims and witnesses", in the *Prosecutor v. Nsabimana and Nteziryayo*, dated 21 May 1999, that denied a similar order. The Chamber decides that the present request is not more specific than the one referred to in the said Decision but is alike overly broad and may impinge Article 20(4)(b) of the Statute.

28 Finally, the Chamber recalls that such protective measures are granted on a case-by-case basis, and shall take effect only once the particulars and locations of the witnesses have been forwarded under seal to the Victims and Witnesses Support Section by the Prosecutor.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS measures (a), (b), (c), (d), (e), (f), (h), (i), (j), (k) and (l).

GRANTS measure (g) with the following modification: to replace the words "all documents and information" with the words "all materials";

DENIES measure (m).

Arusha, 25 April 2001,
Judge Mehmet Güney

(Seal of the Tribunal)

PROSECUTION AUTHORITIES

7. *Prosecutor v. Musabyimana*, ICTR-2001-62-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 19 February 2002

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 Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registry: Adama Dieng

Date: 19 February 2002

The PROSECUTOR
v.
Samuel MUSABYIMANA

Case No. ICTR-2001-62-I

DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor
Silvana Arbia
Jonathan Moses
Faria Rekkas
Counsel for the Defence
Gerardus Knoops

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judges William H. Sekule, Judge Winston C. Matanzima Maqutu, and Judge Arlette Ramaroson (the "Chamber");

BEING SEIZED of:

(i) the "Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 24 September 2001, (the "Motion");

(ii) the "Brief in Support of the Motion by the Prosecutor for Protective Measures for Victims and Witnesses" (the "Brief");

(iii) the "Response Motion to the Prosecutorial Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Brief in Support thereof" filed by the Defence on 5 November 2001;

(iv) the "Reply by the Prosecutor to the Defence Response in Respect of the Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment" filed on 20 November 2001.

CONSIDERING that the Parties were informed that the Motion would be decided solely on the basis of their written briefs, pursuant to Rule 73 of the Rules and Procedure and Evidence (the "Rules");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules; in particular Articles 19, 20, and 21 of the Statute and Rules 69 and 75 of the Rules;

SUBMISSIONS OF THE PARTIES

The Prosecution

1. The Prosecution requests that the Chamber order protective measures for persons who fall into three categories, described at paragraph 3 of the Motion:

(a) Victims and potential Prosecution witnesses who presently reside in Rwanda, and who have not affirmatively waived their right to protective measures;

(b) Victims and potential Prosecution witnesses who presently reside outside Rwanda but in other countries in Africa and who have not affirmatively waived their right to protective measures, and;

(c) Victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures.

2. The Motion for protective measures is framed in the following terms:

(a) An order that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses described hereinafter be sealed by the Registry and not included in any records of the Tribunal, other than the **CONFIDENTIAL** material provided to the Trial Chamber in support of this motion; that the said witnesses will bear the following pseudonyms: **CAA, CAB, CAC, CAD, CAE, CAF, CAG, CAH, CAI, CAJ, CAK, CAL, CAM** and any other additional witnesses will also be assigned pseudonyms which will be used during the course of the trial;

(b) An order that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential witnesses described in Paragraph 2, be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures of these individuals;

(c) An order requiring that to the extent that any names, relations, addresses, whereabouts of and any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal;

(d) An order prohibiting the disclosure to the public or the media, of the names, relations, addresses, whereabouts of, and any other identifying data in supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such victims and potential prosecution witnesses, and this order shall remain in effect after the termination of this trial;

(e) An order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals specified in Paragraph 2 (sic), to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, such persons so designated by the assigned Counsel or the Accused;

(f) An order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 3(e) above, have access to any information referred to in Paragraphs 3(a) through 3(d) above and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and requiring Defence Counsel to ensure that any member departing from the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 (sic);

(g) An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witness at any time or place without leave of the Trial Chamber and parties;

(h) An order prohibiting the disclosure to the Defence of the names, relations, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and in any event, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than twenty-one (21) days before the victim or witness is to testify at trial;

(i) An order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential prosecution witnesses or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;

(j) An order that the Prosecutor designate a pseudonym for each prosecution witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trail, and the public;

(k) An order prohibiting any member of the Defence team referred to in Paragraph 3f above, from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

(l) An order prohibiting the Accused individually or any member of the Defence team, from personally possessing any material which includes or might lead to discovery of the identity of any protected witness;

(m) An order prohibiting the Accused individually from personally possessing any material which includes, (but not limited to) any copy of a statement of a witness even if the statement is in redacted form, unless the Accused is, at the time of the possession, in the presence of his Counsel, and instructing the Detention Centre authorities to ensure compliance with the prohibition set out in this Paragraph.

3. The Prosecution contends that there is a substantial danger for potential victims and witnesses if their identities are known. There is particular risks in north western and central areas of Rwanda where the Prosecutor submit that violence has increased.

4. The Prosecution relies on two affidavits, one from Remi Abdulrahman, Chief of the Security and Safety Section of the Tribunal in Kigali, dated 6 September 2001, and the other from Samuel Akorimo, Commander of Investigations for the Tribunal, dated 14 August 2001, and on informative material in Annexes C to K to the Brief. The aforementioned documents contain reports on attacks on Tutsi refugee camps and other genocide survivors by Rwandan rebels, ex-FAR militiamen and Interahamwe who have spread into central Rwanda, as far as the Gitarama *prefecture*. Due to the presence of Interahamwe in Uganda, of ex-FAR members in Burundi and considering the ongoing war in the Democratic Republic of Congo (DRC), the Prosecution argues that the risk of violence in Rwanda and the African Great Lakes Region has increased.

5. Relying on the affidavit of Mr Akorimo, the Prosecution exposes the risk of violence against victims and Prosecution witnesses in the Gitarama *prefecture*, after a group of armed infiltrators killed persons in the Gitarama area in June 2001. Further, the Prosecution submits that, in the Gitarama *prefecture*, the perpetrators and victims of the genocide live in absolute proximity with each other, and the likelihood of harm from perpetrators to victims is very high.

6. Moreover, the Prosecution alleges that these threats affect not only victims and potential witnesses residing in Rwanda but also those living in those areas and even outside the continent, due to the presence in those areas of Interahamwe groups, former Rwandan Armed Forces (ex-FAR) and members of the former civilian government of Rwanda.

7. Finally, the Prosecution relies on the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR to demonstrate that such orders as those requested have been granted in the past and would not affect the Accused's rights.

The Reply by the Defence

8. Counsel for Musabyimana opposes the measures requested by the Prosecutor. The Defence argues that there are insufficient grounds to grant the use of pseudonyms insofar as the enumerated threats emanate from governmental or military sources and the Accused, who is a bishop, fulfils his religious functions and is not affiliated with the government or the military.

9. The Defence alleges that several procedural safeguards can be implemented instead of the drastic measure of "anonymous witnesses".

10. Alternatively, the Defence requests that the order not to disclose identifying data to the Defence sooner than 21 days before the victim or witness is to testify at trial" be rejected by the Chamber.

The Response by the Prosecution

11. The Prosecution argues that, in accordance with the jurisprudence of the Tribunal, there is compelling evidence to grant the measures requested. Furthermore, the full names and identifying features of the witnesses will be provided to the Defence in time for adequate preparation.

12. The Prosecution maintains that the fact that the Accused holds a non-military and non-governmental position is irrelevant to the issue of witness protection. The Prosecution contends that disclosing the names and details of witnesses at an early stage causes an increased risk of danger to witnesses by the Accused, or his supporters, or those who oppose of the work of the Tribunal.

13. The Prosecution rejects the suggestion of the Defence to use "other" procedural safeguards since the Defence has failed to distinguish between protective measures during trial and protective measures presently requested, which are to be implemented before trial.

14. Moreover the Prosecution asserts that the "21 days" request is in accordance with the earlier Decision of the Tribunal in *the Prosecutor v. Tharcisse Muvunyi and Others (Case No. ICTR-2000-5-I,* 25 April 2001) and that such period provides adequate time for preparation of the Defence.

HAVING DELIBERATED

Legal Basis of the Motion

15. The Chamber recalls that, pursuant to Article 19 of the Statute, a trial shall be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses". The Chamber also acknowledges that, pursuant to Articles 14 and 21 of the Statute, the Tribunal shall provide for the protection of victims and witnesses, "[which] protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of victim's identity" (Article 21 of the Statute).

16. Pursuant to Article 20 of the Statute and mindful of the specific right, "[t]o have adequate time and facilities for the preparation of his or her Defence" and the right "[t]o examine, or have examined, the witnesses against him or her", the Chamber may order on a case by case basis, pursuant to Rules 69 and 75 of the Rules, any appropriate measures for the protection of witnesses.

17. Rule 69(A) of the Rules provides that "[i]n exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise". Rule 75(A) of the Rules further stipulates that "[a] Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Support Section (the "WVSS"), order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused."

18. The Chamber also recalls Rule 69 (C) of the Rules whereby "the identity of the victim or witness

shall be disclosed in sufficient time prior to the trial to allow adequate time for the preparation of the prosecution and the defence."

19. To determine the appropriateness of such protective measures, the Chamber must be satisfied that "an objective situation exists whereby the security of the said witnesses is or may be at stake." (*See The Prosecutor v. Nteziryayo, Case No. ICTR-97-29-T,* "Decision on the Defence Motion for Protective Measures for Witnesses", 18 September 2001). In the instant case, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information contained in the supporting documents to the Motion.

20. To demonstrate the existence of exceptional circumstances, the Tribunal also requires that the Parties provide updated information when seeking the granting of these protective measures (*See The Prosecutor v. Ntagerura, Case No. ICTR-96-10A-I,* "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 27 June 1997). The Chamber notes that some of the evidence adduced in support of the volatile security situation in Rwanda and the Great Lakes region as annexed to the Brief is more than two years old and does not adequately address the present security situation in these areas.

21. Nonetheless, the Chamber notes that the affiant Remi Abdulrahman, in his capacity as Chief of the Security and Safety Section of the ICTR in Kigali, has presented an updated assessment of the security situation in Rwanda and the neighbouring countries. The latter's affidavit indicates that the security situation in the western part of Rwanda, in the areas of Gisenyi and Ruhengeri, presents a certain threat level. Moreover, the affidavit of Samuel Akorimo indicates that infiltrators in Ruhengeri and Gisenyi Provinces in early May 2001 have aggravated the potential for reprisals from armed dissidents. The Trial Chamber finds that these affidavits contain serious and detailed allegations of violence and that the objective security situation prevalent in Rwanda and neighbouring countries could be of such nature as to put at risk the lives of victims and potential Prosecution witnesses residing there.

22. The Chamber finds that the Prosecutor has not provided substantive evidence of threats to the lives of witnesses residing outside Africa. However, the Chamber concurs with its reasoning in the "Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members" of 20 March 2001 (*Case No. ICTR-97-21-0338).* In that instance, the Chamber held that, although the Defence had not demonstrated the existence of threats or fears in regard to potential witnesses residing outside Rwanda and the region, it decided that the present security situation "would affect any potential witness even if residing outside the region."

23. In the exceptional circumstances of this case, the Chamber finds justified the measures required by the Prosecution at points (a), (b), (d), (e), (h), (i), (k) and (l), noting that these measures are in accordance with orders formerly granted by the Tribunal in similar exceptional circumstances.

On point 2 (c) of the Motion

24. The Chamber modifies, *propriu motu,* measure (c) by adding the words "that such identifying information be expunged from the documents in question" insofar as the original order lacked such precision regarding measures to be taken in case of identifying information concerning witnesses in existing records of the Tribunal. (*See The Prosecutor v. Kajelijeli Case No. ICTR-98-44-I* "Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 6 July 2000).

On point 2 (f) of the Motion

25. The Chamber grants the measures requested by the Prosecutor, with a simplification and modification of the measure which provides that any member leaving the Defence team remit "all materials" that could lead to the identification of protected individuals, given that the term "information" used in the requested order may be understood to include intangibles which, naturally, cannot be remitted (*The Prosecutor v. Bagambiki and Imanishimwe, Case No. ICTR-97-36-I and 36-T*, Decision of 3 March 2000).

On point 2 (g) of the Motion

26. The Chamber, in accord with its Decision of 18 September 2001 in *the Prosecutor v. Nteziryayo, (Case No. ICTR-97-29-T)*, agrees with measure (g) subject to the deletion of the words "and the parties" in regard to the responsibility to prohibit photographing, audio and/or video recording, or sketching of any Prosecution witness.

On point 2 (h) of the Motion, Timing of Disclosure of Unredacted Witness Statements

27. The Chamber notes that the Prosecution requests that the disclosure of identifying data which would reveal, *inter alia*, the identity of potential witnesses be prohibited to the Defence "until such time as the Trial Chamber is assured that the witnesses have been afforded an adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and in any event, that the Prosecutor is not required to reveal the identifying data to the Defence sooner than twenty-one (21) days before the victim or witness is to testify at trial". The Chamber notes that the Prosecution is in fact requesting that disclosure be made on a rolling basis and be conditioned to the implementation of protective measures.

28. The Chamber notes that the Tribunal's jurisprudence on the timing of disclosure of identifying information and unredacted statements in witness protection orders has varied since the first orders rendered in 1996, due to the specific circumstances of the cases examined.

29. The Chamber recalls that in several decisions rendered between July and September 2000, Trial Chamber II ordered the Prosecution to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of the witnesses (See for instance the said Order in the Prosecutor v. Karemera, 6 July 2000).

30. Accordingly, in light of the necessity to strike a balance between the right of the Defence and the demonstrated need for protective measures for witnesses, the Chamber allows the Prosecution to temporarily conceal identifying information concerning its witnesses but modifies, *propriu motu,* measure (h) by ordering that: "Provided that protective measures are put in place, all the unredacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence."

On point 2 (m) of the Motion

31. The Chamber concurs with the "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", dated 21 May 1999, in the *Prosecutor v. Nsabimana and Nteziryayo*, finding that such request "is overly broad and may impinge Article 20(4)(b) of the Statute". The Chamber therefore denies measure 2(m).

32. The Chamber finally recalls that, in conformity with the Tribunal's jurisprudence, such protective

measures are granted on a case by case basis, and shall take effect only once the particulars and locations of the potential witnesses have been forwarded to the Victims and Witness Support Section by the Prosecution, bearing in mind the practicalities involved

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS measures (a), (b), (d), (e), (i), (j), (k) and (l);

DENIES measures (m);

MODIFIES measures (c), (f), (g) and (h) **GRANTING** them as follows:

(c) An order requiring to the extent that any names, relations, addresses, whereabouts of and any other identifying information, concerning such victims and potential prosecution witnesses is contained in existing records of the Tribunal, that such identifying information be expunged from the documents in question;

(f) An order requiring the Defence to provide to the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defence team who will, pursuant to Paragraph 3(e) above, have access to any information referred to in Paragraphs 3(a) through 3(d) above and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and requiring Defence Counsel to ensure that any member departing from the Defence team has remitted *all materials* that could lead to the identification of persons specified in Paragraph 2;

(g) An order prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Trial Chamber;

(h) An order prohibiting the disclosure to the Defence of the names, relations, addresses, whereabouts of and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any other information in the supporting material on file with the Registry until such time as the Trial Chamber is assured that witnesses are protected. Provided that protective measures are put in place, all the unredacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence.

Arusha, 19 February 2002

William H. Sekule	Winston C. Matanzima Maqutu	Arlette Ramaroson
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

PROSECUTION AUTHORITIES

8. *Prosecutor v. Kamuhanda*, ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defense Witnesses, 22 March 2001.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Laïty Kama
Sitting as a single Judge pursuant to Rule 73 of the Rules

Registrar: John M. Kiyeyeu

Date: 22 March 2001

THE PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-99-54-T

DECISION ON JEAN DE DIEU KAMUHANDA'S MOTION FOR PROTECTIVE MEASURES FOR DEFENSE WITNESSES

The Office of the Prosecutor:
Ken Flemming
Ifeoma Ojemeni
Melinda Pollard
Jayantha Jayasuriya

Counsel for Kamuhanda:
Aïcha Condé

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

JUDGE LAÏTY KAMA, sitting as a single Judge pursuant to Rule 73 of the Rules;

BEING SEIZED of the "Requête aux fins de Mesures de Protection des Témoins," (the "Motion") filed on 26 February 2001, to which documents are attached in support of the Motion;

CONSIDERING the "Prosecutor's Brief in Response to Motion by the Defense for Protective Measures Regarding Defense Witness, filed on 24 February 2001" (the "Prosecutor's Response") filed on 14

March 2001;

CONSIDERING the Statute of the Tribunal (the "Statute") particularly Articles 19, 20 and 21 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75 of the Rules;

CONSIDERING that the Motion will be decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Defense submissions

1. The Defense seeks protective measures for its potential witnesses before they testify, because they fear for their safety and for the safety of their families. The Defense further submits that the measures sought are justified because she intends to enter a defense of alibi pursuant to Rule 67 of the Rules and if the measures were not to be granted, the Defense would not be in a position to enter such a defense.

2. In support of its request, the Defense relies upon the documents attached to its Motion as well as upon the documents filed by the Prosecutor in support of her Motion seeking protective measures for her witnesses filed on 9 March 2000. The documents attached to the Motion include *inter alia*: a Declaration made on 15 July 1998 by Mr. Philip Reyntjens, a Professor at the University of Anvers, Belgium; three Articles dated 1 February 2001, 19 December 2000 and 18 December 2000 from the "Fondation Hirondelle;" as well Articles by Colette Braeckman on 19 December 2000 reported in the Belgian daily newspaper, "Le Soir."

3. The Articles from the "Fondation Hirondelle" report on the court proceedings in Kenya surrounding the death of Mr. Seth Sendashonga, who was allegedly to testify in the *Kayishema and Ruzindana* trial. The other Articles by Colette Braeckman report on the situation of insecurity in the Democratic Republic of the Congo (the "DRC") resulting from the war of 1998.

4. The Defense, therefore requests the Chamber to order, in essence, the following measures:

[1] Requiring that the names, addresses and other identifying information concerning Defense witnesses and their whereabouts be kept under seal and not included in any records of the Tribunal;

[2] Prohibiting the disclosure to the public or the media of the names and addresses of Defense witnesses as well as their whereabouts and other identifying information;

[3] Requiring the Prosecutor and the Witness and Victims Support Section to limit to the minimum the number of persons with access to information concerning protected witnesses when their names shall have been communicated by the Defense;

[4] Ruling that the Defense shall be allowed a period of 21 days for the disclosure, to the Prosecutor, of information concerning the Defense witnesses prior to the appearance of the latter;

[5] Prohibiting the Office of the Prosecutor from revealing to anyone whomsoever the names and addresses as well as other identifying information concerning witnesses when

such information shall have been disclosed by the Defense;

[6] Requiring that the Prosecutor and her representatives, acting on her instructions, shall notify the Defense of any request to contact Defense witnesses and for the Defense to make the necessary arrangements to that end;

[7] Prohibiting the photographing and/or video recording, or sketching of any Defense witnesses at any time or place without leave of the Chamber and the parties;

[8] Requiring that the Defense shall use a pseudonym to designate each Defense witness it shall call whenever referring to such witness in proceedings, communications and discussions between the parties to the trial, and to the public;

[9] That Defense witnesses shall be entitled to protection by the Victims and Witness Support Section under the same conditions as those granted to Prosecution witnesses;

[10] That the Defense reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

Prosecutor's submissions

5. The Prosecutor does not object to measures [1], [2], [4], [7], [8], [9] and [10], although she states that the Defense has provided a limited factual basis for its potential witnesses residing in Rwanda and insecure African countries such as the DRC. The Prosecutor, however, objects to granting protective measures for the potential Defense witnesses living in Europe.

6. Furthermore, the Prosecutor objects to measures [3], [5] and [6] submitting that these measures will conflict with her mandate to investigate and prosecute matters unrelated to the present case under Article 15 of the Statute. She argues that, orders limiting her contact to Defense witnesses, if granted, should be limited to contacts concerning the present case. Furthermore, the Prosecutor relies on the "Decision on the Defense Preliminary Motion for Protective Measures for Witnesses," in *Prosecutor v. Kayishema* Case No. ICTR-95-1-T, rendered on 23 February 1998, which underscores a Party's right, in this case, the Prosecutor, to present her case with, particularly the rebuttal to the defense plea of alibi.

AFTER HAVING DELIBERATED

7. The Chamber notes that the Defense brings the Motion on the basis of Articles 20 and 21 of the Statute and Rules 69 and 75 of the Rules.

8. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely Rule 69 and 75 of the Rules. Such protection measures shall include, but shall not be limited to the conduct of in camera proceedings and the protection of victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber may, *proprio motu* or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

9. The Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the

Prosecutor's witnesses.

10. Rule 69 of the Rules *inter alia* provides that in exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

11. Thus, the Chamber, being mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 of the Statute shall therefore, order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

12. The Chamber recalls the findings in *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, "Decision on Protective Measures for Defense Witnesses" rendered on 13 July 1998, at para. 9, that, "[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses."

13. In this case, notice is taken of the documents filed in support of the Motion, which tend to describe a particularly volatile security situations at present in Rwanda and in neighboring countries such as the DRC. These volatile security situations could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda.

14. On this basis, the Chamber sees the fears of the potential witnesses and their families, if they testify on behalf of the Accused without protective measures, as being well founded.

As to the Merits of the Measures Requested

15. As to the Prosecutor's argument that the Defense has provided limited factual basis for its potential witnesses residing in Rwanda and insecure African countries such as the DRC, she objects to granting protective measures for the potential Defense witnesses living in Europe. The Defense, on this score, has requested protective measures for its potential witnesses residing in Europe but who have relatives residing in Rwanda and neighboring countries such as the DRC.

16. The Chamber considers that the Defense has indeed demonstrated fears, which pertain to potential witnesses residing in Rwanda and insecure African countries such as the DRC. However, taking into account the present security situation affecting these potential witnesses, the Chamber considers that though the Defense has provided sufficient factual grounds for the protective measures sought by the Defense with respect to those witnesses residing in Rwanda, and neighboring countries such as the DRC only, the security situation would affect any potential witness residing elsewhere, in this case Europe. The Chamber, therefore, grants protective measures for potential Defense witnesses residing in Rwanda neighboring countries such as the DRC and for those potential witnesses residing in Europe but who have relatives residing in Rwanda and neighboring countries such as the DRC.

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as requested for in measure [1], [2], [4] and [7]. Furthermore, the Chamber notes that the Prosecutor objects to measures [3], [5] and [6] for being in conflict with her mandate under Article 15 of the Statute with respect to her investigations and prosecution of matters unrelated to the present case.

18. The Chamber, upon a plain reading of the requests, is of the opinion that measure [3] and [5] are normal measures assuming the anonymity of witnesses and that they do not conflict with the Prosecutor's mandate under Article 15 of the Statute.

19. At this juncture, as regards anonymity, the Chamber recalls the reasoning in *Prosecutor v. Nsabimana,* Case No. ICTR-97-29-I, "Decision on the Defense Motion to Obtain Protective Measures for the Witnesses of the Defense," rendered on 15 February 2000, (the "Nsabimana Decision"). In the said Decision, the Chamber highlights *inter alia* that, in order for witnesses to qualify for protection of their identity from disclosure to the public and the media, there must be, "[...] a real fear for the safety of the witnesses and an objective basis underscoring the fear."

20. In the present case, the Chamber, following this reasoning, and considering the submissions of the Defense, is of the opinion that there is sufficient showing of a real fear for the safety of the potential Defense witnesses were their identity to be disclosed. Consequently, the Chamber grants measures [1], [2], [3], [4], [5], and [7] as requested in the Motion.

21. As regards measure [6] the Chamber, notes the Tribunal's jurisprudence in this regard, notably in *Prosecutor v. Nahimana,* "Decision on Defense's Motion for Witness Protection" rendered on 25 February 2000, and grants the said measure that requires the Prosecutor and her representatives who are acting under her instructions to notify the Defense of any request for contacting the Defense witnesses, and the Defense shall make arrangements for such contacts.

22. As regards measure [8], the Chamber recalls its "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" in *Prosecutor v. Bicamumpaka* ICTR-99-50-T rendered on 12 July 2000, whereby at para. 15 the Chamber granted the measure so that the Prosecutor should designate a pseudonym for each protected Prosecution witness. Similarly, the Chamber grants the Defense request in measure [8] as requested.

23. As regards the request made in measure [9], the Chamber, mindful of Article 20(1) of the Statute that all Parties are equal before the Tribunal, considers the Defense request in Measure [9] to be as of right, so that to the extent possible the Defense witnesses should be accorded the same conditions as those granted to Prosecution witnesses when they are under the protection of the Victims and Witness Support Section.

24. As regards measure [10], the Chamber considers that the Defense is obviously at liberty, pursuant to Rule 75 of the Rules to request a Judge or Trial Chamber, at any time, to amend the protective measures sought or to seek additional measures for its witnesses, if necessary.

As to the taking into effect of the protective measures sought

25. The Chamber finally decides that, in conformity with the Tribunal's well-established jurisprudence, in any case such protective measures are granted on a case by case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Chamber adds that the Defense shall furnish to the Victims and Witnesses Support Section of the Registry with all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Defense requests in measures [1], [2], [3], [4], [5], [6], [7] and [8] of the Motion for its potential witnesses residing in Rwanda, the neighboring countries such as the DRC and for those potential witnesses residing in Europe but who have relatives living in Rwanda and neighboring countries such as the DRC;

Arusha, 22 March 2001.

Laïty Kama
Judge

(Seal of the Tribunal)

PROSECUTION AUTHORITIES

9. *Prosecutor v. Kajelijeli,* ICTR-98-44-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 6 July 2000.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER II

Original : French

Before:
Judge Laïty Kama, Presiding Judge
Judge William H. Sekule
Judge Mehmet Güney

Registry: John Kiyeyeu

Decision of: 6 July 2000

THE PROSECUTOR

V.

Juvénal Kajelijeli

ICTR-98-44-I

DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

Counsel for the Prosecutor:

Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence :

Mr Lennox Hinds

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal")

SITTING as Trial Chamber II, composed of Presiding Juge Laïty Kama, Judge William H. Sekule and Judge Mehmet Güney;

SEIZED of the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses in Prosecutor v. Juvénal Kajelijeli (the "Motion"), submitted on 9 March 2000;

CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

CONSIDERING that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

WHEREAS Defence Counsel for Juvénal Kajelijeli has not responded to the Prosecution's Motion;

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69 and 75 of the Rules of Procedure and Evidence (the "Rules"):

ARGUMENTS OF THE PROSECUTION

1. The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.

2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue the following orders articulated at point 3 of its Motion:

a) Requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses be sealed by the Registry and not included in any records of the Tribunal;

b) Requiring that the names, addresses, whereabouts of, and other identifying information concerning the individuals cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;

c) Requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals is contained in existing records of the Tribunal, that such information be expunged from the documents in question;

d) Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry or any other information which would reveal the identity of these individuals, and this order shall remain in effect after the termination
of the trial;

e) Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

f) Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in Paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;

g) Prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Chamber and the Parties;

h) Prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and authorizing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and, in any event, ordering that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven days before such individuals are to testify at trial unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules;

i) Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents of guardian of that person if that person is under the age of 18,
that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

j) Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the witnesses in question decide otherwise.

Moreover, the Prosecution stipulates in its request that it reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

3. Having cited several decisions rendered by the Trial Chambers ordering protective measures for potential witnesses for reasons of security, the Prosecutor maintains that in the instant case there has been no improvement in the reigning insecurity, which existed when the earlier cases were decided.

HAVING DELIBERATED,

On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):

4. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be effective until the Chamber determines otherwise, without prejudice, pursuant to Article 69 (C), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

5. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the International Criminal Tribunal for Ex-

Yugoslavia ("ICTY") in Prosecutor v. Tadi‰, IT-94-I-T. In its decision of 10 August 1995, the Chamber held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decision, the ICTY determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

6. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation situation prevalent in Rwanda and neighboring countries could be be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. Consequently, the Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

On point 3(f) of the Motion

7. The Chamber will grant the measures requested by the Prosecutor, with a modification of the measure which provides that any member leaving the Defence team remit "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted.

8. The Chamber endorses the holding in Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, (3 March 2000), concerning the Prosecutor's Motion for Protective Measures for Victims and Prosecution Witness, in which the Trial Chamber substituted the words "all materials" in place of "all documents and information".

On points 3(g) and 3(i) of the Motion

9. Regarding the measures sought in points 3(g) and 3(i), the Chamber considers that these are normal protective measures which do not affect the rights of the accused and decides to grant them as they stand.

On the Period of Disclosure of the Identity of the Prosecution Witnesses to the Defence before they testify (Point 3(h) of the Motion):

10. According to the Chamber, the seven (7) day period proposed by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial is not reasonable to allow the accused requisite time to prepare for his defence, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

11. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial (Prosecutor v. Semanza, ICTR-97-21-I, (10 December 1998); Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, (3 March 2000); Prosecutor v. Nsabimana and Nteziryayo, IctR, (21 May 1999);).

On the Use of Pseudonyms (point 3(j) of the Motion)

12. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in Prosecutor v. Muhimana, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials";

MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.

Arusha, 6 July 2000

Laïty Kama	William H. Sekule	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

PROSECUTION AUTHORITIES

10. *Prosecutor v. Delalic,* IT-96-21, Decision on the Motion by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through "M", 28 April 1997.

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IN THE TRIAL CHAMBER

Before:

Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:

28 April 1997

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTIONS BY THE PROSECUTION FOR PROTECTIVE MEASURES FOR THE PROSECUTION WITNESSES PSEUDONYMED "B" THROUGH TO "M"

The Office of the Prosecutor

Mr. Eric Ostberg Mr. Guiliano Turone
Ms. Teresa McHenry Ms. Elles van Duschotten

Counsel for the Accused

Ms. Edina Residovic, Mr Ekrem Galiatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Mr. Branislav Tapuskovic, Mr. Micheal Greaves for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Mr. Mustafa Brackovic, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On 10 March 1997, the trial commenced before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law

Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") of the four accused person, Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, for crimes within the jurisdiction of the International Tribunal, namely, grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war, which were allegedly committed in 1992 within the precincts of the Celebici camp, in Konjic Municipality of the Republic of Bosnia and Herzegovina.

Presented for determination by the Trial Chamber are six separate motions (jointly referred to as the "Motions") by the Office of the Prosecutor ("Prosecution") seeking protective measures for twelve witnesses in this case, designated by the pseudonyms "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L" and "M".

The first motion, seeking protective measures for witness "B", was filed on 25 February 1997 (Official Record at Registry Page ("RP") D 2852 - D 2856). The second, third, and fourth motions, seeking protection for witnesses "C", "D" and "E" respectively were filed on 26 February 1997 (RP D 2876 - D 2880, D 2881- D 2885, and D 2886 - D 2890 respectively). The fifth motion, seeking protection for witness F, was filed on 28 February 1997 (RP D 2892 - D 2896), while the sixth motion, seeking protection for witnesses "G" through to "M", was filed on 13 March 1997 (RP D 3013 - D 3017).

The Defence on behalf of three of the accused persons, Zejnil Delalic, Hazim Delic and Esad Landzo, filed a *Joint Response of Defence to Prosecution's Motion for Protective Measures for Witnesses "B", "C", "D", "E", "F"* on 10 March 1997 (RP D 2993 - D 2995). On 11 March 1997, the Defence on behalf of the accused, Zdravko Mucic filed a *Response to the Prosecution's Motion for Protective Measures for Witnesses "B", "C", "D", "E" and "F".*

On 14 March 1997, both the Prosecution and the Defence for the four accused persons argued their positions orally before the Trial Chamber in a closed session hearing. At the same hearing, the Trial Chamber heard Mr. William McGreeghan of the International Tribunal's Victims and Witnesses Unit with respect to certain matters concerning witnesses "G" through to "M".

The Trial Chamber delivered an oral decision, granting the Motions in part and denying them in part, on 24 March 1997, reserving a written decision to a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

1. The Prosecution urges the Trial Chamber to grant the protective measures sought on the basis of the provisions of Rule 75 of the International Tribunal's Rules of Procedure and Evidence ("Rules").

Rule 75

Measures for the Protection of Victims and Witnesses

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the

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Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims or witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an *in camera* proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chamber's public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) giving testimony through image- or voice- altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measure to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

2. Certain other provisions of the Statute of the International Tribunal ("Statute") and the Rules, some of which are hereinafter set out, are also of relevance to the determination of the issue before the Trial Chamber.

Rule 78

Open Sessions

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Rule 79

Closed Sessions

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

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(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

Rule 90

Testimony of Witnesses

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

. . . .

B. Pleadings

I. The Prosecution

3. The Prosecution seeks eleven separate measures for the protection of the twelve witnesses, "B" through to "M", in the following terms.

Prayer 1: the names, addresses, whereabouts and other identifying data concerning the pseudonymed witnesses shall not be disclosed to the public or to the media;

Prayer 2: all hearings to consider the issue of protective measures for the pseudonymed witnesses shall be held in closed session, however, edited recordings or transcripts of the session(s) shall, if possible, be released to the public and to the media after review by the Office of the Prosecutor in consultation with the Victims and Witnesses Unit to ensure that no information leading to the possible identification of the witnesses is disclosed;

Prayer 3: the names, addresses, whereabouts of, or other identifying information concerning the pseudonymed witnesses shall be sealed and not included in any of the public records of the International Tribunal;

Prayer 4: to the extent the names, addresses, whereabouts of, or other identifying information concerning the pseudonymed witnesses are contained in existing public documents of the International Tribunal, that information shall be expunged from those documents;

Prayer 5: documents of the International Tribunal identifying the pseudonymed witnesses shall not be disclosed to the public or to the media;

Prayer 6: the pseudonyms shall be used whenever the witnesses are referred to in International Tribunal proceedings and in discussions among the parties;

Prayer 7: the testimony of the pseudonymed witnesses shall be heard in closed session or, if a witness is willing to appear in open court, his/her testimony may be given using image and voice altering devices to the extent necessary to prevent his/her identity from becoming known to the public or the media;

Prayer 8: if the testimony of the pseudonymed witnesses is given in closed session, edited recordings and transcripts of the session(s) shall be released to the public and to the media after review by the Office of the Prosecutor in consultation with the Victims and Witnesses Unit to ensure that no information leading to the possible identification of the witnesses is disclosed;

Prayer 9: the accused, the Defence Counsel and their representatives who are acting pursuant to their instructions or request shall not disclose the names of the pseudonymed witnesses or other identifying data concerning these witnesses, to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witnesses adequately. Any such disclosure shall be made in such a way as to minimise the risk of the witnesses' names being divulged to the public at large or to the media;

Prayer 10: the accused, the Defence Counsel and their representatives who are acting pursuant to their instructions or request, shall notify the Office of the Prosecutor of any requested contact with the pseudonymed witnesses or their relatives, and the Office of the Prosecutor shall make arrangements for such contacts as may be determined necessary; and

Prayer 11: the public and the media shall not photograph, video-record or sketch the pseudonymed witnesses while they are within the precincts of the International Tribunal.

4. Additionally, in respect of witness "B", the Prosecution seeks protective measures in the following terms.

> [W]itness B shall testify from the remote witness room, and his testimony shall be broadcasted [sic] to the courtroom by one-way closed circuit television. The image of witness B shall appear on the screens of the Trial Chamber, of the Defence counsel and the Prosecution, but not on the screens of the accused. For the screens of the accused an image distortion shall be used
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> . . . .
>
> RP D 2853 at para. 6.

5. The protective measures sought by the Prosecution may be categorised into three groups. The first set of measures, sought for all twelve witnesses are for *confidentiality* or protection from the public and the media. The second, sought only for witness "B", is a form of *partial anonymity* from the accused person. The third, also sought only for witness "B", is for protection against *retraumatisation.*

i. Confidentiality

6. In the Motions and orally, the Prosecution offered reasons to justify the requests of each of the witnesses for confidentiality.

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7. In the case of witness "B", who is alleged to have been a detainee in the Celebici camp, the reason given is that his family still lives in Konjic municipality. Witness "B" fears that his family will be vulnerable to acts of retaliation if his status as a witness in this case becomes public.

8. With regard to witness "C", the Prosecution alleges that, as a detainee in the Celebici camp, this witness was a victim of sexual assault. It submits that the witness will find it extremely difficult and embarrassing to testify about this in public, and also wishes to protect another person, also a victim of the sexual assault, from being exposed to the public.

9. For witness "D", the Prosecution states that, although the witness was not detained in Celebici, the witness has very specific knowledge about what happened in the camp. The witness has expressed a fear that if it becomes public that he will be a witness in this case, he would be in danger within the Bosnian community of refugees in which he currently resides in a host country.

10. The Prosecution states that witness "E", who is also alleged to have been detained in the Celebici camp, lives as a refugee in a host country where there have been acts of violence directed against persons of his ethnic group. The Prosecution contends that there will be safety risks for him in that community if his participation as a witness in this case becomes public.

11. On behalf of witness "F", the Prosecution submits that he lives in a community where persons of his ethnic group are in the minority. It contends that there are tensions between the different ethnic groups living in this community and that the safety of witness "F"' will be called into question if it becomes public knowledge that he will be a witness.

12. The Prosecution further contends that witnesses "G" through to "M" were all detained for varying periods of time in the Celebici camp. They do not wish their status as witnesses in this case to become public because they live in a Bosnian refugee community in a host country composed of persons of different ethnic groups, and their testimony will leave them vulnerable to acts of retaliation. In addition, the Prosecution contends that a report that a person has been making enquiries about witnesses in this case in their host country has heightened their desires to be protected from possible acts of violence by this person. Mr. William McGreeghan of the Victims and Witnesses Unit stated that the Unit had received this report and that appropriate steps have been taken to have the matter investigated by the relevant authorities in the host country.

13. In sum, therefore, the twelve witnesses, with the exception of witness "B", whose special position will be considered in more detail below, do not seek any protection from the accused, and the Prosecution has disclosed the names of each of these witnesses to the Defence. The prayers for confidentiality are in relation to third parties, namely, the general public and the media. In principle, the Prosecution desires that the testimony of the witnesses should be heard in open session as much as possible, with the possibility of going briefly into private sessions if the testimony contains sensitive information. Furthermore, the Prosecution submits that witnesses "D", "E", "H" and "M", have no objection to their names being mentioned by other witnesses; they only wish to keep their roles as witnesses in this case from the public and the media.

ii. Partial Anonymity and Retraumatisation

14. The Prosecution submits that witness "B" seeks to avoid face to face confrontation with the accused persons while giving testimony for two reasons. First, witness "B" believes that if the accused persons see him in court, they will recognise him and this will bring "additional security risks" for his family (RP 2855 at para.4). Witness "B" believes that his family will not exposed to such risks in the absence of

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visual confrontation because his name, which has been disclosed to the accused persons, is insufficient to enable them to identify him. Secondly, the Prosecution submits that it has learnt, from a telephone conversation with witness "B", that the witness is very traumatised by his experiences in the Celebici camp. It declares that witness "B" is very nervous about testifying and has expressed a wish not to have to see the accused persons when he does so. It contends that seeing the accused persons, even after four years, will be too much for this witness. On these grounds, the Prosecution urges the Trial Chamber to permit witness "B" to testify from the remote witness room, out of the view of the accused.

15. On the whole, the Prosecution implores the Trial Chamber to acknowledge that risk appraisal is personal to each individual, so that the possibility of retraumatisation, the apprehension of danger and the fear of retaliation either from the public or the accused persons will vary from one person to another. It argues that the protective measures sought would respond to the individual needs of each witness while at the same time safeguarding the rights of the accused. It declares that the Trial Chamber would be striking a proper balance between the public interest in the protection of witnesses and the rights of the accused by granting the relief requested.

II. The Defence

16. In a joint written response, the Defence on behalf of the accused persons, Zejnil Delalic, Hazim Delic and Esad Landzo states that it finds no objective basis for the requests on the grounds of fear, danger or retaliation. However, "for the sake of judicial economy" the Defence maintains no objections to the Motions provided that there is "face to face testimony within the courtroom of the Tribunal" (RP 2994). The Defence contends that such a face to face confrontation between the accused and the witnesses against them is guaranteed by the provisions of Rule 90(A). Defence counsel for the accused Zdravko Mucic in his written response supports the response of the other accused persons.

17. In oral argument, the Defence on behalf of each of the accused persons argued its position separately.

Zejnil Delalic

18. The Defence for this accused contends that there are no objective grounds for requesting protection for as many as one-fifth of the witnesses of fact in this case. Specifically, in relation to witness "B", Defence counsel contended that there is no real argument or explanation as to why this witness seeks the forms of protection sought. For witness "C", counsel stated that she had "no comment". With respect to witnesses "G" through to "M", the Defence avers that the fact that a person is searching for witnesses in this case does not bring into jeopardy the safety of anyone. The Defence raises the possibility that the search for witnesses may be for the purposes of investigations connected with the case.

Zdravko Mucic

19. The Defence counsel for this accused contended that the Prosecution has not given sufficient reasons to justify the protection sought in each individual case. Counsel took particular exception to the protection sought for witness "D" whom he contended held a position within the Celebici camp and ought, therefore, to give evidence in open session.

Hazim Delic,

20. On behalf of this accused, the Defence rejects the argument of the Prosecution that risk assessment is a personal matter. It declares that this is to turn the test for granting protective measures on its head.

Arguing that the Prosecution has called no objective evidence in support of its requests, the Defence contends that it is for the Trial Chamber to determine on the basis of such objective evidence whether to exercise its discretion to grant protection. Emphasising the right of the accused to a public trial, the Defence also avers that there is a real risk that the trial will be perceived as unfair if one-fifth of the Prosecution's fact witnesses are heard in closed session.

Esad Landzo

21. The Defence for Esad Landzo agrees with the arguments put forward on behalf of the other accused persons. It contends, in relation to witness "B", that the Prosecution has not satisfied the threshold necessary to obtain the forms of protection sought. The Defence argues that unless there is medical evidence to prove that witness "B" is in such a serious emotional state that confronting the accused would result in retraumatisation, the Trial Chamber should not grant the requested measures. With regard to witnesses "G" through to "M", Defence Counsel expressed the opinion that the reasons for seeking protection are imaginary and fabricated by the witnesses in question.

C. Findings

22. The Motions before the Trial Chamber raise matters of fundamental and critical importance in the determination of cases under the jurisdiction of the International Tribunal. Particularly, they bring into special focus issues relating to the conflicts between the rights of the accused and the protection of witnesses during trial. Concisely stated, the following issues call for determination. First, there are issues of confidentiality or the non-disclosure of the names and other identifying information of the witnesses to the public and the media. Secondly, there is the issue of partial anonymity of a witness by providing protection from the public, the media and the accused. Thirdly and finally, there is the issue of preventing the retraumatisation of a witness by providing protection from the accused. The Trial Chamber will consider these issues *seriatim*. We shall, however, first deal with the statutory and case-law background.

I. Statutory Background

23. A number of the applicable provisions of the Statute and the Rules are set out above. The Statute is very careful, explicit and unequivocal in defining the rights of the accused, whilst at the same time providing for the protection of victims and witnesses.

24. Article 15 of the Statute vests the Judges of the International Tribunal with the power to formulate and adopt the Rules of Procedure and Evidence and to include therein, rules for the protection of victims and witnesses. Article 22 provides that the measures set out in such rules shall "include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity". The rationale for this provision is as stated in paragraph 108 of the *Report of The Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), (U.N.Doc. S/25704, 3 May 1993), ("Report").

> In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape and sexual assault . . . .

25. The importance attached to the protection of victims and witnesses is exemplified by a specific

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mention in paragraph 99 of the Report where it is stated that the Trial Chambers shall also provide appropriate protection for victims and witnesses during proceedings. Article 20 which regulates the commencement and conduct of trial proceedings provides in paragraph 1 as follows.

> The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

The same Article in paragraph 4 provides that "hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."

26. Furthermore, the Secretary-General observed as follows in paragraph 106 of the Report.

> It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights

Article 21(4) prescribes the minimum guarantees of a fair trial. In Sub-paragraph (e), it states that the accused is entitled "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Consistent with the powers vested in the Judges, Rules 69, 75, 79, 90 and 96 have been adopted for the protection of victims and witnesses.

27. In the determination of the Motions, we shall rely on the interpretation of the Statute and the Rules. The International Tribunal, through decisions of the Trial Chambers, is gradually creating its own precedents - a factor which was lacking at its inception. It is, therefore, helpful to consider, for purposes of interpretation, recent decisions of the Trial Chambers on the applicable provisions. Article 31 of the Vienna Convention on the Law of Treaties (U.N.Doc. A/CONF. 39/27) has been found to be useful and relevant in the interpretation of the Statute and the Rules. Similarly, decisions on the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR") have been found to be authoritative and applicable. This approach is consistent with the view of the Secretary-General that many of the provisions in the Statute are formulations based upon provisions found in existing international Instruments (See paragraph 17 of the Report).

28. The Trial Chamber shall interpret the relevant provisions in the light of the object and purpose of the International Tribunal. The object and purpose of Security Council Resolution 827, establishing the International Tribunal has been described as threefold, namely, to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace. (First Annual Report of the International Tribunal at para. 11, U.N.Doc A/49/150(1994)).

29. The Trial Chamber shall now consider the subject matter of the requests in the Motions in their order of gravity.

II. Confidentiality

30. The prayers requesting confidentiality are seeking non-disclosure of identifying information to the

public or the media. They also seek, by implication, a denial of the right of the accused to a public hearing, a right guaranteed under Article 21(2) of the Statute, and a requirement of Article 20(4) unless otherwise directed by the Trial Chamber. Rule 78 is based on Article 20(4) of the Statute. The circumstances under which the Trial Chamber will order the exclusion of the media and public from all or part of the proceedings are prescribed in Rule 79. Fear is a reason common to eleven of the twelve witnesses in respect of whom protection is sought from the public or media. Fear, that public knowledge of their testimony will result in danger to themselves and their families. For one of the witnesses, witness "C", the reason for the confidentiality request is not fear, but a desire for privacy, a wish not be publicly associated with the alleged sexual assaults upon his person and that of another.

31. In *Prosecutor v Dusko Tadic*, (Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R, IT-94-1-T, T.Ch. II, 31 July 1996 at para. 6), Trial Chamber II, (Judges McDonald, presiding, Stephen and Vohrah), construing the provisions of Rule 79(A)(ii) made the following statement.

> In balancing the interests of the accused, the public and witness R, this Trial Chamber considers that the public's right to information and the accused's right to a public hearing must yield in the present circumstances to confidentiality in the light of the affirmative obligation under the Statute and the Rules to afford protection to victims and witnesses. This Trial Chamber must take into account witness R's fear of the serious consequences to members of his family if information about his identity is made known to the public or the media.

32. Article 21(2) of the Statute of the International Tribunal provides as one of the rights of the accused that, "[i]n the determination of charges against him, the accused is entitled to a fair, and public hearing, subject to Article 22 of the Statute." This provision, which is made subject to Article 22, anticipates the circumstances when the accused should not be entitled to the exercise of his right to a public hearing. Article 22 directs the Judges to make rules for the protection of the victims and witness enabling the conduct of *in camera* proceedings and the protection of the identity of the victim. The protection of the witness by *in camera* proceedings does not invariably detract from the right of the accused, nor from the duty of the Trial Chamber to give full respect to the rights of the accused (see Rule 75 (B)(i)).

33. It is important to note that the Trial Chamber cannot without good reason, deny the accused the right to a public hearing enshrined in Articles 20(4) and 21(2). Rule 75(A) enacted pursuant to Article 22 provides.

> A Judge or a Chamber may *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the rights of the accused.

Accordingly the measures formulated by virtue of Article 22 must be consistent with the rights of the accused. The Statute of the International Tribunal emphasises the public nature of a trial as an essential feature of the proceedings (Articles 20(4), 21(2)).

34. The principal advantage of permitting the public and the press access to a hearing is that their presence contributes to ensuring a fair trial. In *Pretto & Ors v Italy*, (Series A, No. 71 (1984) 6 EHRR 182) the ECHR stated that "[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered". Thus, a public hearing is mainly for the benefit of the accused and not necessarily of the public. The

following dictum of Chief Justice Warren in *Estes v Texas,* a case decided by the United States Supreme Court, supports this view.

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously. . . .

381 U.S. 532 at 583 (1965)

35. The two interests requiring attention in the trial which ought to be maintained, are the right of the accused to a public hearing, and the right of the witness to protection in the interests of justice. Accordingly, the Trial Chamber in considering the motion must balance these two interests. This is clearly provided by Rule 79 which enables the exclusion of the press and public from the proceedings for various reasons including safety by the non-disclosure of the identity of a victim or witness. Thus, in certain circumstances, the right to a public hearing may be qualified and curtailed to accommodate other interests.

36. Several of the Rules relate to maintaining a balance between the right of the accused to a public hearing and the protection of victims and witnesses. Rule 69 allows for non-disclosure at the pre-trial stage of the identity of a victim or witness who may be in danger until the witness is brought under the protection of the International Tribunal. This non-disclosure applies to the press, public and the accused. Under Rule 75 appropriate measures consistent with the rights of the accused may be taken to protect victims and witnesses. Rule 79 enables the exclusion of the press and public from the proceedings on the grounds of public order or morality, the safety or non-disclosure of the identity of a victim or witness or the protection of the interest of justice.

37. It is clear from the construction of the provisions of the relevant Articles of the Statute of the International Tribunal, namely Article 20(4), 21(2) and 22, and the enabling Rules, namely, Rules 69, 75 and 79, that the Statute which is the legal framework for the application of the Rules, provides that the protection of victims and witnesses, is an acceptable reason to limit the accused's right to a public trial. Article 14(1) of the ICCPR and Article 6(1) of the ECHR state that everyone is entitled to a fair and public hearing. Nevertheless both Articles provide that the press and the public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or where publicity would prejudice the interest of justice.

38. The satisfaction of the public interest in this case is of crucial importance. This trial, apart from being the first multiple-defendant international criminal trial since the Nürnberg and Tokyo trials involving crucial issues relating to command responsibility, is also the second trial before the International Tribunal.

39. After considering all the rights and interests in issue, the Trial Chamber is not persuaded that the arguments presented by the Prosecution have shown that all the twelve witnesses indicated must be heard in closed sessions in order to guarantee their protection. The Trial Chamber notes the submissions of the Defence that granting the prayers of the Prosecution will result in too much evidence being heard in closed sessions. The Trial Chamber is aware of its statutory duty to protect witnesses and cannot lightly abdicate the same. It is encouraging that none of the parties has suggested the contrary. The Trial Chamber is of the opinion that a combination of protective measures, including closed sessions will satisfy the needs of the witnesses and constitute adequate protective measures in these proceedings.

(i) Witness "C"

40. Witness "C" is alleged to have been a victim of sexual assault. Testifying about the event can be a most difficult and humiliating experience for him. In this case the evidence is likely to concern another person who is not a witness. The Report at paragraph 108 makes specific mention of the need to protect victims and witnesses especially in cases of rape or sexual assault. The Trial Chamber has no hesitation whatsoever in granting to the Prosecution its request for a closed session hearing for the testimony of witness "C".

41. Public order or morality is one of the reasons for excluding the public or the media from all or part of the proceedings (Rule 79 (A)(i)). The identity of sexual assault victims has conveniently been considered not subject matter of public disclosure. A number of jurisdictions, both civil and common law, have adopted the position that the identity of an alleged victim of sexual assault should be kept from the public. In England and Wales, Section 4 of the Sexual Offences (Amendment) Act, 1976, provides that after a woman has complained of a rape offence, neither her name nor her address nor a still or moving picture of her shall be published during her lifetime if it is "likely to lead members of the public to identify her as an alleged victim of such an offence". Furthermore, the Canadian Criminal Code (1954) in Section 442(3) guarantees anonymity from the public upon application to the Court.

42. Civil law jurisdictions such as Switzerland, Denmark and Germany have similar legislation. Swiss law prohibits the publication of the identity of a victim if it is necessary to protect the interests of the prosecution or if the victim requests non-disclosure. The courtroom may be closed during the victim's testimony (Bundesgesetz Über die Hilfe an Opfer von Strafteten, art. 5). In Denmark, a victim in an incest or rape case, may request a trial *in camera* and would be granted (Administration of Justice Act section 29). In Germany, publicity can be restricted or excluded, in order to protect the accused and witnesses. ((Gerichtsverfassungsgesetz sec. 170) - See Christine van den Wyngaert, Criminal Procedure Systems in the European Community (1993)).

43. Furthermore, in *The Prosecutor v Dusko Tadic,* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses ("The Tadic Protection Decision"), Case No:. It-94-1-T, T.Ch. II, 10 August 1995 at para. 40), the majority of Trial Chamber II, Judges McDonald and Vohrah, cited several decided cases regarding sanctions on the press in the United States of America for disclosing the identities of sexual assault victims - *Florida Star v BJF*, 491 U.S. 524 (1989). There are also other cases such as *Waller v Georgia*, 467 U.S. 39, 46 (1984). For partial closure see *Douglas v Wainwright*, 739 F 2d. 531 (11th cir. 1984). For total closure see *Press-Enterprise Co. v Superior Court*, 464 U.S. 501 (1984).

44. In all these jurisdictions, evidence involving sexual assault afford sufficient reasons to justify confidentiality.

45. The Trial Chamber has come to the decision to permit witness "C" to give testimony in closed session. The Defence has not specifically raised any objections to the measure. Counsel for the accused, Zejnil Delalic, in response to the Prosecution during oral argument stated that "[i]n relation to witness number C, we have no comment".

(ii) Witnesses "D" through to "M"

46. In the circumstances of the International Tribunal, in addition to cases concerning sexual assault, sufficient consideration may be found to justify confidentiality, where there are demonstrable fear of reprisals, taking into account the community in which the witnesses and their families live. This view is

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facilitated by the statutory duty of the Trial Chamber to offer protection, in appropriate circumstances, and the inability of the International Tribunal to guarantee the safety of the victims or witnesses due to the lack of a viable witness protection programme.

47. In relation to all the other witnesses apart from witness "B", the Trial Chamber does not consider that the Prosecution has satisfied the requirements to permit the testimony of any of them to be heard in closed session. The Prosecution's argument that fear is subjective and that risk assessment is a personal matter is well founded. However, the Trial Chamber must be presented with some objective criteria upon which it can base its decision whether to grant or to refuse the requests for protection.

48. The Prosecution has failed to give any indication as to the nature or importance of the testimony of these witnesses. It would seem to us that, if the testimony of these witnesses were crucial, then the more vulnerable they would be to acts of retaliation. In respect of witnesses "G" through to "M" the Prosecution conceded during oral argument that investigation about the person allegedly searching for the Celebici witnesses, and whose activity stirred up the fear is still ongoing. The reports are as yet unsubstantiated.

49. In these circumstances, the Trial Chamber finds that the unsubstantiated fears of these witnesses may be abated by less severe protective measures than total confidentiality. We consider it sufficient, in the circumstances, that these witnesses should be shielded from visual recognition by the public and media. In accordance with the provisions of Rule 75B (i)(c) these witnesses may give their testimony in open session, through image altering devices.

III. Confidentiality / Partial anonymity

50. The Prosecution seeks non-disclosure to the public and the media of information identifying witness "B". The Prosecution also seeks protection from face to face confrontation with the accused on the ground that to permit the accused to see witness "B" will increase the danger to his safety. These protective measures *stricto sensu* amount to anonymity, as witness "B" has stated that the accused persons will only recognise him if they actually see him face to face. The name disclosed is not helpful for his identification.

51. The statements of witness "B" contain very strong allegations. The Prosecution has not sought to substantiate them but has merely presented them in the bare form as expressed by the witness.

52. More than the confidentiality, witness "B" seeks a protection making it impossible for the accused person to recognise him at the Trial. Admitting that accused persons cannot recognise him by his name alone, which is disclosed, the Prosecution seeks this protective measure. It is a fundamental principle in the administration of justice before the Trial Chambers to ensure that a trial is fair and expeditious and that the proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses (Article 20 of the Statute). Thus the balance between the rights of the accused and the protection of witnesses must be maintained.

53. The request on behalf of witness B, if granted, will undoubtedly diminish the exercise of some of the accused's rights, the most important of which is the right to examine or have examined, the witnesses against him (see Article 21(4)(e)). If the Trial Chamber grants the Prosecution's requests, the accused persons will be denied not only the right to a public hearing, but also a confrontation with the witness, a crucial part of a criminal proceeding. The Trial Chamber cannot ignore such an obvious conflict between the rights of the accused and the protection of the witnesses in the trial. The balancing of

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different interests is inherent in the notion of a fair trial. A fair trial means not only fair treatment to the accused but also to the prosecution witnesses.

54. The general rule is that all the evidence, as much as is practicable, should be produced in the presence of the accused at the hearing with a view to confrontation with the accused. The underlying reasoning for the disclosure of the identity of witnesses has been stated in *Kostovski v The Netherlands*.

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.
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> (1990) 12 EHRR 434.

55. Article 6 of the ECHR and Article 14 of the ICCPR which are nearly identical to Article 21(4)(e) of the Statute of the International Tribunal are relevant. The right of the accused to face his accusers cannot be compromised except in the public interest and to uphold public policy. In *Unterpertinger v. Austria* (1991) 13 EHRR, 175 the European Court of Human Rights held that non-confrontation of the accused with his accuser could constitute a violation of Article 6(1) of the ECHR. In *Delaware v Fensterer*, 474 U.S. 15, 22 (1985), the United States Supreme Court stated, with respect to the confrontation clause of the Sixth Amendment to the United States Constitution, as follows.

> The confrontation clause is generally satisfied when the defence is given a full and fair opportunity to probe and expose [testimonial] infirmities such as forgetfulness, confusion, or evasion through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness's testimony.

Ideally face to face confrontation is the core of the values epitomised in the accused confronting his accuser in each case. It is not a condition *sine qua non* of the right.

56. Three decisions of the Trial Chambers of the International Tribunal deserve consideration. First, there is the majority decision of Trial Chamber II, Judge Gabrielle McDonald presiding, in the Tadic Protection Decision, allowing anonymity notwithstanding the provisions of Article 21(4)(e) of the Statute. Secondly, there is the separate and dissenting opinion of Judge Stephen ("Judge Stephen's Dissenting Opinion") on the same matter. Thirdly, there is the decision of Trial Chamber I in *The Prosecutor v Tihomir Blaskic,* (Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses ("Blaskic Protective Measures Decision"), Case No.: IT-95-14-T, T.Ch. I 5 Nov. 1996). In that case, Trial Chamber I followed Judge Stephen's Dissenting Opinion

57. The interpretation of the provisions of Article 21(4)(e) in conflict with Article 22 and the question of witness anonymity were in issue in each case. The majority in the Tadic Protection Decision outlined guidelines to be applied in considering the testimony of the anonymous witness. First, the Judges must be able to observe the demeanour of the witness. Secondly, the Judges must be aware of the identity of the witness in order to test his reliability. Thirdly, the witness must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the incriminating information was obtained, excluding information enabling tracing the name. Finally, the identity of the witness must be released when the reasons for requiring such security of the witness is

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over.

58. These guidelines did not appeal to Judge Stephen who held otherwise. After considering the provisions of Articles 20(1), 21(4) and 22 he came to the conclusion that "the Statute does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21 and in particular the "minimum guarantee" in [paragraph] (4)" (See Judge Stephen's Dissenting Opinion at RP 5025).

59. In the Blaskic Protective Measures Decision, Trial Chamber I quoted Judge Stephen's Dissenting Opinion with approval. The Trial Chamber held as follows.

> The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.

RP 2147 at para. 24.

60. Trial Chamber I approved of the factors enumerated by the majority in the Tadic Protection Decision before anonymity could be granted. These are: (a) first and foremost, there must be real fear for the safety of the witness or his or her family; (b) secondly, the testimony of the witness must be important to the case of the Prosecutor; (c) the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; (d) the ineffectiveness or non-existence of a witness protection programme by the Tribunal; and (e) the protective measures taken should be necessary. However, Trial Chamber I required the Prosecution to show proof that the conditions were satisfied. This Trial Chamber agrees with the decision of Trial Chamber I in the Blaskic Protective Measures Decision and adopts the reasoning and decision therein.

61. The Prosecution has admitted that the accused will not know witness "B" merely by his name. Therefore, unless there is face to face confrontation, absent any protective measure, the Defence cannot possibly prepare adequately for cross-examination of the witness. The Defence will not in the circumstance possess adequate information, to place witness "B" in his proper setting *(People v Pleasant,* 244 NW2d 464 (1976)*)*. Granting the Prosecution's applications will constitute a violation of the accused's right under Article 21(4)(e), and will result in the anonymity of witness "B".

62. The Trial Chamber may conceive of a situation where the rights of the accused can be neutralised by protective measures. This is not such a case. It is admitted that the witness cannot be recognised by his name. It seems preposterous that the witness seeks protective measures against face to face confrontation with the accused which is the only factor which will enable the accused to offset his disadvantage. The Trial Chamber cannot concede the grant of the protective measure which is based on unsubstantiated allegations that the safety of the witness will thereby be jeopardised. The Prosecution has not satisfied the tests laid down by the majority in the Tadic Protection Decision for the grant of anonymity.

63. There is no indication by the Prosecution of the importance of the testimony of witness "B". There is nothing to show that the credibility of this witness has been investigated. There is no evidence before the Trial Chamber that the physical assaults allegedly suffered by witness "B" are traceable to any of the accused persons. In the circumstances therefore, the Trial Chamber declines to grant the request of the

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Prosecution that witness "B" should testify from the remote witness room. Witness "B" shall testify from the courtroom, where his demeanour can be observed by the Judges and Defence Counsel who will cross-examine him. In addition, the accused will be able to see witness "B" in the courtroom and may communicate freely with their Counsel during the course of his direct testimony and cross-examination.

IV. Retraumatisation

64. The Prosecution requests that witness "B" neither see the accused persons nor should they see him when giving testimony. The reason for this request is that witness "B" will be retraumatised if he sees the accused persons.

65. There is inestimable advantage to the Trial Chamber in a criminal proceeding where the accused and his accusers meet face to face. The Trial Chamber is afforded the unique opportunity and advantage of observing the facial and bodily expressions of the witness. In the decision of *Coy v. Iowa* (487 U.S. 1012, 1016 (1988)), the United States Supreme Court opined that there is something deep in human nature that regards face to face, confrontation between accused and accuser as essential to a fair trial in a criminal prosecution. The crucial nature of face to face confrontation does not, however, necessarily constitute it into an indispensable ingredient of a fair trial. Where there is a conflict between the protection of a vulnerable witness and the requirement of a face to face confrontation, the latter must yield to the greater public interest in the protection of the witness. This is exemplified in the provisions of Rule 75(B)(iii) which enables the Trial Chamber to order "appropriate measures to facilitate the testimony of vulnerable victims and witnesses."

66. The vulnerability of witness "B" is based on the possibility of retraumatisation. The Trial Chamber has no evidence of this other than the *ipse dixit* of the Prosecution. Retraumatisation is essentially a medical, psychological condition which requires better proof than the evidence before us. The evidence before us does not support the claim that witness "B" is a vulnerable witness.

67. The Trial Chamber rejects the submission of the Defence that Rule 90(A) implies that a witness can only be heard from the courtroom. Direct evidence is evidence presented directly before the Trial Chamber either from the courtroom or, in appropriate circumstances as determined and directed by the Trial Chamber, from the remote witness room. The mandate of the Trial Chamber is to ensure a fair trial, and maintain a balance between the rights of the accused and the protection of the witness.

68. The Trial Chamber does not consider in this case, that the testimony of witness "B" ought to be taken in the remote witness room, the grounds for making the request have not been substantiated. Less restrictive measures which will not interfere with the rights of the accused should satisfy the condition of witness "B". A screen will be placed in the Court room to prevent witness "B" from seeing the accused and, therefore, negate the possibility of the witness being retraumatised, as he has claimed he would be.

III. DISPOSITION

For the foregoing reasons, this **TRIAL CHAMBER**, being seised of the Motions filed by the Prosecution

PURSUANT TO RULE 75,

HEREBY ORDERS AS FOLLOWS:

Specific Measures

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(1) The testimony of witness "C" shall be heard in closed session during which neither members of the public nor of the media shall be present. Edited recordings and transcripts of the closed session(s) during which the testimony of witness "C" is given shall be released to the public and to the media after review by the Office of the Prosecutor and the Victims and Witnesses Unit to ensure that no information leading to the possible identification of the witness "C" is disclosed.

(2) Witness "B" shall testify from the courtroom in open session(s) during which the Trial Chamber and Defence Counsel shall be able to observe his demeanour. A protective screen shall be placed between witness "B" and the accused persons to prevent the witness from seeing the accused. The accused persons shall be able to see witness "B" on the electronic monitors assigned to them in the courtroom. Image altering devices shall be employed to ensure that the visual image of witness "B" is protected from the public and the media. The protective screen placed between the accused persons and witness "B" shall not impede the conduct of cross-examination in any manner and special measures may be requested of the Trial Chamber in this regard.

(3) The testimony of witnesses "D", "E", "F", "G", "H", "I", "J", "K", "L" and "M" shall be given in open session(s) using image altering devices in order to conceal their visual images from the public and the media;

(4) Unless the Trial Chamber determines that any part of the testimonies of witnesses "B", "D", "E", "F", "G", "H", "I", "J", "K", "L" and "M" should be heard in private session(s), every part of their testimonies will heard in open session(s) in the manner hereinbefore prescribed.

(5) If, pursuant to a determination of the Trial Chamber, the testimony of any of witnesses "B", "D", "E", "F", "G", "H", "I", "J", "K", "L" or "M" is heard in private session(s), edited recordings and transcripts of the private session(s) shall be released to the public and the media after review by the Prosecution and the Victims and Witnesses Unit to ensure that no information leading to the possible identification of the witnesses is disclosed.

(6) Defence Counsel shall not cross examine any of the pseudonymed witnesses on any matters relating to their identities or by which their identities may become known to the public or the media;

General Measures

(7) The pseudonyms by which these witnesses have been designated shall be used whenever the witnesses are referred to in the present proceedings and in discussions among the Parties.

(8) The names, addresses, whereabouts and other identifying data concerning the pseudonymed witness shall not be disclosed to the public or to the media.

(9) The names, addresses, whereabouts of, or other identifying information concerning the pseudonymed witnesses shall be sealed and not included in any of the public records of the International Tribunal.

(10) To the extent the names, addresses, whereabouts of, or other identifying information concerning the pseudonymed witnesses are contained in existing public documents of the International Tribunal, that information shall be expunged from those documents.

(11) Documents of the International Tribunal identifying the pseudonymed witnesses shall not be disclosed to the public or to the media.

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(12) The above listed general measures shall apply to witnesses "D", "E", "H" and "M" only so far as the identifying information contained in any of the public documents or records of the International Tribunal reveals the fact that that they are witnesses in this case. The general measures shall not apply to any documents or records containing the identifying information of witnesses "D", "E", "H" and "M" which does not reveal, either directly or by implication, that they are witnesses in this case.

(13) Defence Counsel and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of the pseudonymed witnesses or other identifying data concerning these witnesses, to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witnesses adequately. Any such disclosure shall be made in such a way as to minimise the risk of the witnesses' names being divulged to the public at large or to the media.

(14) Edited recordings or transcripts of the closed session hearing on these Motions held on 14 March 1997 shall be released to the public and the media only after review by the Office of the Prosecutor and the Victims and Witnesses Unit to ensure that no information leading to the possible identification of the witnesses is disclosed.

(15) The public and the media shall not photograph, video-record or sketch the pseudonymed witnesses while they are within the precincts of the International Tribunal.

All other prayers requested of the **TRIAL CHAMBER**, but not hereinbefore specifically granted, are hereby **DENIED**.

Done in both English and in French, the English text being authoritative.

Adolphus
Godwin
Karibi
-
Whyte

Presiding
Judge

Dated this twenty-eighth day of April 1997

At The Hague

the Netherlands.

[Seal
of
the
Tribunal]