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SCSL-2004-14-PT
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Designated Judge

Registrar: Robin Vincent

Date filed: 4 May 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – PT

PROSECUTION MOTION FOR MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

Office of the Prosecutor
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Defence Office
James Jenkin-Johnston for Norman
Michiel Pestman for Fofana
Charles Margai for Kondewa

INTRODUCTION

1) *Prosecutor against SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA*, SCSL-2004-14-PT, is a joinder of three separate trials, originally brought under three separate case numbers, namely, *Prosecutor against SAMUEL HINGA NORMAN* SCSL-2003-08-PT, *Prosecutor against MOININA FOFANA* SCSL-2003-011-PT and *Prosecutor against ALLIEU KONDEWA* SCSL-2003-12-PT.
2) The joinder decision was rendered on 27 January 2004. Prior to this date, when the three trials were still separate, a decision granting protective measures for prosecution witnesses was handed down in each case. While all three decisions grant identical protective measures, the time frames for disclosure to the defence of unredacted statements of protected prosecution witnesses are different with 42 days in the Norman and Fofana cases and 21 days in the Kondewa case.

PROSECUTOR'S MOTION

3) The purpose of this motion is twofold and it seeks the following:
    1) Modification of the two protective measures orders granted in *Prosecutor against SAMUEL HINGA NORMAN* and *Prosecutor against MOININA FOFANA*, with respect to (i) the time frame dictating the cut-off point for disclosure to the defence of unredacted witness statements and the identifying information of witnesses such as the names, addresses, locations and any other identifying data. The prosecution calls upon the trial chamber to modify the deadline for disclosure to 21 days before the witness is called to testify before the Special Court of Sierra Leone. The prosecutor submits that a necessity to change and unify the deadlines for disclosure is imposed by evidence which indicates that there exists a more imminent risk for the security of prosecution witnesses throughout the country than that which existed at the time when the first decisions on protective measures were handed down.
    2) Additional protective measures for different categories of witnesses in compliance with the Trial Chamber's *Order to the prosecution for renewed motion for protective measures* dated 2 April 2004.

PROSECUTOR'S SUBMISSIONS

A) Modification of deadline for disclosure to 21 days

4) The crimes alleged against the Accused Norman, Fofana and Kondewa are crimes which formed part of a common scheme to gain effective control of the territory of Sierra Leone by completely eliminating, through all available means, the AFRC/RUF, its sympathizers and all those who did not actively resist the AFRC/RUF, commonly referred to as "collaborators".

5) As all the defendants face the same charges and the criminal liability of each accused person was incurred in part, by his individual participation in a common plan, the prosecution witnesses that will be called to testify are typically common to all accused persons, particularly with regard to the evidence of crimes.

6) Further, all witnesses and/or their families live in Sierra Leone, in very small communities in which any investigation on behalf of the accused would necessarily have to take place. They live among those front line perpetrators, ex-kamajor combatants and strong sympathizers of the accused. They live and work in a closely-knit setting. Consequently, they are all exposed to the same risk and are subjected to the same potential interference or acts of retaliation once their identity becomes known. The majority of Prosecution's witnesses have expressed that given the setting where they live and the precarious circumstances in which they find themselves they are very vulnerable to potential acts of violence from the kamajors. They further believe their security will be jeopardized when it is known that they are giving evidence against the three accused. This necessarily dictates that at this stage, each and every prosecution witness benefits from the same type of protection; including precisely the same timeframe for disclosure of their identity to the accused and his defence team.

7) The prosecution asks that the timeframe for disclosing unredacted statements to the defence fixed in *Prosecutor Against Fofana* and *Prosecutor Against Norman* to 42 days be modified to 21 days as granted in *Prosecutor Against Kondewa*. Notably, the 21 day delay has already been judged the most appropriate cut-off point for disclosure by the Trial Chamber in the *Kondewa* case, given, as Judge Benjamin Mutanga Itoe stated:

> " [...] *the particularly bloody, hostile and vicious environment in which these gruesome offences were cruelly perpetrated and the necessity to fulfill the procedural imperatives of an adversarial system of justice*

governing the courts by providing witnesses to sustain the charges [...].[1]

8) The Prosecutor reiterates that it is in the interest of justice and for parity of treatment that this measure should be ordered in the present case.

9) The 21 day delay before testimony has been considered in numerous cases by our sister tribunals as a reasonable and sufficient time to allow the Defence to conduct any inquiries relating to remaining issues such as credibility of the identified witness. The Chambers of the ICTY and ICTR (See *Prosecutor v. Karemera*, ICTR-98-44-I[2] hereto attached as annex 12, *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T[3] hereto attached as annex 13, *Prosecutor v. Kordic,* IT-95-14/2[4] hereto attached as annex 14, *Prosecutor v. Muvunyi*, ICTR-2000-55-I[5], hereto attached as annex 15, *Prosecutor v. Rwamakuba*, ICTR 98-44-T[6] hereto attached as annex 16) held that disclosure of witnesses' identity 21 days before testimony provides the appropriate level of protection for witnesses and allows adequate time for preparation of the Defence.

10) The Prosecution notes the authority assigned by Rule 69 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone (the "Rules") 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 Judge or Chamber decides otherwise". Further, the Prosecution submits that pursuant to Rule 75 a Judge or the Trial Chamber has ongoing authority to review and modify its own decisions where appropriate for the purpose of witness protection measures. This can be done on its own motion or at the request of either party. The present motion brought by the Prosecution seeking unification and harmonization of the timeframe for disclosure of unredacted statements and witness identification information, previously established in three different witness protection motions rendered by the Trial Chamber before the joinder of the Norman, Fofana and Kondewa cases is an appropriate measure for the privacy and protection of witnesses consistent with the rights of the accused.

11) The prosecution is in possession of recent information which establishes a considerable

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[1] *Prosecutor against Allieu Kondewa*, SCSL-2003-12-PT, "Ruling on the prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure and urgent request for interim measures until appropriate protective measures are in place", 10 October 2003 para. 25.

[2] "Decision on the defence motion for modification of a decision of 12 July on protective measures for prosecution witnesses", 7 October 2003.

[3] "Decision on the prosecutor's motion for protective measures for victims and witnesses", 27 March 2001.

[4] "Orders for measures to protect victims and witnesses", 15 January 1999.

[5] "Decision on the prosecutor's motion for orders for protective measures for victims and witnesses to crimes alleged in the indictment", 25 April 2001.

[6] "Decision on the Prosecutor's motion for protective measures for witnesses", 22 September 2000.

increase in the risk of potential harm to witnesses should the identifying data of protected witnesses be revealed too far in advance of their testimony. The evidence below is extracted directly from the different sources as enumerated in points I through VIII.

I. Chief of Investigation's declaration, attached at annex 8, provides an overview of the statements provided ex-parte and under seal at annexes 1 – 7, without revealing the identity of the witnesses [The information contained in these statements (annexes 1 – 7), some of which was provided to the Prosecution under Rule 70, is provided in event the Trial Chamber seeks additional supporting documentation in support of this motion. These statements are filed ex-parte and under seal to protect the identity of the witnesses and should under no circumstances be disclosed to anyone other than the Judges of the Trial Chamber]:

The potential security risk to Prosecution witnesses has increased dramatically in the recent months. There is an ongoing effort to identify and intimidate witnesses. The OTP received information that the names of witnesses who are suspected or perceived to testify against Hinga Norman, Moinina Fofana and Allieu Kondewa are recorded on a list and are closely monitored. This procedure is carried out by a group called "the Concerned Kamajors" composed of CDF hardliners and former CDF commanders who are strong supporters of the three indictees. The CDF continues to exist in many areas and still maintains two operational offices in Bo and Kenema. The offices are used to plan intimidation campaigns against potential witnesses in different parts of the country and to organize frequent meetings for the purpose of undermining the work of the Special Court. The persons in command who are controlling these current kamajors activities are former CDF members Joseph Fefegula- former CDF secretary, Arthur Koroma- former commander and recently appointed acting CDF coordinator in the place of Hinga Norman- and Joe Nuni – former commander. They are fervent supporters of the kamajors secret society and still very prominent figures within the CDF network. Furthermore, recent evidence gathered by Special Court investigators shows that a very influential kamajor hardliner said "let the witnesses just testify and God will deal with them. They will die one after another". At a meeting held in September 2003 by a group of kamajor initiators called "Eastern Region Initiators Development Association (EREIDA), the

initiators consented that "they should use any means within their power to eliminate any would-be witnesses against Hinga Norman and his colleagues". Consequently, the majority of our witnesses are extremely concerned about their security. They fear that drastic measures such as physical harm, towards them and their family, torture and even execution will be taken against them once they are fully identified as collaborating with the Special Court. There are instances where OTP investigators have been threatened by ex-kamajors combatants who are strongly opposed to the activities of the Special Court. Further, in November 2003, a discussion with both UNAMSIL peacekeepers and SLP authorities requesting to provide open security for Special Court activities in a CDF stronghold area revealed that both organs were hesitant to assist out of fear for their security in spite of being armed.

II. "Decision prohibiting communications and visits", SCSL-2003-08-PT, dated 20 January 2004:

Communication privileges of detainee Hinga Norman, the former National Coordinator of the Civil Defence Forces, had to be urgently prohibited by the Registrar of the Special Court due to statements that he had made in a telephone conversation from the Detention Facility which appears to be calling various factions to arms and inciting his supporters to public unrest. A relevant passage of this conversation is herein reproduced:

"Man: No, I wanted to speak to the media (BBC).
Norman: No Don't send it to the media yet.
Man: No. That's not what I intend discussing with the media. I just want to grant them a special interview. Because I've already got a journalist willing to interview me tomorrow.
Norman: [...] Just tell them that we are asking whether they want peace or war. We have already asked them this question before but we've not got a response and time is far spent. And we have been in detention for about 11 months. More importantly, there were people who didn't benefit from the war and they are waiting for another conflict to compensate for what they lost."[7]

III. In a telephone interview conducted from the detention centre, Hinga Norman implied again that civil unrest was imminent:

"HN: [...] Chief Norman is not going to be held in jail while the courthouse isn't built or is being built.[...]

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[7] The complete transcript is attached as annex 35; See also the following news reports: *"Special Court accuses indicted militia chief of inciting civil unrest"* IRIN, 22 January 2004 (annex 26), *"Norman accused of planning unrest"* Concord Times", 22 January 2004 (annex 27), *"Norman caught inciting supporters"* Christian Monitor, 22 January, 2004 (annex 28).

HN: I am not going to accept that and I've sent word to my men that I told them to wait and give chance to justice. Now I see that justice has been abused under the Special Court that has no right to be in Sierra Leone in the first place. If I'm charged with Geneva Convention crimes, then I should be tried under the Geneva Convention court, not a Special Court. So that is not a legal implication. But I'm refusing to accept whatever condition that I'm being held under and I'm telling my men that the time for justice is over.
[...]
VICTOR: So, Chief, you think you will be made the sacrificial lamb?
HN: Yes. I am not only thinking, that is what they are attempting to do. But we are all going to be sacrificed, beginning now.[8]

IV. "Confidential submissions made by the Government of the Republic of Sierra Leone under Rule 65 (B) of the Rules of Procedure and Evidence" SCSL-2004-14-PT, dated 23 February 2003 filed in the present case in the context of the Bail Application for accused Fofana, Declaration of Acha Kamara, Inspector General of the Sierra Leone Police, dated 7 April 2004 hereto attached as annex 9:

The government of Sierra Leone acknowledged its current lack of police and military capacities throughout the territory of Sierra Leone, particularly in remote areas. The Attorney General of the Republic of Sierra Leone and the Inspector General affirmed that at the present moment, the country's Police Force is not in a position to provide the necessary services in order to guarantee the adequate and effective surveillance of potential Special Court witnesses against harassment, threats, violence and other intimidation and interference. The Inspector General reiterates that the CDF continues to exist throughout the country and is holding regular planning meetings. Members of the former Civil Defence Forces were reported to be planning, in a non specific manner, ways to disrupt the activities of the Special Court and therefore to prevent the prosecution of the accused persons. Moreover, the Sierra Leone Police has gained intelligence of recent arms trafficking activities in the country and reports suggest that supporters of the CDF and sympathizers of the three former CDF leaders are attempting to rearm themselves and to acquire arms and ammunition. The Inspector General's declaration also highlights that kamajors are being recruited to fight as mercenaries in Liberia. There is information of ongoing cooperation between the kamajors and the LURD in Liberia which can clearly have a very destabilizing

[8] The complete transcript is attached as annex 36. See also *"Chief Hinga Norman speaks from his cell in Sierra Leone and vows he would be made "a sacrificial lamb" as he accuses the Special Court of protecting president Ahmad Tejan Kabbah"*, Sierra Herald, 6 January 2004, Vol. 5 Nr. 4 attached as annex 29.

effect on the security situation both in Liberia and in Sierra Leone.

V. "Ex-Kamajohs plan to attack" Standard Times, 30 January 2004, (attached as annex 30):

The security threats have recently gone beyond just targeting potential witnesses; threats have been directly made against Special Court staff. According to a news article in the Standard Times press, dated 30 January 2004, *"It has reliably been learned that some ill-motivated former civil defence force fighters of the now defunct kamajor militia are planning to physically attack the newly transferred Regional Commissioner of Police in the Eastern Region, Mr. Tamba Gbeki."* The motivation for this attack, according to the article is based on the fact that Mr. Gbeki who was working until recently as an Investigator for the Special Court is alleged to have played an important part in the arrest and apprehension of former Civil Defence Forces Coordinator, Hinga Norman. As mentioned above the Office of the Prosecutor has knowledge of other cases where Special Court investigators have been threatened by ex-kamajors combatants who are strongly opposed to the activities of the Special Court.

VI. "Norman's Boys attack journalist" New Vision, 23 March 2004, (attached as annex 31):

A journalist has been physically assaulted very recently on Spur Road, Freetown by two alleged former bodyguards of Sam Hinga Norman. The attack was ment to "teach [the reporter] a lesson" for working for New Vision, a newspaper which according to the two ex-kamajors is in favour of the Kabbah Govement and the SLPP who, in their opinion, have betrayed Hinga Norman by sending him to jail.

VII. "Kamajors declare Operation Road Block" The Exclusive, 12 February 2004, (attached as annex 32) "Kamajors Vow", The Exclusive, January 20 2004, (attached as annex 33) "Free Hinga Norman or No Palm Oil", The Pool, Friday January 30 2004, (attached as annex 34):

Recent news articles acknowledge that the former militia group still shares significant influence and power throughout the country despite its official disbandment. It is reported to be "always scheming heinous actions to disrupt the peace of Sierra

Leone"[9]. The Exclusive newspaper reported that kamajors around Bo and Kenema were planning a Road Block Operation of the Bo-Kenema highway "to create a "state within the state" as to render the Kabbah administration handicapped, as the RUF used to do". A civilian interviewed by the paper affirmed that "if, at all, the kamajors converge once again to create problems the people living in Kenema and beyond will suffer much. She explained that kamajors living in Tongo field are still harassing civilians".[10] According to Sierra Leonian press, members of the disgruntled kamajors society, who are yet to be pacified over the detention of Hinga Norman, are said to be planning an attack on the Special Court to release their leader. "A former aide to Chief Norman, Abdul Karim is reported to be a member of the delegation to put modalities in place for a well planned raid on the detention center."[11] Another news article asserts that there are indications of a concerted plan to invade Freetown. Recruits to carry out this plan were known to be kamajor mercenaries who had been recently involved in fighting in Liberia.

VIII. Declaration of Saleem Vahidy, Chief of Witness and Victims Unit dated 8 April 04, (attached as annex 10):

The Victims and Witnesses Unit (the Unit) expresses concerns regarding the lack of necessary resources that it possesses in order to implement effective measures for the protection of such a considerable number of witnesses.[12] The Declaration of Saleem Vahidy, Chief of Witness and Victims Unit stresses that due to the limited operational funds, the Unit, since its creation and at any point in time throughout the mandate of the Special Court was to tender protection only to a very restricted number of witnesses.

12) Consequently, the genuine fears and the reluctance to testify expressed by potential witnesses are objectively founded. As noted above, it is impossible, despite the urgent need that exists due to the general and imminent security risk, for the Witness and Victims Unit to relocate and protect large numbers of witnesses and the witnesses' families, needless to say the 154

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[9] *"Kamajors declare Operation Road Block"* The Exclusive, 12 February 2004 attached as annex 32.
[10] *Id.*
[11] *"Kamajors Vow"*, The Exclusive, January 20 2004 (attached as annex 33).
[12] See *Prosecutor v. Tadic*, "Decision on the prosecutor's motion requesting protective measures for victims and witnesses", 10 August 1995 para. 65, where the Court granted prosecution's request for full anonymity of four witnesses considering as one factor, that the Tribunal had no long-term witness protection program, nor the funds to provide for one and the Tribunal had no police force that could care for the safety of witnesses once they leave the premises of the ICTY (attached as annex 17).

witnesses that prosecution intends to call at trial at this point. All of Prosecution's witnesses and their families live in very small communities throughout the territory of Sierra Leone, among those people who are ready to have recourse to any means to prevent them from testifying against those indicted for whom they still share a strong feeling of loyalty and sympathy. Disclosing their identity 42 days before testimony will considerably increase the risk of interference and potential harm towards witnesses or members of their family. These factors, significantly amplify the unacceptability of open disclosure of identifying information of witnesses and victims prior to 21 days before the witness is to appear in Court. In *Prosecutor v. Kordic*[13], the Chamber ordered a 21 day and 30 day limit for disclosure of unredacted statements to the Defence based on whether the person providing the statement was or was not at that time a current or former citizen of the former Yugoslavia.

13) At this point, given the evidence of ongoing and concerted efforts of former CDF members to identify witnesses and to intimidate them, the Prosecution is greatly concerned that witnesses will refuse to testify absent efficient protective measures that can realistically be provided to them. Further, the reluctance of witnesses to continue to cooperate with the Special Court is intensified by the prospect that, as it now stands, many would have to disrupt their lives, and their family's lives for a minimum period of six weeks and probably longer. Many of them will have to leave their jobs behind. Others are concerned about their farms which represents their only source of income and on which they depend to survive. Therefore, a great number of witnesses expressed that they cannot afford to be away from their homes and villages and to abandon all their responsibilities for such a long period of time. This reinforces, once again the necessity of changing the deadline for disclosure to 21 days before the witness will appear in Court. The Special Court, unlike other tribunals such as the Nuremberg, which relied for the most part on documentary evidence, is heavily dependant on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. The Rules of Procedure and Evidence were molded to fit the task at hand and provide the necessary protection for witnesses. The prosecution asserts that its case will be unfairly prejudiced and the fulfillment of the Tribunal's mandate and objective obstructed if the relief sought herein is not granted.

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[13] See *Supra* note 5.

14) It is important to emphasize that once the defence investigates into the background of identified witnesses, further disclosure of information and witnesses' identity may occur. In this respect, it has already been accepted by the ICTY Trial Chamber[14] that there is a risk that the persons to whom the defence has spoken may reveal to others the identity of identified witnesses, with the consequential risk that these witness will be interfered with. The Prosecution argues that in our case, the precarious security situation and the active efforts that are being made to identify Prosecution witnesses requires that the identity of witnesses be kept confidential until 21 days before scheduled testimony. Once the Defence or its investigators begin to make enquiries about the witnesses whose identity has been disclosed, there is nothing to prevent their identities from being further disclosed by those persons contacted for inquiries by the Defence. Many Prosecution witnesses have identified among their neighbors specific commanders or former combatants who committed horrific crimes and who are aware of the witnesses who could possibly bring evidence against them and their high level CDF leaders. Witnesses express genuine concerns that once they are identified as collaborating with the Special Court, the present threats and intimidation directed against them will be converted into acts of violence or even their extermination. Thus, the utmost efforts should be concentrated in keeping witness's identity confidential until a point closer to the time of testimony.

15) In view of the fact that the three defendants now benefit from a joint trial and in light of the new circumstances and the serious and immediate risks with respect to the security of prosecution witnesses, the 21 days for disclosure should be the measure applicable in relation to all three accused. The prosecution submits that the relief sought does not prejudice the accused's rights but rather creates a fair balance between the rights of the accused to adequately prepare for trial and the importance of protecting witnesses. The following reasoning adopted by the Trial Chamber in *Prosecutor against Kanu*, lays down clear parameters in light of which the demarcation between the interests of the accused and the right of witnesses to protection must be considered:

> *" What, however, appears certain in my mind is that the doctrine of anonymity and non-disclosure, even though it might appear contradictory to, is not necessarily inconsistent with the principles of a fair trial that are guaranteed to the Accused under Artcle 17(2) of the Statute because the lifting of the veil of*

[14] *Prosecutor v. Brdjanin,* Decision on third motion by Prosecution for protective measures, November 8, 2000 para. 13 (attached as annex 18); See also *Prosecutor v. Brdjanin,*, "Decision on fourth motion by prosecution for protective measures"15 November 2000 para. 9 (attached as annex 19).

> *anonymity before the calling of these shielded witnesses balances the legal claim to a status of and prerogative to protection and anonymity that they might have enjoyed all along with the leave of the Court."*[15]

16) The Prosecution recognizes that the jurisprudence originating from the ICTR and the ICTY shall serve as guiding principle in the decisions taken by the Trial Chambers of the Special Court with respect to witness protection. However, it is imperative to note that the factual and environmental realities that exist in Sierra Leone are considerably different from the circumstances that were present in Rwanda or the former Yugoslavia. In this respect, the Trial Chamber of this Court has already conceded this fact at different occasions in the following terms:

> *"The Special Court", therefore, based upon its examination of the documentation produced and, in particular, of the foregoing, concludes that there exists, at this particular time in Sierra Leone, a very exceptional situation causing a serious threat to the security of potential witnesses and to victims, and accepts the affirmation that, according to the words of Mr. Vahidy, "in Sierra Leone the protection of witnesses is a far more serious and difficult matter even than in Rwanda."*[16]

17) The Prosecution calls the Trial Chamber to modify the witness protection measures to conform with a more extensive protection under the circumstances to protect the witnesses who are to be called at trial. This amendment is vital, on one hand, in light of the particularly dangerous security situation that currently exists in Sierra Leone due largely to the presence of thousands of loyalists and former CDF combatants who are vehemently opposed to the activities of the Special Court and who are, as the evidence establishes, seeking to paralyze the mission of the Court. On the other hand, the grave atrocities that were committed and the serious violations of international humanitarian law with which the accused are charged are additional factors that militate towards the 21 day delay before testimony for disclosure of witnesses' identity to the Defence. This measure creates the necessary equilibrium between the right of the accused to a fair trial and the importance of protection of witnesses required by the Rules of Procedure and Evidence and established in the case law.

B) Additional protective measures during trial

18) Before addressing the issue of additional protection for different categories of witnesses, the

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[15] *Prosecutor against Kanu*, SCSL-2003-13-PT, "Decision on the prosecution motion for immediate protective measures for victims and witnesses", 24 November 2003 para. 29.

[16] *Prosecutor against Gbao*, SCSL-2003-09-PT, "Decision on the prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure", 10 October 2003 para 25; *Prosecutor against Bazzy Kamara*, SCSL-2003-10-PT, "Decision on the prosecutor's motion for immediate protective measures for witnesses and victims and for non-public disclosure", 23 October 2003 para. 15.

Prosecution intends to briefly review, in accordance with the *Order to the prosecution for renewed motion for protective measures* dated 2 April 2004, the different protective measures already granted by the Court in the Norman, Fofana and Kondewa cases prior to the joinder of the three trials. In this respect, it is the Prosecution's respectful submission that the status quo regarding witness protection already existing be maintained at the trial stage. The Prosecution recognizes that a distinction should be drawn between protection at the pre-trial stage versus protection during trial where the right of the accused to fair judicial proceedings becomes the central focus and where the veil of anonymity of witnesses from the accused persons must be lifted. The same logic is not always true in regards to the public. The prosecution submits that the fairness of trial is not automatically compromised when serious security concerns dictate that witnesses' identity be not released to the public or media. Our sister tribunal, the ICTR clearly enunciated this view. Urged by the precarious security situation existing in Rwanda, up to almost 100 per cent of Prosecution witnesses were entitled to confidentiality from the public and media during and after trial. This translated into the use of pseudonyms at all times during the Court proceedings and the protection of witness's image from the public by a screened witness booth. As previously demonstrated in this motion and as concurred by the Trial Chamber of this Court[17] security of witnesses in Sierra Leone, particularly those testifying in the CDF case is much more shaky than in Rwanda. For these reasons, the Prosecution requests that measures contained in orders b) to k) as granted previously in the witness protection decisions in *Prosecutor against SAMUEL HINGA NORMAN* SCSL-2003-08-PT, *Prosecutor against MOININA FOFANA* SCSL-2003-011-PT and *Prosecutor against ALLIEU KONDEWA* SCSL-2003-12-PT, and to the extent they apply to the trial and post-trial stage, remain in effect. Additionally and in order to comply with order e) "prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims", which order is intended to remain in effect post-trial, the Prosecution requests that witnesses residing in Sierra Leone and who haven't waived their right to protection be allowed to testify from behind a screen that will shield them from public view.

19) In light of the jurisprudence and the Rules of Procedure and Evidence of the Special Court for Sierra Leone (see Rules 69, 75, 79, 85(D), 90(A)), certain witnesses can benefit from

[17] *Id.*

additional protection and different measures can be granted in order to ensure the safety of witnesses who have a high security risk or are considered vulnerable. In this exercise the Courts have been extremely cautious to ensure that a fair balance exists between the right of the accused to a fair and public trial and the adequate protection of witnesses (*Prosecutor v Bradnin & Talic*, ICTY, IT-99-36, 3 July 2000 (annex 20); *Prosecutor v Tadic*, ICTY, IT-94-1, 10 August 1995 annex 17)[18].

20) In accordance with the *Order to the prosecution for renewed motion for protective measures* dated 2 April 2004, the Prosecution is hereby requesting additional protective measures for three different categories of witnesses namely: A) child witnesses, B) witnesses who are victims of sexual assault and gender crimes and C) insider witnesses. In effect, the Prosecution submits that the same case for specific protective measures is made with respect to every witness or sub-category of witnesses within categories A), B) and C). Annexed to this motion and marked with the letters A to C, are tables of the pseudonyms divided into these 3 categories. The totality of prosecution witnesses are comprised into two groups: I-witnesses of fact and II- expert witnesses and witnesses who have waived their right to protection.

21) The Prosecution wishes to emphasize that the categorization is based on the witness list filed on 4 May 2004. This list is not final and as stated during the pre-trial conference held on 28 April 2004, the number of witnesses subjected to the measures granted by the Chamber will be reduced based on factors such as judicial notice and admissions by the defence.

21) The measures sought by the Prosecution are intended to protect the witnesses' identity from the public during the trial phase allowing however the lifting of the "anonymity veil" in favor of the accused persons. The Prosecution submits these measures 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. [19]

22) It is submitted that the special circumstances of our case militate in favor of protection of

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[18] See also Article 17 of the Statute of the Special Court for Sierra Leone.

[19] See *Prosecutor v. Delalic*, "Decisions on the motion by the prosecutor for protective measures for the prosecution witnesses pseudonymed 'B ' through to 'M'", 28 April, 1997 (annex 21); *Prosecutor v. Krnojelac*, "Order on protective measures for witnesses at trial", 26 October 2000, annex 22.

witnesses from the public. As the evidence herein presented establishes (more particularly in paragraphs 11 and 12), the security situation of witnesses who will be called to testify in the present case has deteriorated dramatically in the past months. As shown previously, there is an imminent and general risk that once witnesses' identity and their status as a witness is publicly released, witnesses can face serious physical harm and acts of retaliation from those who are still loyal to the former kamajor society and the accused persons. There is no physical separation between witnesses, witnesses' family and the perpetrators of atrocities. They all live in small and often isolated communities where police presence is non-existent. The affairs of an individual within such a community quickly become known to all members of that community. It can also reasonably be expected that the security situation will be made more rather than less precarious by the planned December 2004 UNAMSIL withdrawal.

23) The Prosecution submits that these considerations are important in evaluating the security concerns of individual witnesses. As established in *Prosecutor v Kamuhanda,* ICTR-99-54-T, 22 March 2001 annex 23, the appropriateness of protective measures for witnesses should not be assessed solely on the representations of the parties, rather the appropriateness should be assessed "in the context of the entire security situation affecting the concerned witnesses". Further, given the locus of the alleged crimes and the seat of the Special Court in Freetown, regional security issues are relevant. (*Prosecutor v Kajelijeli,* ICTR-98-44-I, 6 July 2000 annex 24). 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. (*Prosecutor v Muvunyi and others* ICTR-2000-55-I, 25 April 2001 annex 15).

Group I- Witnesses of fact

Category A Witnesses – Sexual Assault Witnesses and Victims

24) Annexed to this motion in annex 11 is an affidavit of An Michels, psychologist dated 30 April 2004. In her affidavit, Ms Michel's, deposes to the possible retraumatization of these witnesses by giving evidence in the trial. The possible trauma is not limited to the actual process of giving *viva voce* evidence. Testifying in public can result in rejection by the victim's family and community. (*Prosecutor v Tadic*, ICTY, IT-94-1, 10 August 1995, annex 16) This is particularly so in communities like Sierra Leone that are small and closely knit.

25) The prosecution asks that the confidentiality of all Category A witnesses be protected vis-à-vis the public and media by allowing these witnesses in addition of testifying behind a screen, to

testify with the aid of voice distortion equipment in accordance with Rule 75(B)(i)(a). The use of the screen will ensure that the public cannot visually identify the witnesses, while not preventing the Defence from observing the demeanor of the witnesses. The use of voice distortion equipment will ensure that the public cannot identify the witnesses by their voice, a real possibility given that the witnesses will testify to crimes of sexual violence in specific locations.

26) Being cognizant that only protective measures which are absolutely necessary will be ordered, the Prosecution largely does not seek measures which will prevent a face to face confrontation and deny the Trial Chamber and the Defence the opportunity to observe the facial and bodily expression of Category A witnesses. However, for witnesses who were allegedly sexually assaulted by any of the Accused persons, the Prosecution may additionally request, on a witness-by-witness basis and as the need arises, that they be allowed to testify by one-way closed circuit television pursuant to Rule 75(B)(i)(c). This would prevent the witness from face to face confrontation with the Accused while preserving the right of the Accused to observe the witness. As stated in *Delalic*[20] although face to face confrontation is an "inestimable advantage" to the Court, it is not an "indispensable ingredient" of a fair trial.

27) Additionally, Rule 79(A) gives the Trial Chamber discretion to exclude the press and public from all or part of the proceedings. Doing so for the protection of the privacy of witnesses in cases of sexual offences is specifically noted as a ground upon which such discretion may be exercised. The Prosecution notes that on a witness by witness basis, it may ask the Trial Chamber to exercise this discretion.

Category B Witnesses – Children

28) Child witnesses possess exceptional vulnerability. In addition to having been victimized, they provide evidence on the individual criminal responsibility of the accused persons and thus also fall within the category of insider witnesses. Having been initiated by, recruited by and/or served under accused persons, child witnesses are likely to be familiar to the accused and possess substantial fears of confronting and being seen by them.

29) Additionally, having experienced childhood during a civil war and suffered the attendant trauma and disruption to family and school life, the Prosecution's child witnesses are clearly at a developmental stage which affects their ability to become familiar with, and be intimidated

[20] *Id.* para 65.

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.

30) These contextual factors demand sensitivity when considering appropriate protective measures for children, see the affidavit of An Michels, psychologist to the Victims and Witnesses Unit, dated 30 April 2004, attached as annex 11. The Prosecution therefore submits that specific protective measures must be accorded to child witnesses, which include victims and ex-combatants, to ensure their safety and to prevent any retraumatization that would result from their participation in the trial process.

31) Consistent to Rule 75(B)(i)(a) the Prosecution seeks an order that Category B witnesses be allowed to testify via closed circuit television. The Prosecution submits that the use of closed circuit television for the testimony of child witnesses, as in the case of gender crime witnesses, permits the defendant to observe and hear the testimony of the child, while minimizing serious emotional distress from the presence of the defendant and any handicap to presentation of his/her testimony.[21] The witness' demeanor may also be observed by the Trial Chamber and the Prosecution, but only the distorted image should appear on the public's monitors. The Prosecution recognizes that the Trial Chamber must balance protecting child witnesses from the trauma of testifying in the presence of an accused with the ability of the accused persons to face their accuser; however, "the latter must yield to the greater public interest in the protection of the witness".[22] Further, as with category A, the Prosecution may request closed sessions during the testimony of child witnesses as needed on a case-by-case basis, as provided under Rule 79.

Category C Witnesses - Insiders

32)The testimony of Category C witnesses is crucial to the proof of the Prosecution's case. These witnesses give evidence of the structure of the CDF 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.

33) The Prosecution submits that the very sensitive and highly material nature of insiders' testimony for proving the possible guilt of the accused makes them and their families very

[21] 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.
[22] See *Prosecutor v. Delalic*, *Supra* note 20.

vulnerable to acts of retaliation and potential harm. This is even more the case given the secret nature of the kamajor society and the very strict laws prohibiting those who were once part of it from divulging any information related to the internal rules and functioning of the society.

34) The Prosecution accepts that 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.

35) The Prosecution submits however that insiders that can be easily recognized by the public by the content and nature of their testimony despite the voice alteration measure, should be allowed to testify in closed sessions. This measure is absolutely necessary in light of the fact that some high level CDF officials are very well known people within their communities and the country at large. These attributes makes them easily identifiable by the public and therefore dictate that for witness confidentiality in view of the potential harm they face they be heard in closed sessions. The Prosecution will make such application, if the need arises, on a witness by witness basis.

Group II- Expert witnesses and witnesses who have waived their right to protection

36) The Prosecution reserves the right to request protective measures for expert witnesses and witnesses who at this time have waived their right to protection, if and when needed.

PRAYER

Modification of disclosure deadline to 21 days

37) Based on the arguments above, the Prosecution submits that it has established sufficient justification for delayed disclosure both in law and on the evidence. Therefore, for all the reasons discussed herein and based on the newly discovered information and consequent to the joinder of trials, the Prosecutor prays the Trial Chamber issue an order to change the witness protection regime that presently exists in two cases and to fix the deadline for disclosure of non-redacted witness statements and any identifying information to 21 days before testimony.

Additional protective measures

38) In order to provide protection for witnesses called by the Prosecution during trial, the Prosecution requests the Trial Chamber to maintain in existence orders b) to k) set out in the three protective measures decisions handed down in this case, to the extent they apply to the trial and post-trial stage; and to issue the following additional orders:

(1) All witnesses residing in Sierra Leone who haven't waived their right to protection shall testify with the use of screening from the public where their image is not already protected by measures requested herein;

(2) 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;

(3) Witnesses in Category A shall testify with the use of voice distortion;

(4) Witnesses in Category B shall testify with the aid of closed circuit television; the image appearing on the public's monitors should be distorted;

(5) Witnesses in Category C shall testify with the use of voice distortion.

39) Moreover, 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 category of witnesses or to individual witnesses within each category. Further, the Prosecution reserves its right to apply for specific protective measures for individual witnesses not already comprised in categories A) B) and C), as the need arises.

Freetown, 4 May 2004

For the Prosecution,

Luc Côté
Chief of Prosecutions

James C. Johnson
Senior Trial Attorney

PROSECUTION INDEX OF AUTHORITIES:

Declarations:

1. Ex-parte and under seal filing.
2. Ex-parte and under seal filing.
3. Ex-parte and under seal filing.
4. Ex-parte and under seal filing.
5. Ex-parte and under seal filing.
6. Ex-parte and under seal filing.
7. Ex-parte and under seal filing.
8. Declaration of Chief of Investigation.
9. Declaration of Brima Acha Kamara, Inspector General of the Sierra Leone Police.
10. Declaration of Saleem Vahidy, Chief of Witness and Victims Unit.
11. Declaration of An Michels, psychologist.

Cases:

12. *Prosecutor v Karemera, "Decision on the Defence Motion for Modification of a Decision of 12 July on Protective Measures for Prosecution Witnesses"*, ICTR-98-44-1, 7 October 2003.
13. *Prosecutor v Nyiramasuhuko, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses"*, ICTR-97-21-T, 27 March 2001.
14. *Prosecutor v Kordic, "Orders for Measures to Protect Victims and Witnesses"*, IT-95-14/2, 15 January 1999.
15. *Prosecutor v Muvunyi, "Decision on the Prosecutor's Motion for Orders for Protective measures for victims and witnesses"*, ICTR-2000-55-I, 25 April 2001.
16. *Prosecutor v Rwamakuba, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses"* ICTR-98-44-T, 22 September 2000.
17. *Prosecutor v Tadic, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses"* ICTY, IT-94-1, 10 August

1995.

18. *Prosecutor v. Brdjanin, "Decision on third motion by Prosecution for protective measures"*, ICTY, IT-99-36, 8 November 2000.
19. *Prosecutor v. Brdjanin,, "Decision on fourth motion by prosecution for protective measures"*, ICTY, IT-99-36, 15 November 2000.
20. *Prosecutor v Bradnin & Talic, " Decision on motion by prosecution for protective measures*" ICTY, IT-99-36, 3 July 2000.
21. *Prosecutor v. Delalic, "Decisions on the motion by the prosecutor for protective measures for the prosecution witnesses pseudonymed 'B ' through to 'M'"*, ICTY, IT-96-31, 28 April, 1997;
22. *Prosecutor v. Krnojelac, "Order on protective measures for witnesses at trial"*, 26 October 2000;
23. *Prosecutor v Kamuhanda, "Decision on Jean-Dieu Kamuhanda's motion for protective measures for defense witnesses"* ICTR-99-54-T, 22 March 2001;
24. *Prosecutor v Kajelijeli, "Decision on the prosecutor's motion for protective measures for witnesses"*, ICTR-98-44-I, 6 July 2000;
25. *Prosecutor v. Norman, "Decision prohibiting communications and visits"*, SCSL-2003-08-PT, dated 20 January 2004.

Newspaper Reports:

26. "Special Court accuses indicted militia chief of inciting civil unrest" IRIN, 22 January 2004.
27. "Norman accused of planning unrest" Concord Times", 22 January 2004.
28. "Norman caught inciting supporters" Christian Monitor, 22 January 2004.
29. "Chief Hinga Norman speaks from his cell in Sierra Leone and vows he would be made "a sacrificial lamb" as he accuses the Special Court of protecting president Ahmad Tejan Kabbah", Sierra Herald, 6 January 2004, Vol.5 Nr. 4.
30. "Ex-Kamajohs plan to attack" Standard Times, 30 January 2004.
31. "Norman's Boys attack journalist" New Vision, 23 March 2004.
32. "Kamajors declare Operation Road Block" The Exclusive, 12 February 2004.
33. "Kamajors Vow", The Exclusive, January 20 2004.
34. "Free Hinga Norman or No Palm Oil", The Pool, Friday January 30 2004.

Transcripts of Telephone Interviews of Sam Hinga Norman from the Detention Center:

35. Transcript of telephone conversation conducted by Sam Hinga Norman from the detention center (1).
36. Transcript of telephone interview conducted by Sam Hinga Norman from the detention center (2).

Witness categories:

37. Category A witnesses.
38. Category B witnesses.
39. Category C witnesses.

ANNEXES 1-7

FILED CONFIDENTIALY

EX-PARTE AND

UNDER SEAL.

ANNEX 8:

Declaration of Chief of Investigation.

Declaration

3 May 2004

1. 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.
2. 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 Defense. 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, who have already had their lives, and their families' lives threatened by some of the defendants who are either indicted or under investigations 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 neighboring 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, 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.

3. The mandate of the investigations, as set forth in the Statute of the Special Court for Sierra Leone, is to investigate and prosecute those who bear the greatest responsibility for the crimes within the jurisdiction of the Court.
4. The witnesses and sources my investigative team has interviewed have included eye witnesses, victims, alleged perpetrators as well as high level CDF insiders. Also, we are in constant contact with numerous other confidential sources of information within the region, which provide current security and threat information which is relevant to the safety and security of our witnesses and sources.
5. As a result of my investigations, members of the civilian population who may be called upon to appear as witnesses before the Special Court have expressed significant concern to me regarding their safety and security if it became known that they are co-operating with the Special Court, especially if their identities are revealed to the general public, or to a suspect or accused.
6. Potential witnesses have also expressed fear of reprisals from relatives and friends of the accused, associates of the accused, and those who support the causes or faction the accused represents.
7. Potential witnesses have also expressed fears for their own family members if it became known that the potential witness was co-operating with the Special Court.
8. The fears expressed by potential witnesses and by sources have increased dramatically over the period of time that I have been supervising this investigation. Potential witnesses, sources, and indeed almost every individual with whom we come into contact to obtain information regarding the activities of the CDF/Kamajors are at first instance terrified at the thought of testifying in public and are fully convinced that doing so will bring direct reprisal against themselves and their families.

9. In addition to the fears expressed by sources and potential witnesses, there have been numerous instances of direct threats against such persons. The threats do not necessarily target those who are directly providing us with information; in some cases the threats target those who are *presumed* to be providing the Office of the Prosecutor with information, whether or not they are in fact in contact with us. Those in this category are often CDF insiders who previously had some disagreements with one or more of the accused, and are thus now presumed by CDF hardliners to have a vendetta of sorts against the accused. The vendetta is presumed to be a motivation to these individuals to cooperate with the OTP, and those individuals are routinely threatened, and live in great fear. Again, this is independent of whether they are actually providing us with any information, or whether we in fact have ever been in contact with them. They are in turn convinced that whether they testify or not, they will be presumed to have provided us with information, and thus they live in fear. This state of affairs demonstrates the widespread alarm that has spread among former and present CDF members, their families and their associates since the beginning of operations of the Special Court.

10. In addition to these threats, sources and potential witnesses have been openly and publicly targeted with threats by CDF hardliners, in specific incidents which I will describe here.

11. In all the cases, the information I present here is based on information directly provided to me by my investigations staff.

12. In one instance Samuel Hinga Norman was the guest of honour at a tree planting ceremony in Bo on 13 December 2002. During this ceremony, at which Moinina Fofana CDF Director of War and Charles Moiwo, the CDF Public Relations Officer (P.R.O.) were both present, Samuel Hinga Norman made comments in Mende that he knew there were persons betraying "secrets," and he threatened that such persons when caught will be dealt with according to the laws of the Kamajors.

13. In a second meeting that evening at Mahei Boima Road, Bo at which Moinina Fofana was present, clear threats were made by Samuel Hinga Norman that persons giving information to "non-Kamajors" will be "exterminated" together with their entire

families. Samuel Hinga Norman specifically warned Kamajors not to cooperate with the Truth and Reconciliation Commission and the Special Court.

14. Intelligence reports to which I have been privy since then indicate that members of the committee have indeed been going around informing their colleagues about Samuel Hinga Norman's orders not to co-operate with the work of these two institutions.

15. Over the course of time since we began our investigation, as pressure on witnesses has increased, several witnesses who had previously given statements have changed their minds, reportedly out of fear. They have insisted that they no longer wished to have further dealings with me or the Special Court. The witnesses informed me that they had faced threats from members of their community for cooperating with the Special Court and did not feel safe to continue cooperating with the Court. They have expressed security concerns as the primary reason for refusing to testify.

16. Intelligence reports from mid-2003 through to present indicate that 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. Specifically, such individuals have been reported to be investigating and creating lists of those known or suspected to be cooperating with the Special Court, with the aim of preventing the continuation of such assistance. They were also reported to be planning in a non specific way, to prevent the prosecution of accused persons, particularly CDF members, and other ways to disrupt the work of the court. This has raised significant apprehension among potential witnesses. Reports I have received go as far to suggest that supporters of Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa are attempting to find or otherwise acquire weapons and ammunition.

17. Ongoing investigations have revealed that there may be attempts at arms trafficking currently going on in the country, both along the Guinea border as well as along the Liberian border. The CDF remains an organized group with active influence, in particular in Bo and Kenema, but also in Bonthe. Witnesses in all regions are increasingly terrified to speak to Special Court investigators, and sources are often threatened.

18. 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.
19. Between September 2003 and the present time, I have been repeatedly informed of threats against witnesses and sources throughout the southern region. In October 2003, one of our sources informed me that he had been threatened, having been told "you, you will suffer. Based on what we heard about you, you will suffer." He was subsequently warned that he should be extremely careful, that the CDF are watching, and that CDF have the power to do anything they want to him. Another source reported to Office of the Prosecutor Investigators in July 2003 that he had an encounter with CDF hardliners, and that they had informed him that they were extremely angry at the Special Court for its activities. He felt his security to be at risk due to their presumption of his cooperation with OTP Investigators.
20. In November 2003, I received information from numerous reliable sources that the influence of the CDF throughout the southern region is increasing, rather than decreasing. One result of this trend is that witnesses live in fear. Almost every witness approached by Office of the Prosecutor investigators for information about CDF/Kamajor atrocities is terrified to speak to us. Many witnesses said that they will not speak with us unless they are removed from their villages because they are so afraid. Many times when the witness hears that the Special Court wants to speak with them, the witness goes into hiding.
21. In October 2003, one witness informed OTP investigators that since s/he spoke to Special Court s/he has been repeatedly threatened by CDF hardliners in her/his village. S/He lives in constant fear. S/He informed us that there are numerous victims of the CDF/Kamajors in her/his village, but that they are afraid to come to meet Office of the Prosecutor investigators for fear of reprisal by Samuel Hinga Norman's family.
22. I have received and corroborated information that former CDF/Kamajors are involved in sending mercenaries to Liberia to fight with the LURD. More than one of our ex-kamajor witnesses has been approached for recruitment. We continue to receive

intelligence regarding ongoing cooperation between CDF and Kamajors and the LURD.

23. OTP Investigators were personally and directly threatened by a former Kamajor Commander and CDF Loyalist in October 2003, and informed that "we know who you are, who you are talking to, where you are going, what your activities are. If you cause us to live in fear, we will refuse to cooperate with you." At a meeting with this former commander, he confirmed that he was the one responsible for the threats made on BBC just following the arrest of Samuel Hinga Norman last year, and that he was the one who had vowed to take revenge against anyone who cooperates with the Court. Meetings with UNAMSIL and SLP staff have confirmed that he continues to be one of the most active instigators of ongoing threats against reported Special Court informants in Bo District.
24. One source informed us that in mid-2003 CDF hardliners who were infuriated by the arrest of Samuel Hinga Norman gathered together to form a group called the "Concerned Kamajors." OTP investigators have obtained copies of documents signed by this organization. The primary purpose of the "Concerned Kamajors" is reportedly to develop methods for obtaining the release of Samuel Hinga Norman. During the August 2003 cabinet meeting of President Kabbah held in Bo, the Concerned Kamajors made a speech to President Kabbah. It was during this meeting that Arthur Koroma was reportedly appointed as the CDF National Coordinator to stand in for Samuel Hinga Norman during his detention.
25. The CDF/Kamajors in the Eastern Region continue to raise funds to support their ongoing operations. Intelligence information gathered by OTP investigators has shown that the CDF in Kenema have applied for and received funding for several projects, including an alleged garbage collection project, which are reportedly a cover for channelling funding into the CDF organization. One such organization, called ERIDA (Eastern Region Initiators Development Association), was originally established to support the recently deceased Initiator Kamoh Brima Bangura, and to serve as a liaison between the initiators and the government. Part of the mandate of this organization is reportedly to find spiritual means to undermine the work of the

Special Court. This organization, as all the CDF-supported organizations and projects in the Eastern Region, have Arthur Koroma as their chair person.

26. In November 2003, OTP investigators met with Commander of the Ninth Bangladesh Battalion of UNAMSIL in Bo town, as well as with the SLP Southern Region Commissioner at the time. Our request was to both organs to provide security for a team of forensic experts who were going to be exhuming bodies from a mass grave in the center of Bo town. We requested security for the forensic team as well as for the exhumation site, the victims of which were civilians alleged to have been macheted to death by Kamajors at that location. Both institutions were extremely hesitant to provide security for the grave site, in particular at night, due to security concerns. It took much convincing to obtain the cooperation of the UNAMSIL Commander, until he finally agreed, providing comprehensive security for both the team as well as the grave site. The SLP Commissioner categorically refused to provide security for the site at night in the absence of the presence of UNAMSIL armed troops. He informed us that his officers would be at risk if asked to provide night time security for the exhumation site.
27. SLP Southern Region Commissioner at the time informed OTP investigators directly in October 2003 that the CDF loyalists in Bo were planning to hold a public rally and protest against the ongoing detention of Samuel Hinga Norman, but that the police had forced them to cancel the protest.
28. In October 2003, I was told by a Special Court staff member he attended a CDF meeting in Bo. There, he was told by CDF loyalists that they are speaking nightly on the phone with Samuel Hinga Norman from his cell, and that they were taking instructions from him. We later received information (recently confirmed in the media) that part of these discussions included plans for undermining of the Special Court.
29. In spite of SLP efforts to shut down the CDF offices in Bo and Kenema, both CDF offices remain open, and are used as the ongoing meeting site for CDF loyalists.
30. According to information I have gathered, CDF meetings continue to take place including as recently as in December 2003.

31. As part of the funeral arrangements following the recent death in November 2003 of the Eastern Region's Initiator, Kamoh Brima Bangura, Arthur Koroma, self-styled CDF National Coordinator, instructed all loyal CDF members to pay fees to the CDF according to a scale based on the individual's societal status. CDF members' loyalty to the organization was reportedly to be judged based on their compliance with this financial contribution to the organization.
32. Also in November- December 2003, following the death of the Eastern Region Kamajor initiator Kamoh Brima Bangura, CDF loyalists in Kenema held daily vigils and meetings at the CDF headquarters in Kenema, attended by CDF hardliners from all regions. According to several sources, the CDF were planning to undertake a demonstration in full Kamajor regalia as part of the funeral procession planned for 7 December 2003. SLP Partnership Board officials met with Arthur Koroma, CDF Administrator for the Eastern Region and self-proclaimed CDF National Coordinator, and the other CDF leadership in Kenema, to instruct Arthur to not attend the funeral in the uniforms due to the provocation and potential incitement that such a parade would create. Arthur insisted. Until the last minute the plan was to do as such, however, on the morning of the funeral the CDF was confronted by surprising amounts of security, including full UNAMSIL security, full SLP security, fully armed SLA in "battle ready". Due to such high level security, any plans that the CDF had of causing a disruption were forestalled. As part of the plan for an uprising as part of the funeral, Arthur reportedly sent an informant to Monrovia to alert people there, to encourage people to be on alert to go to the places where weapons are stored and open firing. This whole plan was foiled due to the high security presence. The kamajors did not go in their Ronko clothing but they did wear their fetishes.
33. Present at the funeral were commanders from all regions of the CDF, including Mammy Munda (female initiator from Bo), Mohamed Mansaray (Kapra Initiator from the North), Joe Nuni alias "Idi Amin," who is running an organization of ex-commander Kamajors in Bo, Kamoh Lahai Bangura, the High Priest who replaced Allieu Kondewa, also from Bo. Battalion commanders from all regions were present as well, and each commander brought along a group of fighters. The presence of all

these individuals indicates a new unity between the CDF in the East and the South, and an ongoing unity between the initiators and the fighting branches of the CDF.

34. Arthur Koroma was arrested by the SLP in January 2004 on accusation of subversion. He was held in the CID headquarters in Freetown for two weeks and thereafter released, with a warning. Yet in spite of this pressure placed on Mr. Koroma, the fear throughout CDF stronghold areas continues to grow.

35. One source informed us in February 2004 that CDF insiders in Kenema district were taking instructions from Arthur Koroma regarding whether to meet with OTP investigators. Thus, the power and authority of the CDF hierarchy in Kenema remains in tact.

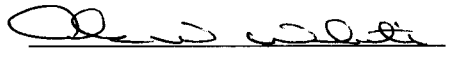
36. As part of an effort to remain in contact with witnesses who have changed their minds about testifying to ensure the security of themselves and other potential witnesses and sources, we met with two individuals in February 2004. One of them told us, trembling, that he cannot risk his life or the lives of his family by coming forward to testify. A second person similarly informed OTP investigators that he must think of the future for himself and his family, and that if he testifies he will not survive afterwards in Sierra Leone.

37. In March 2004, one source informed OTP investigators that s/he fears for her/his security in Bo, and is planning to relocate from there as soon as s/he finds an opportune moment. S/He expressed concern, however, that if s/he should simply disappear from her/his home town suddenly, that could raise suspicions as well regarding her/his interaction with the OTP, and s/he was worried that this situation appeared to have no solution for the moment.

38. Our investigative methodology has developed in a manner which recognizes the threats against witnesses and sources and the severe apprehension they experience with regard to the Special Court. Thus, we have done our utmost under the circumstances which exist in Sierra Leone to protect the confidentiality of our witnesses and sources when we meet them in the field. We never approach witnesses or sources openly and publicly at their homes, rather we consistently send intermediaries to meet them. We vary the intermediaries. We meet with contacts in secluded locations which vary from mission to mission. We attempt if at all possible

not to drive through populated areas with witnesses or sources in our vehicle unless the windows are shaded, and if we do so we ensure that they board and descend from the vehicle in secluded locations. In spite of all these efforts, we encounter escalating unwillingness to speak to us due to security concerns. We have gone to great lengths to protect the confidentiality of those with whom we associate, yet they continue to fear for their safety.

39. Based on over one year managing the investigation into atrocities committed by the CDF/Kamajors in Sierra Leone, I firmly believe that witnesses, sources, and/or their family or associates risk their lives on a daily basis through their cooperation with the Special Court. It is essential for the safety and security of these potential witnesses, their family members and for the work of the Special Court that witnesses be provided with the greatest possible protection under the law that this Court can provide.
40. I, Alan W. White, 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.



Office of the Prosecutor

ANNEX 9:

Declaration of Brima Acha Kamara, Inspector General of the Sierra Leone Police.

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

1. That in my position as 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. In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile, increasing security threats against witnesses.

2. The CDF as an organization continues to exist, in many areas holding regular planning meetings. They are well organized and continue to garner support among loyalists.

3. It has come to my attention in my capacity as Inspector General that members of the civilian population who may be called upon to appear as witnesses before the Special Court are concerned for their safety and security if it became known that they are co-operating with the Special Court, especially if their identities are revealed to the accused or general public.

4. 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. Specifically, such individuals have been reported to be investigating and creating lists of those known or suspected to be cooperating with the Special Court, with the aim of preventing the continuation of such assistance. They were also reported to be planning in a non specific way, to prevent the prosecution of accused persons, particularly CDF members, and other ways to disrupt the work of the court. This has raised significant apprehension among potential witnesses. Reports I have received go as far to suggest that supporters of Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa are attempting to find or otherwise acquire weapons and ammunition.

5. We have also uncovered attempts at arms trafficking currently going on in the country, both along the Guinea border as well as along the Liberian border. The CDF remains an

organized group with active influence, in particular in Bo and Kenema, but also in Bonthe.

6. I have received and corroborated information that former CDF/Kamajors are involved in recruiting and sending mercenaries to Liberia to fight with the LURD. Therefore, any ongoing CDF activities have an impact on the security situation in Liberia, as well as cross border security.

7. I can confirm that there is an organization of Kamajors called the "Concerned Kamajors" who have more than once gathered to express their public disapproval over the arrest of Samuel Hinga Norman. The Concerned Kamajors addressed President Kabbah with their concerns at the cabinet meeting he held in Bo town in August 2003, where the SLP was providing security.

8. I confirm that in spite of attempts on the part of the SLP to close down both the CDF offices in Kenema and in Bo, they continue to function and that CDF loyalists hold meetings in those locations.

9. I confirm that CDF loyalists in Bo were planning to hold a public rally and protest against the ongoing detention of Samuel Hinga Norman in October 2003, but that the police forced them to cancel the protest.

10. I confirm that in October 2003 the SLP were requested by the OTP to provide security for an exhumation site in Bo town and that the Southern Region Commissioner informed OTP investigators that the security of his forces might be threatened should they be required to provide nighttime security for the grave site in the absence of UNAMSIL troops.

11. We continue to receive information regarding the activities and organization of the CDF in the Eastern Region under the authority of Arthur Koroma. Arthur and his colleagues in Kenema refused until the last moment to comply with a direct instruction from the SLP in Kenema regarding the wearing of their traditional uniforms for a funeral procession in December 2003.

12. We are well aware that Arthur Koroma's alleged activities border on subversion, and the SLP arrested him and detained him in January on such accusations. Yet at our current strength and with our current resources, we are somewhat limited in the control we can exert over their organizational capacity. Wherever such reports reach the SLP, we intervene to the best of our ability due to resources and the extent of the threat.

13. In conclusion, the CDF organization, particularly throughout the Bo and Kenema districts, remains intact. SLP efforts have to date been relatively successful at ensuring that their activities do not incite violence. Considering the current capabilities of the Sierra Leone Police and the situation in the country, in my view the SLP does not have the capacity to guarantee the safety of witnesses or prevent them from injury or intimidation.

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

Done in Freetown, Sierra Leone
On 7 April 2004

Brima Acha Kamara
Inspector-General of the Sierra Leone Police

ANNEX 10:

Declaration of Saleem Vahidy, Chief of Witness and Victims Unit.

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

Date

ANNEX 11:

Declaration of An Michels, psychologist.

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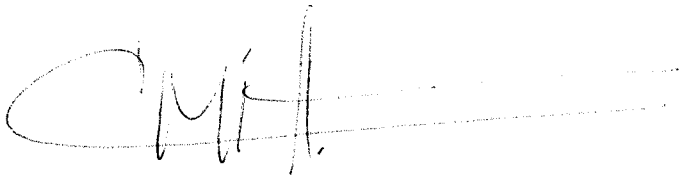
in the presence of the perpetrator could trigger traumatic memories and feelings of fear. The stress during testimony could increase significantly.

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



ANNEX 12:

Prosecutor v Karemera, "Decision on the Defence Motion for Modification of a Decision of 12 July on Protective Measures for Prosecution Witnesses", ICTR-98-44-1, 7 October 2003.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER III

Before:
Judge Lloyd G. Williams, Q.C., Presiding
Judge Andrésia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 7 October 2003

THE PROSECUTOR
v.
Édouard Karemera,
André Rwamakuba,
Mathieu Ngirumpatse,
Joseph Nzirorera *et al.*

Case No. ICTR-98-44-I

DECISION ON THE DEFENCE MOTION FOR MODIFICATION OF A DECISION OF 12 JULY 2000 ON PROTECTIVE MEASURES FOR PROSECUTION WITNESSES

Counsel for the Defence of Accused Nzirorera:
Peter Robinson
Dior Diagne

Counsel for Co-Accused:
Didier Skornicki and John Traversi
David Hooper and Andreas O'Shea
Charles Roach and Frédéric Weyl

Office of the Prosecutor:
Don Webster
Tamara Cummings-John

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

SITTING as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., Presiding, Andrésia Vaz and Khalida Rachid Khan ("Chamber");

BEING SEIZED of the "Motion for Modification of Decision on the Prosecutor's Motion for Protective Measures for Witnesses", filed on 4 August 2003 pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("Rules") by the Defence for Accused Joseph Nzirorera ("Motion");

CONSIDERING the Prosecution Response to the Motion, filed on 23 September 2003 ("Response") and the Defence Reply to the Response, filed on 30 September 2003 ("Reply");

CONSIDERING the Decision on the Prosecutor's Motion for Protective Measures for Witnesses rendered by Trial Chamber II of the Tribunal in the present Case, regarding Accused Nzirorera, on 12 July 2000 ("Nzirorera Decision of 12 July 2000");

CONSIDERING, further, the Decisions on the Prosecutor's Motions for Protective Measures for Witnesses rendered by Trial Chamber II of the Tribunal in the present Case, regarding Accused Karemera and Ngirumpatse, on 6 July 2000 ("Karemera Decision of 6 July 2000" and "Ngirumpatse Decision of 6 July 2000"), and regarding Accused Rwamakuba, on 22 September 2000 ("Rwamakuba Decision of 22 September 2000");

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules, and, especially, Articles 20 and 21 of the Statute and Rules 66, 69 and 75 of the Rules;

NOW REVIEWS the Motion, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the Parties.

1. In the Nzirorera Decision of 12 July 2000, Trial Chamber II of the Tribunal, then seized of the present Case, *inter alia* ordered that the identity of each protected witness be disclosed no later than 21 days prior to their testimony ("Disclosure Order of 12 July 2000").

2. In the Nzirorera Decision of 12 July 2000, Trial Chamber II further:

(i) Ordered that the Accused or his Defence Counsel 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 witness or any relative of such person; and

(ii) Required that, when such interview is granted, with the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, the Prosecution undertake all necessary arrangements to facilitate such interview ("Contact Order of 12 July 2000").

3. The same orders were made in the Karemera and Ngirumpatse Decisions of 6 July 2000 and in the Rwamakuba Decision of 22 September 2000.

4. The Defence for Accused Nzirorera is presently requesting the Chamber to amend the Nzirorera Disclosure and Contact Orders of 12 July 2000, in the light of a change of circumstances since these Orders were rendered. The Defence emphasises that the Accused's right to a fair and expeditious trial would be prejudiced by the continued application of these Orders.

I. Request for Modification of the Nzirorera Disclosure Order of 12 July 2000

A) Parties' Submissions

5. The Defence notes that, on 18 July 2003 in the *Military I* Case (*Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T), Trial Chamber I of the Tribunal amended a previous Order compelling the Prosecutor to disclose the identity of the protected prosecution witnesses' identity to 35 days prior to each of these witnesses' scheduled appearance. Trial Chamber I decided, according to the Defence, that disclosure of the protected prosecution witnesses' identity would be carried out by the Prosecutor 35 days prior to the commencement of each trial session.[1]

6. The Defence requests that the same modification as above be made, in the Accused's case, to the Nzirorera Disclosure Order of 12 July 2000. The Defence emphasises that the reasons advanced by Trial Chamber I for the modification are equally relevant to the Accused's case, in that, (i) there will be fewer than 100 witnesses in the Accused's case and, (ii) the Accused's trial is likely to be conducted without significant breaks.

7. The Defence adds that the circumstances of the Accused's case have changed in two respects since the Chamber rendered the Nzirorera Disclosure Order of 12 July 2000, and that these new circumstances support the adoption of the same deadlines of disclosure of protected witnesses' identity as those presently in force in the *Military I* Case:

> (i) The improvement, by all accounts, of the situation of witnesses, in view of the fact that no evidence was received of threats or reprisals to the prosecution witnesses having testified before the Tribunal;
>
> (ii) The fact that the Defence intends to send an investigator to interview people who can corroborate or contradict the information provided by each protected prosecution witness once that witness' identity is disclosed, and that the Registry used to approve such requests within 7 days, but that it now takes 30 days to approve them. The Defence adds that it is essential that this investigation be completed before cross-examination, and that such cannot be the case under the current deadlines for disclosure of the protected prosecution witnesses' identity.

Response

8. The Prosecutor essentially responds:

> (i) That the circumstances are different in the present Case from those of the *Military I* Decision of 18 July 2003, which was issued over a year after the commencement of trial, at the end of the third trial session, while the Accused's trial in the present Case has not commenced; and
>
> (ii) That disclosure of the identities and un-redacted witness statements of all prosecution witnesses in advance of the commencement of trial will not significantly expedite matters at trial.

Reply

9. The Defence essentially replies:

(i) That the 21-day rule was abandoned in the *Military I* Case after it resulted in delays caused by the Defence's lack of preparation, and that the modification sought would avoid such disclosure problems in the present Case;

(ii) That the Prosecutor has not shown that the new deadlines for full disclosure to the Defence in the *Military I* Case have resulted in security problems for prosecution witnesses, that, in opposing the modification, the Prosecution seeks to hamper the Defence's preparation to cross-examination of its witnesses and that such tactics should not prevail over the search for truth and the right to a fair trial.

B) Deliberations

10. The Chamber is prepared to modify the Order of 12 July 2000 to the extent that the disclosure of the identity of the prosecution witnesses should be made 21 days ahead of each Trial session rather than 21 days before the witness is called to testify.

11. Modification of the Nzirorera Disclosure Order of 12 July 2000 should equally apply to the Karemera and Ngirumpatse Disclosure Orders of 6 July 2000 and to the Rwamakuba Disclosure Order of 22 September 2000.

II. Request for Modification of the Contact Order of 12 July 2000

A) Parties' Submissions

Motion

12. The Defence notes that, under the Nzirorera Contact Order of 12 July 2000, it is to seek an authorisation from the Chamber to contact a protected prosecution witness. The Defence argues that this procedure has proved cumbersome and lengthy in the case of their request to interview Witness G, which the Chamber granted on 27 June 2003.[2] The Defence therefore requests that the Contact Order of 12 July 2000 be modified to provide that all requests to interview potential prosecution witnesses shall be made in writing to the Witnesses and Victims Support Section of the Tribunal ("WVSS"), and that this Section shall promptly make all arrangements to facilitate such an interview.

Response

13. The Prosecutor objects to the modification proposed, essentially, that the requirement of court approval, (i) has not been proved to have caused delays in making arrangements for meetings with protected prosecution witnesses; (ii) did not influence witnesses to decline invitations to meet with the Defence; (iii) is an effective means of monitoring the security of witnesses, in that it ensures the integrity of the proceedings and the protection of vulnerable witnesses.

14. The Defence essentially replies, (i) that the Prosecution has failed to explain how such a regime would pose a security problem for its witnesses; (ii) that the only change would be that the Chamber would not have to deal with the request; and (iii) that, as under the current regime, there would be no direct contact with the protected witness except through the WVSS.

B) Deliberations

15. In Decisions rendered by the Tribunal since July and September 2000, it was held that contact

by a party with the other party's witnesses should remain an *inter partes* matter, save where a dispute arises.[3] The Chamber subscribes to such a statement and decides that it will no longer be necessary for the Defence to notify the Trial Chamber when requesting to contact protected prosecution witnesses. However, the Chamber does not consider that it is desirable that requests to interview potential prosecution witnesses be made to the WVSS rather than to the Prosecutor. The WVSS may nevertheless facilitate such an interview.

16. Modification of the Nzirorera Disclosure Order of 12 July 2000 should equally apply to the Karemera and Ngirumpatse Contact Orders of 6 July 2000 and to the Rwamakuba Contact Order of 22 September 2000.

17. The Chamber adds that interviews with another party's witnesses or potential witnesses should as a general rule take place in the presence of the opposing party, to protect the integrity of the process.

18. The Chamber further emphasises that there can be no justification for the Defence wanting to interview every single prosecution witness in the present Case, as indicated in the Motion.[4]

FOR THE ABOVE REASONS,

THE TRIBUNAL,

I. ORDERS the Prosecutor to disclose the identity of the protected witnesses he intends to call at trial at the latest 21 days in advance of the commencement of the trial session during which the concerned witnesses are scheduled to testify.

II. ORDERS the Defence to notify the Prosecution in writing, on reasonable notice, of its wish to contact a protected victim or potential prosecution witness or a relative of such person. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, the Prosecution shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.

III. DECLARES that the other party may attend any such interview, if it so wishes.

IV. DENIES the Motion in all other respects.

Arusha, 7 October 2003

Lloyd G. Williams, Q.C.,	Andrésia Vaz	Khalida Rachid Khan
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

[1] Referring to *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003.

[2] In the Chamber's Decision on the Defence Motion for Interview with Witness G.

[3] See *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-I, *Décision (Requête du Procureur aux fins de mesures de protection des témoins à décharge)* (TC), 30 May 2002, § 20. See also *Prosecutor v. Nsengimana*, Case No. ICTR-2001-69-T, Decision on Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, para. 24.

[4] See Defence Motion at para. 11: "It is the intention of the defence to interview before the trial each prosecution witness who claims to have information concerning Mr. Nzirorera."

ANNEX 13:

Prosecutor v Nyiramasuhuko, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", ICTR-97-21-T, 27 March 2001.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before:
Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registrar: Mr Adama Dieng

Date: 27 March 2001

The PROSECUTOR
v.
Pauline NYIRAMASUHUKO
and
Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

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

The Office of the Prosecutor:
Japhet Mono
Ibukunolu Alao Babajide
Manuel Bouwknecht

Counsel for Nyiramasuhuko:
Nicole Bergevin
Guy Poupart

Counsel for Ntahobali:
René Saint Léger
Michael Bailey

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

SITTING as Trial Chamber II (the "Chamber"), composed of Judges Laïty Kama, presiding, William H.

Sekule, and Mehmet Güney;

NOTING that the Prosecutor filed on 11 December 1997 a "Motion from the Prosecutor to order protective measures for the victims and witnesses of the crimes alleged in the Indictment No. ICTR-97-21-I", but that a decision on the matter could not be found in the judicial record of the Tribunal;

NOTING that the Chamber was seized of a "Motion to re-file motion from the Prosecutor to order protective measures for the victims and witnesses of the crimes alleged in Indictment No. ICTR-97-21-I", filed on 15 November 2000;

NOTING the "Decision on the Prosecutor's Motion to re-file motion to order protective measures for the victims and witnesses", dated 27 February 2001 (the "Decision of 27 February 2001");

BEING NOW SEIZED of the "Motion by the Prosecutor for protective measures for victims and witnesses", filed on 6 March 2000, (the "Motion");

CONSIDERING the "Brief in support of the Motion by the Prosecutor for protective measures for victims and witnesses" (the "Brief"), attached to the Motion;

WHEREAS, acting on the Chamber's instruction, Court Management Section advised the Parties on 15 March 2001 that the Motion would be reviewed on briefs only pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules"), and informed Counsel for the Defence of a deadline of 21 March 2001 to reply to the Motion;

CONSIDERING the "Réponse à la requête du Procureur aux fins d'obtenir des mesures de protection pour les victimes et témoins dans le dossier de Pauline Nyiramasuhuko" filed on 20 March 2001;

NOTING that Counsel for Ntahobali did not file any reply to the Motion;

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

SUBMISSIONS OF THE PARTIES

The Prosecutor

1. The Prosecutor requests that the Chamber orders 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 Prosecutor requests in paragraph 4 of the Motion that these persons be provided protection

by the following orders:

(a) That the names, addresses whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses described in Paragraph should 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.

(b) Requiring, to the extent that the names, whereabouts of, and other identifying information concerning such victims and potential prosecution witnesses is contained in existing records of the tribunal be expunged from those documents;

(c) Prohibiting publication on the Internet as well as 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 such victims and potential prosecution witnesses. An order that this non-disclosure order shall remain in effect after the termination of this trial;

(d) Prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly any document or information contained in any documents or any other information (sic) *which could reveal or lead to the identification of any individuals specified in Paragraph 3; 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;.*

(e) Requiring the Defence to provide to the Trial Chamber and the prosecutor a designation of all persons working on the immediate Defence team who pursuant to paragraph 4(d) above will have access to any information referred to in paragraphs 4(a) through 4(d) above.

(f) Requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of the Defence team and requiring Defence Counsel to ensure that any member departing from the team remits all documents and information that could lead to identification of persons specified in Paragraph 3 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 Trial Chamber and the Prosecutor;

(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 Trial Chamber is assured that the witnesses have been afforded and adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the defence in a redacted form until such mechanism is in place; and in any event, that the prosecutor is not required to reveal the identifying data to the defence sooner than seven (21) days before the victim or witness is to testify at trial; (sic)

(i) 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) Requiring 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 trial, and the public;

(k) Prohibiting any member of the Defence team 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) Prohibiting the Accused individually from personally possessing any material which includes or might lead to discovery the identity of any protected witness;

(m) 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 a redacted form, unless the Accused is, at the time of the possession, in the presence of his assigned Counsel, and instructing the Registry authorities at UNDF to ensure compliance with the prohibition set out in the Paragraph.

3. The Prosecutor has submitted two Affidavits, respectively from Samuel Akorimo and Remi Abdulrahman, dated 6 March 2001, and informative material in Annex A to the Brief on attacks on Tutsi refugee camps in 1997 and 1998. By doing so, the Prosecutor intends to demonstrate that there is a substantial threat to the lives and properties of potential witnesses to the crimes alleged in the Indictment if their identities were disclosed, and also, to all survivors of the genocide.

4. The Prosecutor alleges that these threats affect not only victims and potential witnesses residing in Rwanda but also those living in the rest of the African continent and even outside the continent, due to the presence in those areas of the former Rwandan Armed Forces (ex-FAR), *Interahamwe* groups and former civil servants from the Rwandan government.

5. More specifically, the Prosecutor relies on the risk of violence against victims and potential witnesses in Butare *préfecture,* where rebel infiltrators have freed genocide suspects from detention centres.

6. According to the Prosecutor, the situation in Butare *préfecture* is of an exceptional nature and renders almost impossible the separation between perpetrators and victims of the genocide, so the likelihood of risk and harm from perpetrators to victims is very high.

7. Finally, the Prosecutor recalls that these measures were earlier ordered in respect of the same witnesses that will appear in this joint trial and that it is in the interest of justice and for parity of treatment that these measures should be ordered.

The response by Nyiramasuhuko

8. The Defence reiterates her position as developed in her own Motion for protective measures for witnesses filed on 27 November 2000 that, all potential witnesses who did not waive their right to

protection should be granted protective measures, be they prosecution or defence witnesses.

As to the Brief

9. Regarding the allegations contained in the Prosecutor's brief, the Defence alleges that victims and potential witnesses of the 1994 events in Rwanda also face threats from the current Rwandan government. She alleges that the Prosecutor did not bring evidence in support of the fact that victims and potential witnesses residing in Rwanda and outside Rwanda would face threats from members of the ex-FAR, *Interahamwe* or former civil servant of the Rwandan government as alleged at paragraphs 3 and 4 of the Brief. The Defence also contends that the allegations of violence against Tutsi refugees in camps are not confirmed by Annex A, lack geographical precision and date back to June 1998 despite the requirements of updated information pursuant to the Decision of 27 February 2001. Consequently, the Defence requests that the allegations contained at paragraphs 3, 4, and 6 of the Prosecutor's Brief be disregarded, if the Prosecutor does not provide supplementary elements.

As to the Affidavit by Samuel Akorimo

10. The Defence contends that this affidavit has already been used by the Prosecutor in the matter of *the Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T. It was then signed by Samuel Akorimo and dated 8 January 2001 whereas in the current Brief, the typed date reads 6 March 2001. Consequently, even if there are slight differences between the two affidavits, the Defence contends that the description of the security situation by the affiant refers to a situation dating back to January 2001, and not March 2001. Moreover, the Defence contends that an affidavit is null and void if not signed and dated by hand by the affiant.

11. Furthermore, the Defence contends that the witnesses referred to in the Affidavit would testify in relation to allegations against her co-Accused Ntahobali, or those who will be tried jointly with her, such as Nsabimana and Kanyabashi, but not specifically in relation to allegations against the defendant herself.

As to measures (h) and (m)

12. The Defence contends that the names of all potential prosecution witnesses should be disclosed to the Defence at the latest during the pre-trial conference to be held on 19 April 2001, pursuant to Rule 67 (A)(i). The Defence submits that this practice was followed in the so called Media and Cyangugu cases.

13. The Defence opposes measure (m) and argues that it violates the Accused's rights set out in Articles 19(1) and 20(4)(b) and (e) of the Statute. The Defence contends that an Accused should have the right to individually possess copies of prosecution witness statements to prepare its defence.

AFTER HAVING DELIBERATED

Legal basis of the Motion

14. 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 conduct of in camera proceedings and 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.

15. According to Rule 69, 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.

16. 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) 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.

17. Mindful of guaranteeing the full respect of the rights of the witnesses and those of the Accused, the Chamber shall order, pursuant to Rule 75, 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.

18. To determine the appropriateness of such protective measures, the Chamber has evaluated the security situation affecting concerned witnesses in light of the information contained in the supporting documents in the Brief. Having considered the Defence's objection, the Chamber has reviewed the Affidavit of Samuel Akorimo dated 6 March 2001 and signed by hand by the affiant, 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*". In that respect, the Chamber notes that the Motion is brought in the matter *of the Prosecutor v. Nyiramasuhuko and Ntahobali*, her co-accused, and that the Motion does not only concern Nyiramasuhuko. The Chamber rejects the Defence's contention that an Affidavit has also to be dated by the affiant to be valid as the signature by the affiant is sufficient and the date need not be hand written. Further, the Chamber notes that the affiant, in his capacity as Commander in charge of the Witness Management Unit of the OTP in Rwanda, stated that he was constantly monitoring security reports prepared by members of his unit. The Chamber is satisfied that in that capacity, the affiant can present an updated assessment of the security situation in Rwanda, and in Butare *préfecture* in particular. The second affidavit by Remi Abdulrahman emphasises the threat levels 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, and therefore justifies warranting protective measures.

19. In relation to documents in support of threats for witnesses residing outside Africa (third category of witnesses according to the Motion (c)), having taken note of the Defence's remarks in that respect, 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".

20. In relation to the non disclosure of witnesses' identity, 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, and has reviewed the measures requested by the prosecutor in light of the current practice of the Tribunal.

21. Pursuant to Rule 75 (B) of the Rules, the Chamber therefore grants measures (a), (b), (d),(e), (f), (g), (i), (j), (k) and (l).

22. The Chamber grants measure (c) but decides, *proprio motu*, to modify the order requesting an order prohibiting in particular "publication on the Internet". In order to prohibit all possible disclosures in any medium, measure (c) should read as follows:

> *"An order prohibiting the disclosure to the public or publication in the media, including the Internet, 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 such victims and potential prosecution witnesses. An order that this non-disclosure order shall remain in effect after the termination of this trial;"*

23. As to measure (h), the Chamber notes a discrepancy between the number of days in which the Prosecutor would be required to reveal the identity of a witness to the Defence prior, between the noun, i.e. "seven" and the number, i.e "21" mentioned in 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, and not in relation to a fixed date in time, considering that the schedule may vary for a variety of reasons (see "Decision on the Prosecutor's Motion for protective measures for witnesses", filed on 6 July 2000, in *the Prosecutor v. Karemera*). The Chamber also recalls that the same order was granted to the Defence for Nyiramasuhuko in its Decision of 20 March 2001. The Chamber therefore grants measure (h) but emphasises that it should read as follows:

> *(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 Trial Chamber is assured that the witnesses have been afforded and adequate mechanism for protection and allowing the Prosecutor to disclose any materials provided to the defence in a redacted form until such 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;*

24. As to measure (m) opposed by the Defence, the Chamber 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, deciding that such a request "is overly broad and may impinge Article 20(4)(b) of the Statute". The Chamber therefore denies this measure.

25. 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), (d), (e), (f), (g), (i), (j), (k) and (l).

PROHIBITS the disclosure to the public or publication in the media including the Internet, 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 such victims and potential prosecution witnesses (measure c);

ORDERS that the identity of the witnesses be disclosed to the Defence twenty-one (21) days prior to the date they come to testify at trial, so as to allow adequate time for preparation of the Defence (measure h).

DENIES measure (m).

Arusha, 27 March 2001,

Laïty Kama	William H. Sekule	Mehmet Güney
Judge, Presiding	Judge	Judge

(Seal of the Tribunal)

ANNEX 14:

Prosecutor v Kordic, "Orders for Measures to ProtectVictims and Witnesses", IT-95-14/2, 15 January 1999.

1999 WL 33482997 (UN ICT (Trial)(Yug))

International Criminal Tribunal for the Former Yugoslavia
IN THE TRIAL CHAMBER

Order

Trial Chamber

Order

PROSECUTOR
v.

DARIO **KORDIC**

MARIO CERKEZ

Order of: 15 January 1999

ORDER FOR **MEASURES** TO **PROTECT VICTIMS** AND **WITNESSES**

ORDER FOR **MEASURES** TO **PROTECT VICTIMS** AND **WITNESSES**

The Office of the Prosecutor: Mr. Geoffrey Nice, Ms. Susan Somers, Mr. Patrick Lopez-Terres, Mr. Kenneth Scott

Counsel for the Accused: Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. Turner Smith, Mr. David Geneson and Mr. Ksenija Durkovic, for Dario Kordic, Mr. Bozidar Kovacic, for Mario Cerkez

Before: Judge Richard May, Judge Mohamed Bennouna, Judge Patrick Robinson
Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

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'),

VUKOVIC

BEING SEISED of the 'Prosecutor's Motion for Amended **Protective Order** and **Measures** to **Protect Victims** and **Witnesses**' ('the Motion'), and confidential memorandum in support thereof, filed by the Office of the Prosecutor ('Prosecution') on 9 October 1998, together with the Response to the Motion ('the Defence Response') filed jointly by the Defence on 23 October 1998, the confidential Prosecution Reply to the Defence Response filed on 24 November 1998 and the Defence Reply thereto filed 4 December 1998,

HAVING HEARD the parties in closed session on 8 January 1999,

NOTING that the material submitted by the Prosecution shows a clear need for protective measures for witnesses and potential witnesses in this case,

NOTING the existing Orders granting protective measures in this case issued on 27 January 1998, 27 November 1998 and 13 January 1999,

CONSIDERING that Article 20 of the Statute of the International Tribunal ('the Statute') requires the

Trial Chamber to ensure that proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses,

CONSIDERING the rights of the accused as set forth in Article 21 of the Statute and, in particular, the right of the accused to have adequate time and facilities for the preparation of his defence,

CONSIDERING that Article 22 of the Statute requires the International Tribunal to provide in its Rules of Procedure and Evidence ('Rules') for the protection of victims and witnesses,

CONSIDERING the provisions of Rules 69, 75 and 79 of the Rules concerning the protection of witnesses,

CONSIDERING ALSO the obligations imposed by the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal and the codes of any national body or organization to which counsel may belong,

PURSUANT TO Articles 20 and 22 of the Statute and Rules 69, 75 and 79 of the Rules

HEREBY ORDERS as follows:

1. For the purposes of this Order: 'The Prosecutor' means and includes the Prosecutor of the Tribunal and her staff; 'Kordic Defence' means and includes only the accused Dario Kordic and such counsel, legal assistants, staff and others as are specifically identified in a list to be maintained by the Kordic defence counsel and filed with the Trial Chamber ex parte and under seal within ten days of the entry of this Order; all additions and deletions in respect of any of the above categories of persons who are necessarily and properly involved in the preparation of the defence to this list shall be notified to the Trial Chamber in similar fashion within seven days thereafter; 'Cerkez Defence' means and includes only the accused Mario Cerkez and such counsel, legal assistants, staff and others as are specifically identified in a list to be maintained by the Cerkez defence counsel and filed with the Trial Chamber ex parte and under seal within ten days of the entry of this Order; all additions and deletions in respect of any of the above categories of persons who are necessarily and properly involved in the preparation of the defence this list shall be notified to the Trial Chamber in similar fashion within seven days thereafter; 'the public' means and includes all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the International Tribunal and the staff of the Registry, the Prosecutor, the Kordic Defence and the Cerkez Defence, as defined above. 'The public' specifically includes, without limitation, families, friends and associates of the accused; the accused in other cases or proceedings before the International Tribunal; defence counsel in other cases or proceedings before the International Tribunal; the media; and journalists;

2. all material that has been disclosed to the **Kordic** Defence and Cerkez Defence in redacted form pursuant to the **Order** for the Disclosure of Documents and Extension of **Protective Measures** issued by this Trial Chamber on 27 November 1998 shall be disclosed to the **Kordic** Defence and Cerkez Defence in full, without redaction, not less than twenty-one days prior to the date set for commencement of the trial;

3. the Prosecutor may, with the approval of the Trial Chamber, make limited redactions to any written statement or testimony which was not part of the material supporting the original Indictment or the Amended Indictment concerning the identity and whereabouts of the person making or providing such written statement or testimony;

4. if the person making or providing any such written statement or testimony is a current or former citizen, national or subject of the former Yugoslavia or any of its parts, the written statements and testimony of such person, as redacted, shall be disclosed to the Kordic Defence and Cerkez Defence immediately and shall be disclosed to the Kordic Defence and Cerkez Defence in full, without redaction, not less than twenty-one days prior to the date set for commencement of the trial;

5. if the person making or providing any such written statement or testimony is not a current or former citizen, national or subject of the former Yugoslavia or any of its part, the written statements

and testimony of such person, as redacted, shall be disclosed to the Kordic Defence and Cerkez Defence immediately and shall be disclosed to the Kordic Defence and Cerkez Defence in full, without redaction, not less than thirty days prior to the date set for commencement of the trial;

6. to the extent that the disclosure of a person's written statement or testimony, or any other evidence, is directly covered by a **protective order** or other **protective measure** granted by another Trial Chamber, relief from such **order** or **measure** will be obtained from the Trial Chamber which entered such **order**, prior to such statement, testimony or evidence being disclosed;

7. save as is directly and specifically necessary for the preparation and presentation of this case, the Prosecutor, the **Kordic** Defence and the Cerkez 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, until such time as the **witness** testifies publicly in open session; (b) any evidence (including documentary, physical and other evidence) or any written statement of a **witness** or potential **witness**, or the substance, in whole or part, of any such evidence or statement that has not already been made public, except in the course of public trial and other public proceedings before the International Tribunal (where not **protected** by further, specific **protective measures**); (c) the non-public or otherwise **protected** testimony of a **witness** or potential **witness** identified or listed by the Prosecutor, or of a person whose written statement(s) has been disclosed by the Prosecutor, except that a person may review his or her own written statement(s) and testimony (and such documentary, physical or similar evidence which is directly related to or included in his or her statement or testimony); and to the extent reasonably necessary to his or her work, an expert witness may review the statements and testimony of other persons, as well as other evidence;

8. if the Prosecutor, the Kordic Defence or the Cerkez 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 a written statement or non-public or otherwise protected testimony of a witness (or any portion of such a statement or testimony) or other non-public evidence is shown or disclosed, that such 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 statement or evidence, such person shall return it to the Prosecutor, the **Kordic** Defence or the Cerkez Defence when such statement or evidence is no longer reasonably necessary for the preparation and presentation of this case;

9. the family, friends and associates of Dario **Kordic** or Mario Cerkez (other than the **Kordic** Defence or the Cerkez Defence) shall not contact any **witness** or potential **witness** who has been identified to the **Kordic** Defence or the Cerkez Defence by the Prosecutor, or whose unredacted written statement(s) or non- public or **protected** testimony has been disclosed by the Prosecutor, concerning or in connection with this case;

10. the **Kordic** Defence and Cerkez Defence may only on reasonable prior written notice to the Prosecutor contact a **witness** or potential **witness** identified to them by the Prosecutor, or a person whose written statement(s) or non-public or **protected** testimony has been disclosed by the Prosecutor;

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

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

Richard May

Presiding

Dated this fifteenth day of January 1999

At The Hague

The Netherlands

[The seal of the Tribunal]

END OF DOCUMENT

ANNEX 15:

Prosecutor v Muvunyi, "Decision on the Prosecutor's Motion for Orders for Protective measures for victims and witnesses to crimes alleged in the indictment ", ICTR-2000-55-I, 25 April 2001.

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)

ANNEX 16:

Prosecutor v Rwamakuba, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" ICTR-98-44-T, 22 September 2000.

TRIAL CHAMBER II

Original : English

Before:
Judge Laïty Kama, Presiding Judge
Judge William H. Sekule
Judge Mehmet Güney

Registry:
John Kiyeyeu

Decision of: 22 September 2000

THE PROSECUTOR
V.
ANDRÉ RWAMAKUBA
ICTR-98-44-T

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 David Hooper

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal")

SITTING as Trial Chamber II, composed of Presiding Judge 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. André Rwamakuba* (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;

WHEREAS the Defence's Reply and Brief in Support of the Reply to the Prosecutor's Motion for the Protection of Witnesses was filed on 5 June 2000;

CONSIDERING that in the interest of justice and in the particular circumstances of the case, the Chamber, *proprio motu*, has decided to consider the Defence's Reply and Brief in Support;

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69, 75 and Rule 72 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, on the basis of the points made in paragraph 3 of the Motion, the following orders:

3.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;

3.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;

3.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;

3.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;

3.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;

3.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;

3.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;

3.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;

3.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;

3.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.

4. 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.

Reply by the Defence

5. Defence for Rwamakuba submits, *inter allia*, that the Prosecutor has not sufficiently identified the "potential witnesses" for which protective measures are sought, nor has she sufficiently and precisely demonstrated that protection is necessary in respect of each witness considering that protection is granted only in exceptional circumstances according to Rule 69.

6. Defence for Rwamakuba specifically objects to the measures provided for in paragraphs 3(e) and 3 (f) of the Motion as they restrain unwarrantedly the Defence.

7. As to the order sought in paragraph 3(h), the seven days period to reveal the identity of the witness before the witness is called to testify at trial is not sufficient enough for the Defence to prepare its case. Considering the problems particular to Rwanda, a period longer than 30 days should apply to the disclosure obligation.

8. Defence concedes that the orders sought in paragraphs 3(a), 3(b), 3(c), 3(d), 3(g), 3(i) and 3(j) are appropriate if the circumstances so justify them.

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):

9. 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) of the Rule regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

10. 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 Rwanda ("ICTR") in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses on 20 November 1998) quoting the findings of The Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in the *Prosecutor v. Tadic*, IT-94-I-T (Decision on the Prosecutor's Motion for Requesting Protective Measures for Witnesses on 10 August 1995). In these decisions, both Trial Chambers 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 decisions, both Trial Chambers determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

11. After having examined the information contained in the various documents and reports that the Prosecutor has annexed to in his brief to support the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation prevalent in Rwanda and neighboring countries could 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 of Paragraphs 3(a), 3(c), 3(d), 3(e) of the Motion. The Chamber is not of the view that the measure sought in paragraph 3(e) could prevent the reasonable and necessary preparation of the Defence.

On point 3(f) of the Motion

12. The Chamber takes note of the Defence's submissions. The Chamber grants 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.

13. 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:

14. ***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):

15. Taking note of the Defence's argument that the right of the Accused to have adequate time for preparation of its case would be impaired by a seven days disclosure period, the Chamber considers that the period sought 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 the case, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

16. 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);).

17. 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, 22 September 2000

Laïty Kama	William H. Sekule	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

ANNEX 17:

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

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 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].

[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.

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[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 restriction of the right of the accused to examine or have examined witnesses against him.

70. The majority of the Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure a fair trial when granting anonymity. It believes that some guidance as to what standards should be employed to ensure a fair trial can be ascertained both from the case law of the European Court of Human Rights and from domestic law. It recognizes, however, that these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses. The following guidelines achieve that purpose.

71. Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. *(Id.* para. 43.) Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness. *(Id.* para. 43.) Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable. The release of nicknames used in the camps clearly falls into this latter category and the majority of the Trial Chamber will therefore not allow the release of this information concerning witnesses who have been granted anonymity without the express consent of these witnesses. Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness. *(See* Article 68 of the German Criminal Code of Procedure (StPO).)

72. Questions relating to the reliability and the relationship of the witness to the accused or the victim by the defence must be permitted. If this information is released, knowledge of the identities of the witnesses would not add considerably to the information which the defence needs to cross-examine them about the events to which they testify. It may prevent questioning them about their past history, which could go to their credibility, but such restriction of the right of the accused would seem to be permissible in the light of the circumstances. As Judge Brooking observed in the *Jarvie* case:

> The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it . . . A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.
>
> *(See Jarvie, supra* at 90.)

73. According to the Defence, the bottom line formulated in the *Kostovski* case is that the accused should be given a proper opportunity to question and challenge a witness and to be informed about particulars which may enable the accused to demonstrate that the witness is prejudiced. These rights are sufficiently safeguarded by the procedural guidelines ensuring a fair trial as outlined above. As long as the Trial Chamber adheres to these guidelines, the Trial Chamber should order appropriate measures for anonymity of vulnerable witnesses, bound as it is by its mandated obligation to offer protection to them in the process of conducting a fair trial.

74. The Rules, especially Rule 89, give the Trial Chamber wide latitude with respect to the receipt of evidence. In this Rule, perhaps more than anywhere else in the Rules, there is a departure from some common law systems where technical rules of evidence predominate. Sub-rules 89 (C) and (D) provide that the only limit on the receipt of relevant evidence is that it has probative value, and it may be excluded only if it is substantially outweighed by the need to ensure a fair trial. Anonymous testimony may be both relevant and probative.

75. The limitation on the accused's right to examine, or have examined, the witnesses against him, which is implicit in allowing anonymous testimony, does not, standing alone, violate his right to a fair trial. Indeed, the Defence recognizes that, under certain circumstances, anonymous testimony is consistent with a fair trial. If the party offering anonymous testimony is able to meet the guidelines set out herein, the testimony should be allowed.

76. Now that the framework in which anonymity may function has been set out, the Trial Chamber has to look at the specific circumstances of this case to determine whether to grant anonymity would be an appropriate measure for witness protection. In this regard, the Trial Chamber has paid particular attention to the confidential filings by the parties concerning prior media contact.

77. Initially, the Trial Chamber must consider the factors that apply to all witnesses. First, with respect to the objective aspect of the criterion that there must be real fear for the safety of the witness, it is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices. The alleged crimes are, without doubt, of a nature that warrants such a finding. Secondly, the Prosecutor has sufficiently demonstrated the importance of the witnesses to prove the counts of the indictment to which they intend to testify. Thirdly, no evidence has been produced to indicate that any of the witnesses is untrustworthy. Fourthly, the International Tribunal is in no position to protect the witnesses and or members of their family after they have testified. When applying these principles to the specific circumstances that can justify anonymity in an individual case, the evidence with regard to each of the five witnesses pseudonymed G, H, I, J and K must be examined separately.

78. Witness G was allegedly forced to participate in the sexual mutilation of Fikret Harambas ic in charge 5 of the indictment. According to a Declaration filed by one of the investigators from the Office of the Prosecutor, witness G originally ruled out the prospect of testifying before the International Tribunal. However, witness G did indicate that he would consider the possibility if "stringent procedures to ensure his confidentiality and security" were implemented. The Defence is aware of the true name of this witness as witness G has, in the past, appeared in the media without disguising his identity. The Defence is not aware, however, of a new identity under a national witness protection programme. The Trial Chamber, by majority, orders that the present identity and whereabouts of witness G be withheld from the Defence. His former identity need not be withheld from the Defence because that identity is already known to them.

79. Witness H was also allegedly forced to participate in the sexual mutilation of Fikret Harambas ic in charge 5 of the indictment. The Defence asserts that it believes that it knows the identity of witness H, who has refused to testify unless: "[the] identity and that of [the] family is completely protected". Because of the reasonable fear of retaliation felt by the witness and because the Prosecutor has met the guidelines for anonymity set out above, the majority decision of the Trial Chamber is to order that the identity of witness H and other identifying information be withheld from the Defence.

80. Witness I is a witness to the alleged sexual mutilation in charge 5 of the indictment. According to the Prosecutor, this witness has had no media contact. On behalf of witness I, the Prosecutor has submitted a Declaration from one of his investigators stating that:

> [B]ased on my observations, it is my opinion that the emotional impact of public disclosure of his victimization would be profound and irreparable. There is a strong likelihood that [witness] I would decline to participate in the proceedings if public disclosure was a condition of his testimony.

This statement fails to satisfy the threshold requirement that the witness requests anonymity from the accused. The Trial Chamber has granted the request of the Prosecutor for confidentiality for witness I from the public and the media, measures which are designed to give witness I the protection from "public disclosure" that he seeks. The obligation of the International Tribunal to protect witnesses should not go beyond the level of protection they are actually seeking.

81. It is alleged that witnesses G, H and I together support charge 5 of the indictment. Witness G has been denied anonymity by the Trial Chamber insofar as it relates to his former identity of which the Defence is already aware. Witness I is also alleged to be a witness to this mutilation. As noted above, it has been asserted that there is "a strong likelihood" that witness I would decline to give evidence if public disclosure was a condition of his testimony. The Trial Chamber has declined to allow witness I to testify anonymously but has granted full confidentiality to protect against public disclosure. The Prosecutor has not disclosed whether he will have other evidence regarding this charge and, of course, the Trial Chamber does not mean to suggest that additional evidence is required. At this stage of the proceeding, however, the accused is not denied a fair trial by the decision to permit witness H to testify anonymously.

82. According to the Prosecutor, witnesses J and K have had no media contact. Both fear reprisals against themselves and members of their families. Again it is asserted by the Prosecutor that witness J will not testify unless the identity is protected. Witness K has also requested that the identity and the identity of family members be protected. The Defence requests the release of the addresses of these witnesses at the time of the alleged offence in order to examine neighbours about the events of charge 11. Neither their identity nor their image is needed for an effective cross-examination, for the Defence asserts that its need is to "examine neighbours". Because of the reasonable fear of retaliation felt by these witnesses and because the Prosecutor has met the guidelines for anonymity set out above, the Trial Chamber, by majority decision, orders the non-disclosure of the identities and other identifying information relating to witnesses J and K.

83. It is alleged that witnesses J and K are "critical witnesses" to charge 11, for they are said to have observed armed forces beat and shoot persons in their neighbourhood. The Defence asserts that:

> [D]isclosure of names and/or images will not be necessary for an effective examination of their statements if their addresses at the time of the events as described in the indictment will be disclosed to the defence.
>
> The defence has no interest in data concerning present whereabouts of any witness for the prosecution.

As the Defence has indicated that it does not need to observe the images of these witnesses while testifying, the accused is not denied his right of cross-examination if the images of witnesses J and K are distorted or otherwise withheld from the accused. However, the Trial Chamber is not persuaded that it is necessary to release the addresses of the witnesses at the time that the alleged crimes took place in order to examine the circumstances of that charge. Revealing the former addresses of witnesses J and K is tantamount to revealing their identity. A less precise description will be sufficient to place the witnesses in their proper setting without giving actual addresses. The majority of the Trial Chamber believes that these witnesses are bystanders. Therefore, their contextual identity is sufficient to assure the accused a fair trial. Providing the Defence with their general locality meets the requirement of contextual identification, for this information will be sufficiently precise 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. The Trial Chamber finds that withholding their addresses will not deny the accused his right to a fair trial. Judge Stephen concurs with such decision subject to confirmation by the Prosecutor that witnesses J and K were, indeed, mere bystanders. The Prosecutor is directed to provide the Defence with the above general locality for witnesses J and K not less than thirty (30) days in advance of the firm trial date.

84. The Trial Chamber, by majority, finds that the Prosecutor has met the necessary standard to warrant anonymous testimony in respect of witnesses H, J and K. If, after considering the proceedings as a whole, as suggested in *Kostovski*, the Trial Chamber considers that the need to assure a fair trial substantively outweighs this testimony, it may strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused. It would be premature for the Trial Chamber to determine now that such testimony must be excluded.

85. This balancing of interests shows that, on the one hand, there is some constraint to cross-examination, which can be substantially obviated by the procedural safeguards. On the other hand, the Trial Chamber has to protect witnesses who are

genuinely frightened. In this situation the Trial Chamber, by majority, grants anonymity to witnesses G (of present identity only), H, J and K as requested by the Prosecutor in his Prayer 11 (a). The Prosecutor's Prayer in the alternative is denied.

86. As Lord Justice Beldam in the judgement given by the Queen's Bench Divisional Court in the British case of *R. v. Watford Magistrates' Court* [1992] T.L.R. 285 stated:

> [I]t would be pointless to withhold the identity of the witnesses or the means by which they could be identified if at the same time the circumstances in which they gave evidence were such that they could by other means, either because of their appearance, or because of the sound of their voices, easily be identified.
>
> (Cited in *R.v. Taylor*, *supra* at 15.)

Therefore the Trial Chamber, by majority, orders that the voices and images of witnesses H, J and K be altered to the extent that this will be necessary to prevent their identities from becoming known to the accused. The Prosecutor's Prayer 8 is granted in respect of these three witnesses H, J and K but denied in respect of witnesses F, G and I.

B. Release of edited recorded eyewitness testimony to the media.

87. In view of the right of the public to learn about the administration of justice in the International Tribunal, and especially because the International Tribunal has been established to prosecute serious violations of international humanitarian law in which the world community has a special interest, the Trial Chamber has decided that, after review by the Victims and Witnesses Unit, edited recordings and transcripts of the proceedings shall be released to the media. Editing will take place at the discretion of the Coordinator of the Victims and Witnesses Unit for the necessary protection of the witnesses, subject to the overall control of the Trial Chamber.

VII. Miscellaneous and general measures sought

88. The Prosecutor's request for measures to protect the identity of witness A has been withdrawn. The Prosecutor intends to release details of the identity of witness A as early as reasonably practicable and, in any event, prior to the commencement of the trial. The Defence asks for the identity to be released right away, asserting that, as the request for protection has been withdrawn, any further denial of information constitutes an inequality of examination. The Trial Chamber agrees with the Defence and orders the identity of witness A to be released immediately.

89. Furthermore, in his alternative Prayer 11 (a), the Prosecutor asks for delayed disclosure of the identity of witness F and the Defence consents to this. The Defence requests that the nickname as used in the camp also be released. The Trial Chamber orders in accordance with both requests. The release of the nickname is necessary to enable the Defence to place this witness in context. Rule 67 (A) requires that the identity of each witness shall be notified to the defence "as early as reasonably practicable and in any event prior to the commencement of the trial". In exceptional circumstances where disclosure of identity is ordered under Rule 69, Sub-rule (C) requires that the identity be disclosed "in sufficient time prior to the trial to allow adequate time for preparation of the defence". The Trial Chamber therefore orders that the identity and nickname of witness F be released not less than thirty days in advance of the firm trial date in order to allow the Defence sufficient time to prepare its case.

90. The Prosecutor has also sought non-disclosure of the current address of witness F and of the relatives of witness F. The Defence has confirmed that it has no interest in the present whereabouts of any witness. The Trial Chamber therefore grants this request.

91. The Prosecutor has already delivered to the Defence the redacted statements of witnesses G, H, I, J and K. The Trial Chamber has determined that witnesses H, J and K are entitled to full anonymity and therefore no further information needs to be disclosed to the Defence concerning the statements of these witnesses. The Trial Chamber, by majority, orders that the full statements of witnesses G and I, redacted only so far as may be necessary to preserve the anonymity of witnesses H, J and K and the current identity of witness G, be released to the Defence not later than thirty days in advance of the firm trial date.

92. The Trial Chamber has thus disposed of all of the requests for protection made by the Prosecutor with the exception of those contained in Prayers 13 and 14. In view of the measures for the protection of witnesses ordered by the Trial Chamber, the relief sought in Prayer 13 flows as a logical consequence and is granted accordingly.

93. Prayer 14 raises a number of practical difficulties for the Trial Chamber in that the enforcement of the powers of the International Tribunal in respect of contempt of its Orders and Decisions depends, as with many of its other powers, on the cooperation of States. However, the Trial Chamber grants the relief requested in Prayer 14 in so far as it relates to the six protected witnesses in the matter now before it.

DISPOSITION

For the foregoing reasons **THE TRIAL CHAMBER**, being seized of the Motion filed by the Prosecutor, and

PURSUANT TO RULE 75,

HEREBY GRANTS the Prosecutor's requests contained in Prayers 1, 2, 3, 4, 5 and 6, Prayer 7 (in respect of witnesses F, G, H and I only), Prayer 8 (in respect of witnesses H, J and K only), Prayers 9 and 10, Prayer 11 (a) (as to witnesses G, H, J and K only) and Prayers 12, 13 and 14 and **ORDERS AS FOLLOWS**:

(1) the identity of witness A shall be released to the Defence immediately;

(2) the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms F, G, H, I, J and K shall not be disclosed to the public or to the media;

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

(4) 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;

(5) 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;

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

(7) the testimony of witnesses F, G, H and I may be given by one-way closed circuit television or such other method as will avoid the retraumatization of these witnesses;

(8) the testimony of witnesses F, G, H, I, J and K shall be heard in closed session: however, edited recordings and transcripts of these sessions shall be released to the public and the media after review by the Victims and Witnesses Unit of the International Tribunal;

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

(10) the Prosecutor shall disclose to the Defence and the accused the name and complete statement of witness F not less than thirty days 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;

(11) the Prosecutor may withhold from the Defence and the accused the current identity of, and other identifying data concerning, witness G and the names of, and other identifying data concerning, witnesses H, J and K;

(12) the Prosecutor shall disclose to the Defence and the accused the complete statements of witnesses G and I, redacted only so far as may be necessary to preserve the anonymity of witnesses H, J and K and the current identity of witness G, not later than thirty days in advance of the firm trial date;

(13) the Prosecutor shall provide the Defence with details of the general locality for witnesses J and K not less than thirty days in advance of the firm trial date;

(14) the testimony of witnesses H, J and K may be given using voice and image altering devices to the extent necessary to prevent their identities from becoming known to the accused;

(15) the accused, the defence counsel 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 investigate the witnesses adequately;

(16) any such disclosure shall 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;

(17) 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 the Office of the Prosecutor shall make arrangements for such contact;

(18) the public and the media shall not photograph, video record or sketch the six protected witnesses appearing in this matter while they are in the precincts of the International Tribunal.

THE TRIAL CHAMBER DENIES the request in Prayer 7 in respect of witnesses J and K, the request in Prayer 8 in respect of witnesses F, G and I and the alternative request in Prayer 11 (b).

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Gabrielle

Kirk
McDonald

Presiding
Judge

Dated this tenth day of August 1995
At The Hague
The Netherlands

[Seal
of
the
Tribunal]

ANNEX 18:

Prosecutor v. Brdjanin, "Decision on third motion by Prosecution for protective measures", ICTY, IT-99-36, 8 November 2000.

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding Judge
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
8 November 2000

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIC

DECISION ON THIRD MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
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. Rule 66(A)(ii) of the Tribunal's Rules of Procedure and Evidence ("Rules") requires the prosecution to disclose to the accused, within the time limit prescribed by the Trial Chamber or the Pre-Trial Judge, copies of the statements of all witnesses whom it intends to call to testify at the trial. This disclosure requirement is made subject to the provisions of Rules 53 and 69,[1] made in accordance with Article 22 of the Tribunal's Statute.[2] Such a time limit has been prescribed in the present case but, in lieu of disclosure of any particular statement, the prosecution was permitted to file a motion within that time seeking protective measures in relation to the identity of the proposed witness who gave that statement.[3]

2. The present application seeks certain protective measures in relation to the witnesses whom the prosecution intends to call to give evidence in the trial.[4] The measures sought would preclude the disclosure at this stage of the identity and current whereabouts of the prosecution's witnesses to the accused and their defence teams.[5] This application is *not* concerned with the protective measures more usually sought, which preclude the disclosure of that information to the public but permit it to the accused. The relief sought is twofold:

1. leave to redact from the statement of *all* witnesses whom the prosecution proposes to call any information

concerning the current whereabouts of each witness, such information to be disclosed to the two accused and their defence teams "upon a reasonable showing";[6] and

2. leave to redact from the statements of *four* witnesses any information concerning the identity of those witnesses, such information to be disclosed to the two accused and their defence teams at a time "closer to trial".[7]

2 Non-disclosure of current whereabouts

3. The redactions sought relating to the current whereabouts of all the prosecution's witnesses are not opposed by the accused Momir Talic ("Talic").[8] The accused Radoslav Brdanin ("Brdanin") does not oppose that relief, provided that the information is disclosed to him no later than sixty days before trial.[9]

4. As the relief sought is not opposed, subject only to a determination of the accused's right to the eventual disclosure of the information redacted, an order will be made granting it. It is unnecessary at this stage to determine just when, if at all, those current whereabouts must be disclosed. In relation to that issue, however, it is pointed out once again that the onus lies upon the party seeking protective measures pursuant to Rule 69 to justify the redactions, not upon the other party to justify disclosure.[10] If there is a dispute concerning this issue, it will therefore be for the prosecution to justify the continued non-disclosure of the current whereabouts of these witnesses.

3 Delayed disclosure of identity

5. The delayed disclosure sought of the identity of the four witnesses in question is completely opposed by Talic, and partly so by Brdanin.

***Ex parte* basis**

6. In relation to two of the witnesses (identified as witnesses 7.74 and 7.75),[11] the prosecution has tendered all of the material upon which it relies on an *ex parte* basis only. Talic objects to such use of *ex parte* communications, and he has submitted that the arguments advanced to justify the protective measures sought should be set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought.[12]

7. The use of *ex parte* communications in these circumstances was discussed recently by the Trial Chamber in relation to the prosecution's application pursuant to Rule 66(A)(i), which concerned the disclosure of the identity of those persons whose statements had been part of the supporting material accompanying the indictment when confirmation was sought.[13] It was determined that the procedure adopted by the prosecution there, and which has been repeated by the prosecution here, of producing *all* the material tendered as justifying the relief sought on an *ex parte* basis deprives the accused of any opportunity of deciding whether to oppose the application, and that the basis of the application must be disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought.[14] The party seeking relief on an *ex parte* basis must identify with some care for the Trial Chamber why the disclosure of the detail of the application to the other party to the proceedings would cause unfair prejudice to either the party making the application or some other person involved in or related to that application.[15]

8. Because that decision of the Trial Chamber was based upon a statement of general principle – one which was not limited to issues relating to discovery[16] – the same procedure must be applicable to applications made pursuant to Rule 66(A)(ii) as well.

9. The extent to which the *ex parte* procedure was adopted by the prosecution in the present case was not warranted. It is difficult to see how the non-disclosure of *every* detail of the material supporting the application could ever be warranted. A hypothetical example may be given (which does not relate to either of the two *ex parte* applications made in the present case) to demonstrate how the salient details of an application for protective measures could be given on an *inter partes* basis without revealing the identity of the witness. The prosecution could state (on a confidential basis only):

The witness, who is a Bosnian Muslim, currently resides outside the former Yugoslavia, but he proposes to

> return within a month to live in the Federation of Bosnia and Herzegovina in a municipality where the majority of persons are Bosnian Serbs and in relation to which the [XYZ Agency] has reported that there is presently a high risk of retaliation if it were known that a Bosnian Muslim was to give evidence against a Bosnian Serb.
>
> It is proposed that the witness will give evidence directly relating to the participation of the accused in planning certain incidents alleged in the indictment. He has expressed fears to an OTP investigator concerning his security, and the security of his family, should the accused learn of his identity, and he has stated as the objective basis for those fears that he has heard from other proposed witnesses for the prosecution that they have received anonymous telephone calls threatening them and their families with violence if they give evidence in this case. The persons making those threats claimed to be acting on behalf of the accused. Such threats had already been reported to the OTP by those other proposed witnesses. The OTP has formal, sworn, statements by the witness and by the other proposed witnesses verifying these facts. The OTP has been unable to verify that the persons making these threats were in fact acting on behalf of the accused.
>
> Any investigation on behalf of the accused would necessarily take place at least in part within the municipality where the witness will be living.

The details could then be completed on an *ex parte* basis, which would identify the municipality involved, the nature of the evidence to be given, and any relationship between the witness and the accused. The prosecution could also file on an *ex parte* basis the additional objective material (including the formal, sworn, statements) upon which it relies for its claim that, despite the obligations imposed upon the accused and their defence teams, there should be no disclosure even to them at this stage.[17]

10. Such an application by the prosecution for protective measures could not identify the witness, but it would provide the accused with sufficient information to decide whether to oppose the application.

11. The prosecution is directed to file, on a confidential basis only and without revealing the identity of the witnesses 7.74 and 7.75, its justification for the non-disclosure of their identity to the accused and their defence teams in such a way that the accused are given sufficient information to enable them to determine whether to oppose the relief sought. The prosecution may also, if it so desires, add to the material presently filed on *an ex parte* basis.

***Inter partes* basis**

12. In relation to the other two witnesses whose identity the prosecution seeks to disclose to the accused and their defence teams at a time closer to the trial (identified as witnesses 7.72 and 7.73), the material upon which the prosecution seeks has been disclosed on a confidential *inter partes* basis. The relief sought is opposed by Talic,[18] and the prosecution's entitlement to it is doubted by Brdanin, upon the basis that the application appears to be based solely upon the witnesses' expressions of concern.[19]

13. The following propositions may now be taken to have been established by the recent jurisprudence of this Trial Chamber:

> (1) What must be shown by the prosecution, in support of an application for protective measures requiring the non-disclosure of the identity of a particular witness to the accused and the defence team until a later stage of the proceedings, is that such disclosure at this stage, despite the obligations imposed upon the accused and his defence team in relation to disclosure by them to the public ("save as is directly and specifically necessary for the preparation and presentation of this case") or to the media (non-disclosure in any circumstances),[20] may put the witness "in danger or at risk".[21]
>
> (2) The fears of the potential witness himself that he may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that he may be in danger or at risk from such a disclosure to the defence, and something more than that must be demonstrated before an interference with the right of the accused to know that identity is warranted.[22] What is required is that there be some objective foundation for those fears.[23]
>
> (3) 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, and, once the defence

> commences (quite properly) to investigate the background of the witness whose identity has been disclosed to them, there is a risk that those to whom the defence have spoken may reveal to others the identity of that witness, with the consequential risk that the witness will be interfered with.[24]
>
> (4) Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary consideration, an interpretation correctly accepted by the prosecution.[25] A balancing exercise is required in each case.[26]

Witness 7.72

14. Concerning witness 7.72, the prosecution says:

> This witness was recently spoken to by an OTP investigator. This witness currently resides in a country outside the former Yugoslavia. The witness stated that he has concerns for his safety and security and that of his family. The witness stated that since December 1999 he has received three anonymous telephone calls from a male asking "... how much do you need to give up your testimony ...". The witness did not recognise the caller, nor does he know who is responsible for these telephone calls. The witness has provided the ICTY with specific details about murders he witnessed (eg names and description of perpetrators and victims).

Talic has argued that, as the identity of the witness is already known to individuals other that the defence to be a witness, the defence must be entitled to know that identity as well. Moreover, he argues, as the witness is to testify in relation to specific events, it is "extremely important" for the defence to check on his reliability as a witness.[27]

15. The first argument does not logically lead to the conclusion that the further disclosure of the witness's identity to the defence may not put him further in danger or at risk. The second argument appears to place the witness in the wrong category. In the first of the Protective Measures Decisions, and in accordance with submissions then made by Talic, the Trial Chamber accepted that the disclosure of the identity of those witnesses who do not directly implicate the accused does little to assist the defence in its preparation for the trial in a case such as the present; the witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who do *directly* implicate the accused as having superior authority or as aiding and abetting.[28] There is nothing to suggest that witness 7.72 is in the second category. Indeed there is every indication that he falls within the first category. But none of this disposes of the application in favour of the prosecution, as the onus lies upon the party seeking protective measures pursuant to Rule 69 to justify the redactions, not upon the other party to justify disclosure.

16. There are a number of problems with the application so far as non-disclosure to the *defence* is concerned, whatever merit it may have had as an application for non-disclosure *to the public*. The statement alleged to have been made, "[...] how much do you need to give up your testimony [...]", suggests more the prelude to the offer of a bribe than a threat, although clearly a threat might be foreseeable if the bribe were refused. There is no suggestion that the OTP has sought to verify the circumstances in which the statement was made, or to elucidate the meaning attributed to it by the witness. There is nothing other than what was said in the telephone call to show that the witness may have believed on reasonable grounds that the caller was associated with the defence. An objectively founded fear of danger or risk from *any* source, in addition to exceptional circumstances, will usually be sufficient for the grant of protective measures involving non-disclosure of the witness's identity to the public but, in order to justify non-disclosure of that identity to the accused and the defence team, it is vital for the prosecution to establish, in addition to exceptional circumstances, that such a disclosure may put the witness further in danger or at risk.

17. There is nothing to suggest that a disclosure of the identity of the witness to the accused and the defence teams may put the witness further in danger or at risk or which is of such an exceptional nature as to warrant the interference with the accused's rights. The prosecution has not suggested, for example, that the evidence of witness 7.72 will directly implicate the accused, or that the family of the witness lives in an area in which any investigation on behalf of the accused would necessarily have to take place. The clear implication is that the witness himself has been relocated in another country with a new identity.

18. The prosecution has failed to establish that an investigation by the defence teams into the evidence of this witness may put the witness further in danger or at risk, and this particular application is refused. A further application may be made for protective measures in relation to the disclosure of the identity of this witness to the public at the appropriate stage.

Witness 7.73

19. Concerning witness 7.73, the prosecution says:

> This witness was recently spoken to by an OTP investigator. The witness currently resides in a village in a municipality within the Federation. This witness is a widowed mother of a young child. She stated that, by the end of the year, she wishes to return to her former house, which is situated in a municipality within the Republika Srpska. She would reside with her young child. The witness has provided the ICTY with specific details about incidents she witnessed (eg names and description of perpetrators and victims).

Talic has argued that the mere fact that the witness intends to settle in Republika Srpska is insufficient reason for the non-disclosure of her identity. He also repeats his argument that the fact that the witness is to testify in relation to specific events is a valid reason for disclosure, so that the defence may check on her reliability as a witness.[29] The second argument again appears to place the witness in the wrong category.

20. As to the first argument, in the absence of any more direct evidence, the particular risk faced by a person testifying against a person of another ethnic group will depend on the particular municipality in which that witness is living (or to which he or she is returning) and the ethnicities of the witness and the accused.[30] It may be assumed that witness 7.73 is a Bosnian Muslim (although this should have been expressly stated by the prosecution). The accused in this case are Bosnian Serbs. Those facts do not *automatically* mean that she will be in danger or at risk from retaliation if she returns to live in Republika Srpska. The UNHCR reports and the other reports provided by the prosecution[31] would tend to suggest that there remains a considerable risk to Bosnian Muslims returning to live in Republika Srpska, although the problem does not exist uniformly throughout the entity. The prosecution has not identified for the Trial Chamber, even on an *ex parte* basis, just where the witness intends to live, so that it gains less assistance from these reports than it should.

21. It may also be assumed that, whatever risk does exist for this witness, it would be increased if it were known that the witness was to give evidence against Bosnian Serbs, and perhaps the more so because of the identity of these two accused. That would clearly entitle the witness to protective measures against the disclosure of her identity *to the public*. But, again, nothing has been demonstrated which suggests that the disclosure at this stage of her identity *to the accused and their defence teams* may put her in danger or at risk, or which is of such an exceptional nature as to warrant the interference with the rights of the accused which the non-disclosure produces. Again, the prosecution has not suggested, for example, that the evidence of witness 7.73 will directly implicate the accused, or that she will be living in an area in which any investigation on behalf of the accused would necessarily have to take place. This is not a matter which should be left for conjecture by the Trial Chamber.

22. The balancing operation which must be carried out in each case requires this particular application for protective measures for witness 7.73 to be refused, but a fresh application may be made if desired at the appropriate stage in relation to the disclosure of her identity to the public.

4 Disposition

23. For the foregoing reasons, the following orders are made:

> 1. The prosecution is granted leave to redact from the statements of all witnesses whom it proposes to call to give evidence in this case any information concerning the current whereabouts of each witness.
>
> 2. In relation to the witnesses for whom protective measures have been sought on an *ex parte* basis, the prosecution is directed to file, on a confidential basis only and without revealing the identity of the witnesses, its justification for non-disclosure of their identity to the accused in such a way that the accused are given sufficient information to enable them to determine whether to oppose the relief sought.
>
> 3. The application for protective measures in relation to witnesses 7.72 and 7.73, by which their identity will not be disclosed to the accused or their defence teams at this stage, is refused.

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

Dated this 8th day of November 2000,

At The Hague,
The Netherlands.

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. *Rule 53* ("Non-disclosure"), so far as it is here relevant, provides: "(A) 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. [...] (C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice. [...]."
Rule 69 ("Protection of Victims and Witnesses"), so far as it is here relevant, 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. [...] (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 ("Measures for the Protection of Victims and Witnesses"), so far as it is here relevant, provides: "(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 Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. [...]"
2. 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."
3. Status Conference, 20 July 2000, Transcript, p 189.
4. Prosecution's Third Motion for Protective Measures for Victims and Witnesses, 31 Aug 2000 ("Third Motion"). The Motion is marked "Confidential". This Decision does not refer to any material contained in the Third Motion which could reveal anything of a confidential nature.
5. Third Motion, par 4.
6. Third Motion, par 3.
7. *Ibid,* pars 4-5.
8. Response to the Prosecution's Third Motion for Protective Measures Dated 31 August 2000, 8 Sept 2000 ("Talic Response"), par 2.
9. Response to Prosecutor's Confidential Third Motion for Protective Measures and Request for Leave Not to Discuss the Identity of Certain Individuals, 6 Sept 2000 ("Brdanin Response"), par 4. The Request for Leave to which the Brdanin Response refers was disposed of by an Order dated 19 Sept 2000. This is discussed in the Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("Second Protective Measures Decision"), par 24.
10. See Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision"), par 16.
11. Third Motion, Draft Order, p 2.
12. Talic Response, par 5.
13. Second Protective Measures Decision, pars 8-11, 14-16.
14. *Ibid,* par 14.
15. *Ibid,* par 11.
16. *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, par 41.
17. See, in particular, the Second Protective Measures Decision, par 18.
18. Talic Response, par 4.
19. Brdanin Response par 1.
20. Protective Measures Decision, pars 65(3) and 65(4).
21. Rule 69(A).
22. Protective Measures Decision, par 26; Second Protective Measures Decision, par 19. The prosecution has filed an application for leave to appeal from the Second Protective Measures Decision (Prosecution's Application for Leave to Appeal Against Trial Chamber Decision of 27 October 2000, 3 Nov 2000), but its complaint is directed to the application of the propositions stated in *both* the Second Protective Measures Decision and the first Protective Measures Decision (from which it did not seek to appeal), rather than to the propositions stated themselves.
23. Second Protective Measures Decision, par 19.
24. Protective Measures Decision, pars 24, 28; Second Protective Measures Decision, par 18.
25. Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000, par 4. During the oral argument on the Motion leading to the Protective Measures Decision, on 24 Feb 2000, counsel for the prosecution conceded that "[...] full regard to the rights of the accused is the first consideration, and the due regard to the rights of the victims is a second one.": Transcript, p 83; Protective Measures Decision, par 20; Second Protective Measures Decision, par 18.
Article 20.1 provides: "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 provisions of Article 22 ("Protection of victims and witnesses"), quoted in footnote 5, *supra*, do not qualify the proposition

stated in the text of par 13(4) of this Decision. See also *Prosecutor v Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (1995) I JR ICTY 123, at 151 (par 30).
26. *Prosecutor v Tadic*, Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996, at 4; Protective Measures Decision, par 7; Second Protective Measures Decision, par 18.
27. Talic Response, par 4.1.
28. Protective Measures Decision, par 34.
29. Talic Response, par 4.2.
30. Second Protective Measures Decision, par 21.
31. See Second Protective Measures Decision, par 21.

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.

ANNEX 19:

Prosecutor v. Brdjanin,, *"Decision on fourth motion by prosecution for protective measures"*, ICTY, IT-99-36, 15 November 2000.

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding Judge
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
15 November 2000

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIC

DECISION ON FOURTH MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
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. Rule 66(A)(i) of the Tribunal's Rules of Procedure and Evidence ("Rules") requires the prosecution to make available to the accused copies of the supporting material which accompanied the indictment when confirmation was sought. The prosecution disclosed that material, but redacted all the statements in that material so as to remove the name and anything else which would identify the persons who made those statements. The Trial Chamber ordered the prosecution to supply unredacted copies of those statements, subject to the proviso that, if the prosecution sought protective measures in relation to any particular person who had made a statement, it need not supply the unredacted copy of that statement until the application for protective measures had been disposed of by the Trial Chamber.[1]

2. In accordance with that proviso, the prosecution filed a number of further motions seeking protective measures. This present decision is concerned only with the Fourth Motion,[2] in which the prosecution seeks the following relief:[3]

> (a) Leave until 10 October 2000 to either file the appropriate motion or disclose the proffer of testimony unredacted in respect of the witness numbered 7.1.
>
> (b) Leave until 21 October 2000 to re-establish contact with the witness to ascertain security concerns, if any, and to either file the appropriate motion or disclose the statement unredacted in respect of witness numbered 7.24.

(c) Leave for disclosure of the identity of the witness to be delayed until a period closer to trial in respect of the witness numbered 7.15.

(d) Leave to withhold from the Accused the identity of the witnesses numbered 7.19, 7.28 and 7.47, whom the Prosecution does not intend to call at trial.

Each of the witnesses referred to had given statements which accompanied the indictment when confirmation was sought, and therefore had to be disclosed pursuant to Rule 66(A)(i). The relief sought in pars (a) and (b) has since been replaced by the relief sought in a yet further motion,[4] in which a decision is being given at the same time as this decision. The applications in pars (c) and (d) are made pursuant to Rule 69 ("Protection of Victims and Witnesses"), which permits the prosecution, in exceptional circumstances, to apply for the non-disclosure of the identity of a victim or witness "who may be in danger or at risk".

3. The applications are *not* concerned with the protective measures usually sought, which preclude the disclosure of information to the public but permit its disclosure to the accused. The measures sought would preclude the disclosure, either at this stage or completely, of the identity of the persons who made the statements which accompanied the indictment when confirmation was sought. The principles which are applicable to applications for such relief have already been fully discussed and stated in previous decisions in the present case.[5] It is unnecessary to re-state all of them here.

2 Delayed disclosure of identity

4. The application for leave to delay disclosure of the identity of witness 7.15 until a time closer to the trial is based upon the following material:

> This witness was recently spoken to by members of the OTP. This witness currently resides in a country outside the former Yugoslavia, however, the witness' [*scil* witness's] mother and siblings live in a municipality within the Republika Srpska. The witness stated that the [witness's] mother is afraid of retaliations against her children from "those who are indicted and those who support the indicted".
>
> The witness stated that the "extreme forces" were very concentrated in the Republika Srpska municipality where the [witness's] mother and siblings currently reside. The witness held a position of authority. The witness stated that the witness had to deal personally with "the Serbs who came into power in the early 1990s, who were still in the same positions today".

The prosecution also relies upon a report of the United Nations High Commissioner for Refugees ("UNHCR") dealing with the situation in the various municipalities of both entities within Bosnia and Herzegovina, dated August 2000, and a letter from another United Nations official which has not been made public but which was attached on a confidential basis to the Second Motion.[6]

5. The accused Radoslav Brdanin ("Brdanin"), in his response, accepts that witness 7.15 is entitled to protective measures which prevent disclosure of his or her identity to the public,[7] but he objects to such measures which prevent the disclosure of such identity to him and his defence team.[8] He asserts that further disclosure to the public as a result of disclosure to the accused and their defence teams would occur only if the defence team "determine to violate court orders regarding disclosure", and he goes on to re-iterate the arguments concerning the unlikelihood of such a course of action by the defence, and concerning the need for detailed investigations before the trial, which had been put in connection with the application which led to the Protective Measures Decision.[9] He concludes:[10]

> In the light of the foregoing, it seems that the rights of the defence mandate full disclosure at an early date so as to permit proper investigation. Such concerns should clearly override the speculative and presumptive allegations that defence counsel and their staff cannot be trusted to abide by the Trial Chamber's protective orders.

6. The accused Momir Talic ("Talic"), in his response, asserts that the fact that the mother of witness 7.15 has fears for the safety of her family is insufficient, and that the testimony of the witness is such that the Republika Srpska officials –

> [...] would certainly know who the witness is if the Defence, as part of its investigations and pursuant to paragraph 4(b) of the [Protective Measures Decision], presented the testimony to them. However, the defence

> does not know the witness' [*scil* witness's] identity and the stubborn refusal of the Prosecutor to disclose it to Defence Counsel will force the Defence to resort to the option given it by the above mentioned Decision.[11]

Talic also asserts that, after the Protective Measures Decision, there is no provision in the Rules of Procedure and Evidence which "provides for the possibility that the [witness's] identity not be disclosed to the Defence".[12]

7. Before turning to consider the merits of the present application, it is necessary to say something concerning certain of the submissions made by the two accused, if only for the purpose of putting them to one side.

8. The first of these submissions is that made by Brdanin, that further disclosure to the public of the identity of witnesses provided to the accused and their defence teams would occur only if the defence teams deliberately violated protective measures ordered by the Trial Chamber. It is true that, in its First Motion,[13] the prosecution attempted to make out the existence of "a history of violations in virtually every case that has been brought before this Tribunal", with the involvement of defence counsel in some of those violations.[14] That attempt, described by the Trial Chamber as "a piece of hyperbole", did not succeed.[15] That allegation has not been repeated since. The prosecution's claim for the non-disclosure to the accused and their defence teams in the present motion is that –

> [...] the longer the identity of a witness is known by people who are working in Republika Srpska, the greater the risk for disclosure, inadvertent or otherwise, to those elements that would see value in preventing a witness from testifying or would seek retaliation on a witness who has agreed to testify.[16]

9. The basis for that claim in the present case will be referred to shortly, but it is important at this stage to emphasise that the existence of a risk of further disclosure of a witness's identity following a quite proper investigation by the defence into the background of that witness has already been accepted by the Trial Chamber, in that there is a risk that those to whom the defence has spoken may reveal to others the identity of that witness, with the consequential risk that the witness will be interfered with.[17] It is open to the prosecution to lead direct evidence of the extent of that risk in the particular case – for example, that such investigations by the defence in the particular case would necessarily have to take place in the area where the witness is living or (in cases such as the present) where the witness's family is living.[18] In the absence of such direct evidence, the particular risk faced by a person testifying against a person of another ethnic group may be assessed, to at least a general extent, by reference to the particular municipality in which that witness is living and the ethnicities of the witness and the accused.[19]

10. It is *that* risk to the particular witness which is the *real* issue in cases where the prosecution seeks to avoid the disclosure of a witness's identity to the accused and the defence team, *not* whether defence teams in general cannot be trusted to comply with the protective measures ordered by the Trial Chamber. The Trial Chamber would be assisted by defence counsel in these cases more with arguments directed to any specific evidence produced by the prosecution of a risk to the particular witness than with repetition of the justifiable complaint concerning the attack upon the integrity of defence counsel generally which was unsuccessfully made by the prosecution in the First Motion.

11. The second of the submissions about which something should be said at this stage is that made by Talic, that the stubborn refusal of the prosecution to disclose the identity of witness 7.15 to him and his defence team will force them to resort to the option – said to have been given to them by "par 4(b)" of the Protective Measures Decision – of presenting the statement of that witness to Republika Srpska officials, who would certainly recognise who witness 7.15 is. (The reference to par 4(b) is obviously to par 65.4(b) of the Protective Measures Decision.) The Trial Chamber proceeds upon the assumption that, although that statement may be interpreted as a threat to present the redacted statement to the Republika Srpska officials in order to ascertain the identity of the witness, such an interpretation was *not* intended. But, whatever the intention may be in showing these statements to Republika Srpska officials, it would be a risky course of action for the defence team of Talic to take.

12. Paragraph 65.4 of the Protective Measures Decision permits the accused and their defence teams to disclose to the public either the identity of a witness or the contents of that witness's statement only so far as such a disclosure is "directly and specifically necessary for the preparation and presentation of this case". But, if the defence presents a redacted copy of a witness's statement to a Republika Srpska official who is known by the defence team to be able to identify that witness from the content of that statement, that action would constitute a deliberate disclosure to that official not only of the contents of the witness's statement, but also of the identity of a witness known by the defence team to be a witness for whom protective measures have been sought. The disclosure of the identity of the witness would be deliberate, even though the defence team itself does not know the identity of that witness. Unless such an action is clearly "directly and specifically necessary for

[Talic's] preparation and presentation of this case", it may well amount to knowingly and wilfully interfering with the Tribunal's administration of justice, and thus a contempt of the Tribunal.[20]

13. Moreover, if presenting statements of the witnesses to officials of Republika Srpska really *is* regarded by the defence team of Talic as "directly and specifically necessary for the preparation and presentation of this case", such a course of action *could* be argued by the prosecution to be one which almost certainly would lead to interference with the witnesses to prevent them giving evidence against these accused. If such an argument is put, and if it is accepted, only a very short period prior to trial will have to be allowed for the accused to know the identity of these witnesses, in order to reduce as far as possible the opportunity for such interference to occur.

14. The last of the submissions about which something should be said at this stage is that made by Talic that, after the Protective Measures Decision, there is no provision in the Rules of Procedure and Evidence which "provides for the possibility that the [witness's] identity not be disclosed to the Defence". That submission was made in the context of the reference in Rule 69(A) to an order for non-disclosure of a witness's identity being made "until such person is brought under the protection of the Tribunal". This rather curious wording was discussed in the Protective Measures Decision,[21] and the existing interpretation of the Rule – that the power to make non-disclosure orders continues throughout the proceedings – was followed there. It is followed again here.

15. Having put those matters to one side, the merits of the present application by the prosecution in relation to witness 7.15 may now be considered. The stated basis for the application – quoted in par 4, *supra* – would certainly be sufficient to order protective measures preventing the disclosure of the witness's identity *to the public*. But, as the Trial Chamber has pointed out before, what would usually be sufficient for that purpose is not usually sufficient to show that the witness may also be in danger or at risk if that witness's identity is disclosed only *to the accused and the defence team* – upon whom strict obligations are imposed in relation to further disclosure by them.[22] Attention *must* be paid by the prosecution in applications such as these to the extent to which the witness is put at risk by quite proper investigations by the defence teams, and to showing that *that* risk is of such an exceptional nature as to warrant the interference with the rights of the accused which non-disclosure to them produces.

16. In this case, there are a number of assertions made which are unaccompanied by any verification by the prosecution. It has been made very clear by the Trial Chamber that the fears of the potential witness are *not in themselves* sufficient, and that some objective foundation must be shown for them.[23] The prosecution has not identified to the Trial Chamber, even on an *ex parte* basis, where the witness's mother and siblings live within Republika Srpska, so that, once again, the Trial Chamber gains less assistance than it should from the reports which have been produced as to the risks in the different municipalities in that entity. The risks to a Bosnian Muslim who gives evidence against a Bosnian Serb, or to the witness's family, are not uniform throughout Republika Srpska.[24] It is not even stated that witness 7.15 *is* a Bosnian Muslim, a very relevant fact which should have been, but was not, revealed to the Trial Chamber. It should not have been left to conjecture. The witness has not been asked by the prosecution to define what is meant by "extreme forces" in the relevant municipality, and the meaning of that phrase also should not have been left to conjecture. Without the statement now made by Talic quoted in par 6, *supra*,[25] there was no clear indication that an investigation into this witness required direct contact with the officials in the area where the witness's mother and siblings reside.

17. The Trial Chamber is concerned that, in a case where very strict protective measures *may* be vital, this pattern of inattention to detail by the prosecution may have caused the Trial Chamber to have insufficient information to make a proper determination of the appropriate protective measures to be granted. The Trial Chamber is sufficiently concerned about the absence of detail in this particular case that it proposes to take the exceptional step of directing the prosecution to file further information concerning this witness. The information is to be of the type which has described as necessary in this and in the previous decisions in this case in relation to protective measures, giving the accused the opportunity to respond to that further information. If any information is to be given on an *ex parte* basis, the prosecution is reminded that it must nevertheless give as much of that information as it can on an *inter partes* (but confidential) basis, so that the accused and their defence teams are given sufficient information to enable them to determine whether to oppose the relief sought.[26]

3 Persons not being called

18. The relief sought in par (d) is leave to withhold completely from the accused and their defence teams the identity of three persons whose statements were part of the supporting material which accompanied the indictment when confirmation was sought, on the basis that the prosecution does not intend to call those witnesses at the trial. It has not been suggested that these three persons would be entitled to protective measures as victims, and the prosecution has made no attempt to rely upon any other basis for the protective measures sought.

19. Such an application was discussed in the Second Protective Measures Decision,[27] when the Trial Chamber said that it was not satisfied that the relief sought was justified and the application there was refused.[28] It was not sought to draw any distinction, nor could one be drawn, between the two applications. For the reasons expressed in that decision, this application, too, must be refused. The identity of the three persons will, however, be revealed on a confidential basis, so that the obligations imposed upon the accused and their defence teams by the Protective Measures Decision will apply to that material.[29]

4 Disposition

20. For the foregoing reasons, the following orders are made:

1. The prosecution is directed to file on or before 13 December 2000 further information concerning its request for protective measures for witness 7.15.

2. Each of the accused may respond to any further information, and to the application as a whole, on or before 10 January 2001.

3. The application for leave not to disclose to the accused or their defence teams at this stage the identity of witnesses 7.19, 7.28 and 7.47 is refused.

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

Dated this 15th day of November 2000,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision"), par 65.2.
2. Prosecution's Fourth Motion for Protective Measures for Victims and Witnesses, 21 Sept 2000 ("Fourth Motion").
3. *Ibid*, par 10.
4. Prosecution's Fifth Motion for Protective Measures for Victims and Witnesses, 10 Oct 2000, pars 3 and 4.
5. Protective Measures Decision; Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("Second Protective Measures Decision"); Decision on Third Motion by Prosecution for Protective Measures, 8 Nov 2000 ("Third Protective Measures Decision").
6. Prosecution's Second Motion for Protective Measures for Victims and Witnesses, 31 July 2000 ("Second Motion").
7. Response to Prosecutor's Fourth Confidential Motion for Protective Measures, 22 Sept 2000 ("Brdanin Response"), par 1.
8. *Ibid*, par 2.
9. *Ibid*, pars 2-8. These arguments are sufficiently referred to at pars 24-28 of the Protective Measures Decision.
10. Brdanin Response, par 9.
11. Response to the Prosecution Motion For Protective Measures Dated 21 September 2000, 10 Oct 2000 ("Talic Response"), par 4.
12. *Ibid*, par 4.
13. Motion for Protective Measures, 10 Jan 2000 ("First Motion").
14. *Ibid,* at pars 9-10; Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000, pars 8-10.
15. Protective Measures Decision, pars 24-27.
16. Fourth Motion, par 4.
17. Protective Measures Decision, pars 24, 28; Second Protective Measures Decision, par 18; Third Protective Measures Decision, par 13 (3).
18. cf Third Protective Measures Decision, pars 9, 17, 21.
19. Second Protective Measures Decision, par 21; Third Protective Measures Decision, par 20.
20. *Prosecutor v Tadic*, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 26.
21. Paragraph 22.
22. Second Protective Measures Decision, par 18.

23. Protective Measures Decision, par 26; Second Protective Measures Decision, par 19; Third Protective Measures Decision, par 13(2).
24. Third Protective Measures Decision, par 20.
25. This statement is discussed in pars 11-13, *supra*.
26. Third Protective Measures Decision, pars 6-11.
27. Paragraphs 26-32.
28. *Ibid*, par 32.
29. Paragraphs 65(3) and 65(4).

ANNEX 20:

Prosecutor v Bradnin & Talic, " *Decision on motion by prosecution for protective measures*" ICTY, IT-99-36, 3 July 2000.

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.

ANNEX 21:

See *Prosecutor v. Delalic*, "*Decisions on the motion by the prosecutor for protective measures for the prosecution witnesses pseudonymed 'B ' through to 'M'*", ICTY, IT-96-31, 28 April, 1997;

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

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
>
> . . . .
>
> 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.

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

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

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

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

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.
>
> (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

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

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

(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.

(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]

ANNEX 22:

Prosecutor v. Krnojelac, *"Order on protective measures for witnesses at trial"*, 26 October 2000;

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Order of:
26 October 2000

PROSECUTOR

v.

MILORAD KRNOJELAC

ORDER ON PROTECTIVE MEASURES FOR WITNESSES AT TRIAL

The Office of the Prosecutor:

Ms Hildegard Uertz-Retzlaff
Ms Peggy Kuo

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

THIS TRIAL CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal");

NOTING the "Motion for Protective Measures for Witnesses at Trial" filed confidentially by the Office of the Prosecutor ("Prosecution") on 16 October 2000 ("Motion") in which the Prosecution seeks protective measures for twenty-six witnesses who are to testify at trial and whose names are identified in an Annex to the Motion;

NOTING the pre-trial conference held on 26 October 2000 in which the Prosecution also requested protective measures in respect of a further witness, FWS-96;

NOTING that the protective measures sought include the assignment of pseudonyms for twenty-six of

the twenty-seven witnesses, facial distortion in the case of twenty-five of the twenty-six witnesses and voice distortion in the case of one witness;

NOTING that the Prosecution provides in the Motion as the reason for the request for protective measures the fact that all of the witnesses the subject of the Motion either intend to return to Bosnia and Herzegovina and in particular the municipalities of Foca and Goražde, or have family members already living there or intending to return, and that to disclose publicly the identities of the witnesses would cause a security threat to them and their families;

NOTING that the security threat which the witnesses fear on the above basis is identified specifically in the Motion as that of physical reprisals;

NOTING the oral indication of counsel for the accused Milorad Krnojelac that the accused does not oppose the grant of the protective measures sought in the Motion;

CONSIDERING that the measures requested for the protection of the witnesses are consistent with the rights of the accused and that their effect on the public nature of the proceedings would be limited;

NOTING the Order on the Prosecutor's Motion to Protect Victims and Witnesses issued by the Trial Chamber on 6 October 1998 in which the Trial Chamber ordered that the accused, his defence counsel, and their representatives who are acting pursuant to their instructions or requests, not disclose to the public, to the media or to family members and associates the names of witnesses, their whereabouts, copies of witness statements, the content of their witness statements or any information which would enable them to be identified and would breach the confidentiality of court proceedings unless necessary for the preparation of the defence;

NOTING that the above order was not limited by date and continues in force throughout the proceedings or until further order;

PURSUANT TO Rule 75 of the Rules of Procedure and Evidence

HEREBY ORDERS THAT:

1. The witnesses identified in the Motion as FWS-08, FWS-12, FWS-33, FWS-35, FWS-54, FWS-66, FWS-73, FWS-76, FWS-77, FWS-78, FWS-86, FWS-96, FWS-104, FWS-109, FWS-111, FWS-115, FWS-120, FWS-138, FWS-139, FWS-142, FWS-144, FWS-146, FWS-162, FWS-192, FWS-198 and FWS-210 shall be referred to by these pseudonyms at all times in the course of their testimony or whenever referred to in the course of the proceedings whether during the hearing or in documents, including the transcript of the proceedings;

2. The witnesses identified as FWS-08, FWS-33, FWS-35, FWS-54, FWS-66, FWS-71, FWS-73, FWS-76, FWS-77, FWS-78, FWS-86, FWS 96, FWS-104, FWS-109, FWS-111, FWS-115, FWS-120, FWS-138, FWS-139, FWS-142, FWS-144, FWS-146, FWS-162, FWS-192, FWS-198 and FWS-210 shall testify with the use of screening from the public and the device of facial distortion shall be used in relation to the audio-visual recording and transmission of the testimony of those witnesses;

3. The witness identified as FWS-104 shall also testify with a voice-distortion device applied to the audio-visual recording and transmission of the testimony of that witness.

6367

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

Judge David Hunt
Presiding Judge

Dated this 26th day of October 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]

ANNEX 23:

Prosecutor v Kamuhanda, "Decision on Jean-Dieu Kamuhanda's motion for protective measures for defense witnesses" ICTR-99-54-T, 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)

ANNEX 24:

Prosecutor v Kajelijeli, "Decision on the prosecutor's motion for protective measures for witnesses" ICTR-98-44-I, 6 July 2000.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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 Presiding Judge	William H. Sekule Judge	Mehmet Güney Judge

(Seal of the Tribunal)

ANNEX 25:

Prosecutor v. Norman, "Decision prohibiting communications and visits", SCSL-2003-08-PT, dated 20 January 2004.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
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THE REGISTRY

Registrar: Robin Vincent

Date: 20 day of January, 2004

Prosecutor against

Sam Hinga Norman
(Case No.SCSL-2003-08-PT)

DECISION PROHIBITING COMMUNICATIONS AND VISITS

Office of the Prosecutor:

David M. Crane

Defence Counsel for Sam Hinga Norman:

James Blyden Jenkins- Johnson
Sulaiman Banja Tejan-Sie
Quincy Whitaker
Timothy Owen

THE REGISTRAR,

CONSIDERING the Resolution 1315 of 14 August 2000, whereby the Security Council requested the Secretary-General to "negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law";

CONSIDERING the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone ("Agreement"), signed in Freetown on 16 January 2002, and the Statute of the Special Court for Sierra Leone annexed to the Agreement ("Statute");

CONSIDERING the "Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court or otherwise Detained on the Authority of the Special Court" ("Rules of Detention") as adopted on 7 March 2003, and subsequently amended on 25 September 2003;

CONSIDERING Rule 3 of the Rules of Detention which provides that the Special Court "shall retain the ultimate responsibility for all aspects of detention pursuant to these Rules [of Detention]" and that all Detainees shall be "subject to the sole jurisdiction of the Special Court at all times that they are so detained, even though physically absent from the Detention Facility, until final release or transfer to another institution";

CONSIDERING that whilst the Rules of Detention ensure the continued application and protection of individual rights of persons in detention, the application of its provisions relating to communication and visits also require that the interests of the administration of justice and the purposes of the Agreement and Statute of the Special Court be considered;

CONSIDERING that the Rules of Detention envisage that a balanced weighing of a detainee's individual rights with that of the institutional duties and obligations of the Special Court may be called for in certain situations where conflicting interests become apparent;

NOTING that Mr. Sam Hinga Norman (the "Detainee") is presently awaiting trial before the Special Court and is being detained in Detention Facility of the Special Court ("Detention Facility"), situated at Jomo Kenyatta Road, Freetown, Sierra Leone;

NOTING the Prosecutor's Request for Active Monitoring of the Detainee's Telephone Calls, dated 20 October 2003, and the Registrar's decision of 25 October 2003 to the effect that all telephone calls made or received by the Detainee, with the exception of

those made to or received from the his Defence Counsel, be "actively monitored" (i.e. recorded and listened to);

NOTING PARTICULARLY that the Registrar has received reports that the Detainee has recently made statements inciting his supporters to public unrest, using communication facilities provided by the Detention Facility and with the intention of having these statements subsequently being reported in the media;

CONSIDERING the Prosecutor's "Urgent request according to Rule 48 of the Rules of Detention to prohibit any contact between Hinga Norman and any other person", dated 20 January 2004, stating that the transcript of a telephone conversation between the Detainee and an unidentified person on 19 January 2004 "demonstrates that Hinga Norman may be prepared to call various factions to arms";

CONSIDERING the Prosecutor's Urgent Request that "all contact (visits and telephone calls) between Hinga Norman and any outsider, including members of his family" is prohibited;

CONSIDERING that Rule 48(A)(ii) of the Rules of Detention provides that "[t]he Prosecutor may request the Registrar or, in cases of emergency, the Chief of Detention, to prohibit, regulate or set conditions for contact between a Detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact [...] could prejudice or otherwise affect the outcome of the proceedings against the Detainee or any other investigation" and that it follows from this Rule that communications and visits between a detainee and any other person may be prohibited if there are reasons to believe that such communications and visits would lead to a detainee's statements appearing in the media with the effect of undermining the mandate of the Special Court;

CONSIDERING that the facilities provided by the Detention Facility are intended for the well-being of the Detainee and not for purposes that frustrate the mandate of the Special Court;

DECIDES pursuant to Rule 48(A)(ii) of the Rules of Detention, for a period of fourteen (14) days following this Decision, which decision shall then be reviewed, to:

(i) Prohibit communication, via telephone between the Detainee with any person(s) (particularly with the media), such prohibition shall not apply to telephone communication with his Defence Counsel on condition that this facility shall not be used in any manner to contact the media;

(ii) Prohibit all visits between the Detainee with any person(s) (particularly with the media), such prohibition shall not apply to visits with his Defence Counsel on condition that this facility shall not be used in any manner to contact the media;

(iii) The aforesaid restrictions will not apply to written communications wherein the current practices shall be maintained and the Detention Facility's regulations concerning correspondence shall be adhered to.

Robin Vincent
Registrar

Dated this 20th day of January 2004
Freetown
Sierra Leone

ANNEX 26:

"Special Court accuses indicted militia chief of inciting civil unrest" IRIN, 22 January 2004.

ReliefWeb Email this document

Source: UN OCHA Integrated Regional Information Network
Date: 22 Jan 2004

Special Court accuses indicted militia chief of inciting civil unrest

FREETOWN, 22 January (IRIN) - The United Nations backed Special Court for war crimes in Sierra Leone has blocked all communications and visits to former militia leader, Chief Sam Hinga Norman, accusing him of making "statements inciting his supporters to public unrest, using communications facilities provided by the detention facility."

Until his arrest in March 2003, Hinga Norman was the Minister of Internal Affairs, and the coordinator of the local militia known as the Civil Defence Forces (CDF), which fought against the rebels of the Revolutionary United Front (RUF) during the country's 10-year civil war.

The decision to block all communications was taken after Norman, had a telephone conversation with an unidentified person on Monday, which was monitored by the prison authorities, in accordance with their regulations.

Based on the transcript of the telephone conversation, the Special Court Chief Prosecutor David Crane immediately put in an "urgent request ... to prohibit any contact between Hinga Norman and any other person", claiming that the telephone conversation "demonstrates that Hinga Norman may be prepared to call various factions to arms."

Norman has retained a strong following amongst the CDF, which is made up of local hunter militias, drawn from different ethnic groups.

Norman's arrest in March shocked many Sierra Leoneans. Some still argue that his treatment was "unjust" and that the government is "ungrateful" because Norman fought on the side of the people and on behalf of the government, of which he was then the deputy defense minister. They say he should not be charged alongside the RUF rebels who were the real perpetrators of the war.

Since Norman's arrest, there have been various claims that militia commanders still loyal to him want to spring him from jail, or create civil unrest to enable his release.

It is in consideration of this perceived threat that the Special Court Registrar has now ordered that "all contact (visits and telephone calls) between Hinga Norman and any outsider, including members of his family is prohibited" for the next 14 days. However, Norman's lawyers are not affected by this order.

The Special Court was set up by agreement between the government of Sierra Leone and the United Nations to "try those who bear the greatest responsibility for serious violations of international humanitarian law" during Sierra Leone's ten-year civil war.

Thirteen people have been indicted, including the former Liberian Head of State Charles Taylor. Two of the indictees have since died, and one - Johnny Paul Koroma is still on the run, leaving nine, including Hinga Norman, who is being held in

custody in the court's multi- million dollar detention facility in the centre of the capital Freetown.

Norman faces eight counts of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.

[ENDS]

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Top

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Other ReliefWeb documents by: UN OCHA Integrated Regional Information Network
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Comments

ANNEX 27:

"Norman accused of planning unrest" Concord Times", 22 January 2004.

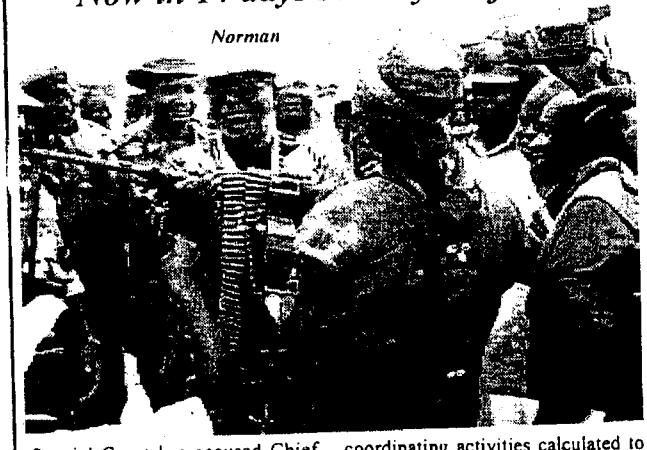
Concord Times

Thursday January 22 2004

Norman accused of planning unrest

***Now in 14 days solitary confinement

Norman



Special Court has accused Chief Sam Hinga Norman, an indictee of the court for planning civil unrest.

For this, the former Internal Affairs and Kamajor Coordinator has been kept in 14- days incommunicado.

According to a Release issued by the Special Court late yesterday, it was the Registrar, Robin Vincent who ordered that all communications involving Sam Hinga Norman – " except for all those with his legal representation," be restricted.

The Release says Norman's telephone conversation late Monday which, " indicated his involvement in coordinating activities calculated to cause civil unrest in Sierra Leone," was recorded and according to an official of the court, " transcript of the conversation is now with the indictee's Defence team."

However, a member of Norman's Defence team, Sulaiman Banja Tejan –Sie who told Concord Times that he was with Norman when the writ was given to him states, " I have not seen the transcript."

He could not comment further as he adds that the Defence team will be meeting today on the issue. " It is from there we can decide on either to issue a statement or go to court for this."

On the other hand, Concord Times was yesterday prevented from seeing another of Norman's Defence Attorney's, J B Jenkins-Johnston by his clerks though his car was parked outside and the lawyer still in the building.

" Effective Monday, Norman will no longer be able to make or receive telephone calls, except to his legal representatives.

Visits, except from his lawyers, are also prohibited," the Release from the Special Court indicates.

ANNEX 28:

"Norman caught inciting supporters" Christian Monitor, 22 January 2004.

6392

Christian Monitor

Thursday January 22, 2004

Norman Caught Inciting Supporters

The registrar of the Special Court for Sierra Leone has freezed all outside communications involving Sam Hinga Norman "except for those with his legal representation", a release issued by the court 21st January stated.

This action was necessitated by the content of an intercepted telephone conversation indicating the erstwhile Internal Affairs Minister's involvement in the coordination of "activities calculated to cause civil unrest in Sierra Leone".

The register of the court, Robin Vincent QC, had received reports that the detainee, a leader of the Kamajors the former civil militia "has recently made statements inciting his supporters to public unrest using communication facilities provided by the court and with the intention of having these statements subsequently being reported in the media".

Sam Hinga Norman

The transcript of one such telephone conversation between Norman and an unspecified person on the 19th January 2004 "demonstrates that Hinga Norman may be prepared to call various factions to arms", the statement fro the registrar said.

The barring order which also includes visits will last for 14 days, by which time it will be reviewed by the registrar.

Norman was taken into custody by the Special Court last March. He faces eight counts of crimes against humanity, violations of Articles 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.

Recently there was talk of an attempt by Kamajors to free Norman from the prisons of the court. These reports were denied by officials of the court.

ANNEX 29:

"Chief Hinga Norman speaks from his cell in Sierra Leone and vows he would be made "a sacrificial lamb" as he accuses the Special Court of protecting president Ahmad Tejan Kabbah", Sierra Herald, 6 January 2004, Vol.5 Nr. 4.

JOIN THE FIGHT AGAINST CORRUPTION IN SIERRA LEONE%%%%%

The BBC Robin White programmes(trsc) Extended Tejan Kabbah interview Assignment - Sierra Leone

TRUTH JUSTICE RECONCILIATION

SIERRA HERALD

VOLUME 5 NUMBER 4 Editor: Victor Sylver JANUARY 6, 2004

PLEASE REMEMBER ALL THOSE WHO SUFFERED AND PERISHED ON JANUARY 6, 1999

Contact Us

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Links to other news sources

Which of these former buddies is being economical with the truth? Or is it six of one and half a dozen of the other? Surely not a baker's dozen

CHIEF HINGA NORMAN SPEAKS FROM HIS CELL IN SIERRA LEONE AND VOWS HE WOULD NOT BE MADE "A SACRIFICIAL LAMB" AS HE ACCUSES THE SPECIAL COURT OF PROTECTING PRESIDENT AHMAD TEJAN KABBAH

The Editorial

Who hounded the late SLENA boss?

Is the President able and willing to tackle corruption?

When will ministers like Dr Prince Harding become account?

Former Deputy Defence minister and at the time of his arrest to face war crime charges, the nation's Interior minister Chief Hinga Norman has at last broken his silence and spoken to the Sierra Herald from his holding cell in Sierra Leone.

This medium wanted to have the reaction of a man whom reports say, was the bosom friend of President Kabbah when the battle was raging between pro-government forces and opponents bent on violently wresting power from the democratically-elected government of President Tejan Kabbah. President Kabbah, in an interview with the BBC's Robin White heaped praises on Chief Hinga Norman and the Kamajors for their role in the defence of the mother country during those trying times, but denied suggestions that he knew in advance of the Special Court's plan to indict, arrest and take into custody Chief Hinga Norman who now faces a number of serious charges relating to violations of international law and of gross violations of human rights.

President Kabbah had stated that Chief Hinga Norman was not facing charges because of his political duties while the Deputy Defence minister, but that he could have been roped in because he could have done something that was far beyond the normal duties associated with a man defending his mother country against the murderous bands of the AFRC/RUF coalition of evil. Chief Hinga Norman told the Sierra Herald on Saturday evening, January 10, that he, too, heard the statements of President Kabbah as broadcast on the BBC and was asked for his reactions by Yours Truly.

Chief Hinga Norman: Well Victor, the only thing I would say is that it is a pathetic issue for a man in his position and for you and myself being Sierra Leoneans to witness the hearing of such a statement from someone who we think require all our respects. That means that I cannot imagine how a President could allow a foreign court to be brought to his own country.... to allow his minister of Internal Affairs to be arrested by his own police and not having any knowledge about it. I would even imagine that those who sat together with him to arrange the arrest of Chief Norman, hearing that would now begin to think how truthful is this man and how reliable is he and can a statesman be so unreliable.....

Editor: But the question is - did he know?

Chief Hinga Norman: I am angry because for ten months I am being held here and they have not asked me one question whether I did something or not, can you imagine? Not being given any access to the public or the press, can you imagine?...and I have not been taken to court to be tried..can you imagine?

Editor: Maybe they are waiting for the trial which should be this year?

Chief Hinga Norman: That is what you are saying, maybe. You used the word maybe...the right of every individual to be abused?

Editor: The President said at one stage you were not arrested because you acted as Deputy Defence minister....

Chief Hinga Norman: This is what I am saying. Why have they not told me anything since my arrest? What have I done? I defended the constitution like General Montgomery of the UK, and McArthur of the US and Eisenhower did in America and became President.

Editor: Before now, did you have any difference of opinion, any quarrel or anything of the sort with the President?

Chief Hinga Norman: Whether I had any difference of opinion with the President or not, all he has to do is to sack me from his Cabinet or government and not to have me indicted on charges that are elusive and cannot be sustained....have you ever seen a law being made after the event is over? The Special Court is not a part of the International Criminal Court.
(Chief Hinga Norman asked that rather than have a Special Court, an impartial investigative body should have been set up to inquire into the role of the principal actors in the war so that who did what would be known)
Not that we don't like a court. We like a court but not a Special Court for special people and for special reasons and for special money.

Editor: Finally Chief, it is said that you were given the opportunity to appear before the TRC but it would not be broadcast like the others and was told that you refused to go under such circumstances.

Chief Hinga Norman: Why should my own be an exception to the rule? Because I am not a Sierra Leonean? Or less opportuned to have human rights? So I should be abused or denied...?

Editor: You could have had sensitive information that might not be in the interest of the public?
(Chief Hinga Norman stated that he was being denied making his TRC submission public because he was of the considered opinion that some members of the Special Court wanted to protect President Kabbah)

Editor: So you think you have been made a sacrificial lamb?

Chief Hinga Norman: Yes, not only thinking, that is what they are thinking to do but we are all going to be sacrificed beginning now.

Editor: The above transcript is not a verbatim record of the conversation had with Chief Hinga Norman but is a fair account of what was said. Some sentences have been paraphrased to make the account more lucid without moving away from the core of the opinions expressed..

The Sierra Herald is published fortnightly with updates between issues as necessary

How did this man get into the Special Court?

Nailing one of the many lies of Expo Times editor Ibrahim Seaga Shaw

Smashing the Expo Times web of deceit, lies and outright dishonesty

A plaintive cry for justice and the truth for the people of Mabaylla over the September 3/4 1997 acts of murder

Chief Hinga Norman: That is the question I am asking you. He has every reason to know. The fact is, he asked for the court in his own writing and his own Attorney-General who is his Vice President now to negotiate for this court, unknown participants as representatives to the Lome agreement resolving the conflict in Sierra Leone. This should never have been the case ....culminating in right now...I've had my fundamental human rights abused, constitutional rights have been abused and our sovereignty has been abused.

Editor: But Chief, at the time when this whole thing about the Special Court was being set up, you were a member of the government. Weren't you aware...

Chief Hinga Norman: No, I would never have imagined that the President would have gone back on his own word and on his own signature to undertake to give amnesty, and to undertake to give pardon...that some of the men that he pardoned, that he amnestied are now working in the army, the police and in the civil and government administration.

Editor: You mean people who were engaged in human rights abuses?

Chief Hinga Norman:...I am saying those who had been sentenced and who got their release as a result of the amnesty granted under the Lome agreement...and the pardon granted under the Lome agreement.....denied his right to speak at the TRC. Hinga Norman and those who fought for this country are not prepared to accept the condition that's in place. Let us go back to the drawing board and re-start the issue.

Editor: I don't want to go into the legal implications because this is *sub judice*...

Chief Hinga Norman: No, no I am not quoting you the legal implications. I am quoting you the consequential implications of holding Chief Hinga Norman ....Chief Hinga Norman does not want to be heard in .....Justice has been abused in the Special Court. If I am charged with crimes under the Geneva Convention, then I should be tried under the Geneva Convention court, not the Special Court.....I am refusing to accept whatever condition that I am being held under and I am telling my men that the time for justice is over.

Editor: So Chief, you don't accept the authority of the Special Court?

Chief Hinga Norman: The Special Court has no authority in Sierra Leone. It has no authority. The Special Court came as a result of our own constitution being abused. It's a violation of our own constitution for which soldiers, Paramount Chiefs, politicians have been executed at Pademba Road.

Editor: The time negotiations were going on to set up the Special Court, you were also a part of the government. If.....

Chief Hinga Norman: Negotiations or no negotiations, whether I was a part of the government or not a part of government nobody abuses the constitution, does not have to obtain excuse because of me being part of the government....Am I not a Sierra Leonean - an educated Sierra Leonean?

Editor: I was just wondering why you didn't raise objections before this arrest?

Chief Hinga Norman: Because I was not part of the Cabinet...I did not discuss this matter and it was not discussed with me....I am telling you that Sierra Leoneans ought to have known that their constitution was being amended. They should have been given the right to that.

Editor: Chief you so sound very, very angry - it is unlike you...

ANNEX 30:

"Ex-Kamajohs plan to attack" Standard Times, 30 January 2004.

STANDARD TIMES

Metro Forward Media

ESTABLISHED JUNE 6, 1994 INDEPENDENT 30th January 2004 Friday Edition Le500

Ex-Kamajohs plan to attack

BY PETER GUMA

It has reliably been learnt that some ill-motivated former civil defence force fighters of the now defunct Kamajoh militia are planning to physically attack the newly transferred Regional Commissioner of Police in the Eastern Region, Mr. Tamba Gbeki.

Commissioner Gbeki was until his recent appointment to the regional headquarter town in the east, attached to the Special Court of Sierra Leone, and is alleged to have played a significant role in the dramatic apprehension of the former Kamajoh coordinator, Chief Sam Hinga Norman by officials of the Special Court.

According to the report, this ill-motivated plan arises from the wrong belief that Mr. Gbeki was responsible for Chief Norman's arrest and subsequent house and illegal detention by whoever is responsible for the establishment of the Court in this country.

CONTINUED BACK PAGE

Chief Norman

Police break up

14 RSLAF and 31 Chadian personnel received the Refresher Drivers Training Course. 8

The training ... is to deliver quality logistics training and maintenance support to West African militaries.

EX-Kamajors plan to attack

FROM PAGE 1

In other words, he is the one they can identify as the hand of the Court in carrying out its dirty work, for which they have vowed never to forgive him.

In a brief encounter with one of the disgruntled ex-Kamajors early this week at the DDR office in Freetown, he said "Mr. Gbeki knew of the plan to arrest Chief Norman and molest him openly in the eyes of secretaries and other junior officers," adding that if they are looking for the one with the greatest blood on his hands they must be looking for Chief Norman's boss, who was giving all the orders, financial and logistical support.

"We all know who was responsible for the establishment and maintenance of the CDF and its various militias. It was not Chief Norman. And Gbeki knows that," he concluded.

When Mr. Gbeki was on the matter, he revealed that, "It is true that some ill-motivated Kamajors are planning to attack me in Kenema, claiming that I was used to arrest Chief Norman and physically molest him," but added that even if he was the one who effected the arrest, he was merely doing his job in the interest of the state as a police officer attached to the Court.

He also noted that as a Sierra Leonean and a descendant of the east, he was not afraid of anyone who did not have regard for the law, and that he is more than ready to ensure that their evil machinations are permanently negated.

The former PRO of the CDF, Mr. Charles Margao said he has no knowledge of such plans by any faction of the CDF and that it could all be mere propaganda to smear the image of the Kamajors, adding that the main of the CDF was to restore democracy.

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ANNEX 31:

"Norman's Boys attack journalist" New Vision, 23 March 2004.

NEW VISION

A Better Vision Is A Better Future

TUESDAY MARCH 23,2004 INDEPENDENT LE 500

The New Vision Is Proud To Introduce To You 'Kongosa Column'. Read A Gist About This Column On Page 2.

Norman's Boys attack Journalist

By Our News Staff

NEW VISION Reporter, Sheku Koroma was on the 15th of March attacked and robbed by the rampaging former bodyguards of indicted Chief Sam Hinga Norman.

"I had left the office and heading home when on alighting from the taxi at Spur Road, two former Kamajors manhandled me and dispossessed me of my wallet containing eighty thousand five hundred Leones, Sheku told New Vision News Desk.

He went further: "They told me they wanted to teach me a lesson because I work for New Vision newspaper, which they said is a mouthpiece of the Kabbah Government and the SLPP who betrayed Chief Sam Hinga Norman by sending him to jail and hypocritically blaming the Special Court for doing that... one of them Johannes alias Orga

See page 7

Chief Norman

JAMES JONAH

6403

Farmers to beat Kabbah's belch full target

crop management, the major factors necessary for vegetable plants, common insects on vegetable plants and the reasons for the application of fertilizers.

Speaking on the occasion, the head of the school, Mr. Dick Johnson said the visit was a step in the right direction for the attainment of food security by 2007. He said if the momentum is kept all over the country we might even attain food security before 2007.

Senior Assistant Secretary in the Ministry, Mr. Ansu S. Tucker in a brief address said the practice of Farmers Field Schools was adopted from East Africa and Asia pointing out that the Benguemarian School seemed to be on the right track with group dynamics.

Also participating in the programme were the District Director II of the Western Area, Mr. Dennis Paul and the Facilitator Western Area II, Mr. Patrick Barlay.

There were 30 participants in the one-week course comprising mainly of women.

Norman's Boys

shouted at me in Mende, grabbing my throat almost strangling me," our reporter narrated.

The said Johannes, who is a bodyguard to Mr. Alie Fawaz of Fawaz Building Materials of Ecowas Street, was in the company of one Sullay, driver of Mr. Fawaz, a Lebanese, who rained kicks on me when I fell.

The matter is being investigated at the Central Police Station and a medical report issued to Sheku Koroma, our Reporter.

Makeni Town

Sleepless night for Ernest

don't even know where he sleeps....you know, many times big people keep their locations and hideouts secret especially when they believe their lives are in danger", a young policeman detailed there explained.

Our findings are that Hon. Ernest Koroma has become nocturnal. The man just cannot sleep at night because as we are told, he is afraid of shadows.

Whether these are shadows within his own party or shadows created by his own mind - one thing is clear – the APC leader feels embattled and is having sleepless nights.

"Ernest Koroma is no longer the cool and calculated insurance executive that he once was", an employee of RITCORP told this medium.

Growing grayer and grayer, Hon Ernest Koroma looks much older than his chronological age.

"It was the late President Siaka Stevens who once said that "the head of an elephant is not for the weak or children to carry", an old APC politician commented.

Hon. Ernest Koroma may have good intentions but his confrontational attitude with senior members of his own party will prove his own undoing.

"It would appear he likes to ride rough shod over and above the common and popular appeal within his party ..... Apart from this being an undemocratic tendency, it portends a very anxious future for a man as relatively young as Ernest Koroma to be so perceived by even the staunch members of the APC and for that matter the old guards of his own party,"Mr. M.L. Bangura, an old guard himself, maintained yesterday.

Many will be tempted to ask the question: 'Is this a despot in the making?'

It is time for Ernest to start calculating his moves and how he appeals to his own camp within the APC and others sitting on the fence even within the APC as to what manner of person he is – despot or democrat.

These sleepless nights of the APC leader Ernest Koroma... Are they real or imagined?

6401

ANNEX 32:

"Kamajors declare Operation Road Block" The Exclusive, 12 February 2004.

6403

Bo-Kenema Highway Prime Target...

Kamajors Declare Operation Road Block

Kamajors in readiness

Reports reaching the Exclusive intimate that the kamajors in Bo and Kenema towns are planning what is code-named "Operation Road Block."

From front page

beyond will suffer much. She explained how kamajors living in Tongo Fields are still harassing people. "It surprises me much to see the kamajors wanting to disrupt the democracy they claim to have fought for," she explained. Also, a young miner who does his mining in Tongo fields expressed similar concerns, corroborating the lady's explanation. The young miner told the Exclusive that he came to Freetown "to purchase basic logistics that will be with us until everything is over". He was in Freetown Monday this week to purchase mining implements, and some other goods that are very expensive in his area of operation.

It could be recalled that the Sierra Leone Police apprehended a senior kamajor, Arthur Koroma recently in Kenema. Although, according to sources, Arthur Koroma was whisked to Freetown to clarify certain issues pertaining to their outfit, after which he returned to Kenema a freed man.

This action of the Police may have angered the entire kamajor group in the Kenema regions. To make things even graver, the recent move by the Special Court for Sierra Leone against kamajor indictees in its custody may have aggravated kamajors, who are always scheming heinous actions to disrupt the peace of Sierra Leone. Recently the Office of The Prosecutor at the Special Court stated that a "Request for Leave" has been issued the Office of The Registrar at Special Court calling for amendment of charges against all nine indictees in custody of the Court.

Additional charges shall be levied against some of the indictees if the Prosecutor's request is granted.

According to these reports, from various sources, the kamajors are determined to create "a state within the state" so as to render the Kabbah administration "handicapped", as the RUF used to do. It is reported that the Bo-Kenema highway is the kamajor's prime target- they intend to disrupt the free flow of goods, especially foodstuffs.

A lady just arriving from Tongo Fields expressed great concerns and fears that if, at all, the kamajors converge once again to create problems the people living in Kenema, and

Contd. page 2

This request was filed in Monday this week and according the Office of The Prosecutor, if the Request is okayed "the amended indictment incorporates new and additional evidence which was not available at the time the current indictments were submitted... and that the filing of the new amendment will not prejudice the rights of the accused to a fair and expeditious trial." The Prosecutors filed-in request intends to include acts of sexual violence abuse committed against women in places as Bo and Mabang which "the accused persons are responsible for." Legal sources opined that sexual violence against women would be a new phenomenon in the jurisdiction of crime against humanity.

Meanwhile, the Defence has fourteen (14) days to appeal against the amended indictment, while the Prosecutor has seven (7) days to respond. If the Prosecutor's request is granted, "female victims of sexual violence abuse would have to testify in court themselves so that trials will be fair and not prejudiced..." an international/human rights activist said.

The Exclusive

Thursday February 19

2004

ANNEX 33:

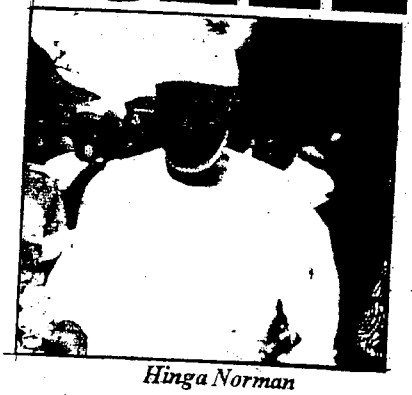
"Kamajors Vow", The Exclusive, January 20 2004.

6405

Kamajors Vow!!

Very reliable intelligence report from the eastern provincial headquarters of Kenema has it that former Kamajors in the region are yet to be pacified over the indictment, arrest and continued detention of their godfather, Chief Sam Hinga Norman, the Special Court for Sierra Leone. Arthur Caulker reports.

According to some very eminent persons in Kenema town, who asked not to be named, the inner caucus of the former militia group - Kamajor - has vowed to invade the Special Court detention centre in Freetown to release Chief Norman, whose detention they described as "very unfortunate and lamentable."



Hinga Norman

Chief Sam Moiwo, a section chief in Kenema, disclosed that an advance group of disgruntled Kamajors have been dispatched to Freetown to be witnessing the trial of Chief Norman at the Special Court. Special Court trials are expected to begin in earnest anytime next month.

The vanguard Kamajor group would be monitoring court proceedings and, at the same time collating their findings at their Bass Street meeting place. A former aide to Chief Norman, Abdul Karim is re-

Contd. page 6-

From front page

ported to be a member of the delegation to put modalities in place for a well planned raid on the detention centre.

Chief Norman's indictment and detention generated a lot of furore last year, with many of his supporters condemning the move, which they regard as unfortunate. They argue that the Kamajor chieftain should be treated as a national hero instead of a villain. Hence, there had been rumours of planned jail breaks to set him free, which, however, have not come to pass.

The Exclusive

Tuesday January 20, 2004

ANNEX 34:

"Free Hinga Norman or No Palm Oil", The Pool, Friday January 30 2004.

6407

"Free Hinga Norman or No Palm Oil"...Kamajors

By our Eastern correspondent

Kamajors in the South and East of the country, are behind the painful scarcity of palm oil in the city, the Pool can authoritatively reveal.

Investigations carried out by or Eastern Correspondent indicate that the Kamajors have sensitized their relatives, to instead ferry their Palm oil produce to neighbouring Liberia as a protest over the arrest and continued detention of Sam Hinga Norman by the Special Court.

"Free Hinga Norman or no Palm oil", they are quoted as

Contd.Page 9

Hinga Norman: Your men are behind you

From Front Page

saying

According to the Kamajors, the [illegible] detention of [illegible] Coordinator is a show of ***"blatant disregard of the efforts by Norman and we the Kamajors in general"***.

Although the Kamajors are known to have officially disbanded, our investigations have proved that they continue to have [illegible]

"We will no longer fire a shot to ensure our man's release but, we will explore all sorts of [illegible]

The Post

Friday January 30, 2004

ANNEX 35:

Transcript of telephone interview conducted by Sam Hinga Norman from the detention center (1).

Tape 1 of 1, Side A

(Conversation begins at tape counter 021)

HN: (Laughter) Yeah, long, long time.

VICTOR: Yeah, (indiscernible - 022).

HN: Long, long, long time.

VICTOR: Yeah.

HN: So have you been existing then, how?

VICTOR: Yes, I have been travelling. You know I was in London.

HN: Yeah, I know that. I went to London, but I couldn't meet with you and I did not hear what you could do either.

VICTOR: All right. Okay. Okay. But in the meantime, I (indiscernible - 026) BBC, but I have my own website here good news (indiscernible - 026/7) Sierra Leone.

HN: Oh, okay.

VICTOR: (Indiscernible 027) the President gave an interview which was broadcast on the airways and --

HN: Yeah. I was privileged to listen to it with Karibi-White.

VICTOR: Yes, because I wanted a verification, because he said that... (Indiscernible - 029) ...he says that he never knew that you were going to be arrested interest.

HN: Well, thank God we already have -- we say that it is a pathetic issue for a man in his position and for you and myself being Sierra Leoneans to witness the hearing of such a statement coming from someone who would think that we require all our respect.

VICTOR: Yeah.

HN: That means that I cannot imagine how a President could be in his own country and a foreign court brought to his own country to arrest his Minister of Internal Affairs by his own police and him not knowing and not having any knowledge about it. I would even imagine that those who stuck together with him to arrange the arrest of Chief Norman herein that we then begin to think how truthful is this man and how reliable is he and can the statement be so reliable and so -- well, so to speak, I mean being afraid to speak the truth?

VICTOR: But, Chief, the question is: Did he know?

HN: But that is a question I'm asking to you. He has every reason to know. In the first place, he asked for the court in his own writing. And his own Attorney General, who is his own vice-president now, went to negotiation for this court. Unknown --

VICTOR: Right.

HN: -- unknown by participants as representatives, you know, to the Lome Agreement resolving the conflict in Sierra Leone, which should never have been the case.

VICTOR: Right.

HN: And now culminatingly, right now, when the indictees have had a fundamental human right abuse, our constitutional rights have been abused and our sovereignty has been abused.

VICTOR: Right.

HN: Yes.

VICTOR: Yes. But, Chief, I mean at that time when this whole thing about the Special Court was being settled, you were a member of the

government.

HN: Yes.

VICTOR: Weren't you aware that --

HN: No. I'm, telling you I was not aware and I would never have imagined that a President would have gone back on his own word and on his own signature to undertake to give amnesty and to undertake to give pardon, which he did, while some of the men that he pardoned and he amnestied are now working in the army and the police and in the civil and governmental administration.

VICTOR: You mean, you mean, you mean people who were engaged in human rights abuses?

HN: I'm not talking about rights abuses. I'm saying those who have been sentenced.

VICTOR: Un-huh.

HN: And who gained their release as a result of the amnesty granted under the Lome Agreement.

VICTOR: Okay.

HN: And the pardon granted under the Lome Agreement.

VICTOR: Okay.

HN: All right. Now, now where are these people? They don't realise their responsibility to have been in prison in the first place. I mean, there is a whole lot, why, you know, his cronies stopped Chief Hinga Norman and denied his right to speak at the TRC. But as I'm saying, that I, Chief Hinga Norman, and those who fought for this country, are not in

the least now prepared to accept the condition as it is. You understand?

We either go back to the drawing board or resolve the issue.

VICTOR: Well, there are also the legal implications...

HN: No, no, no. I'm not quoting you the legal implications. I'm quoting you the consequential implications of holding Chief Hinga Norman and saying that he bears the greatest responsibility. Chief Hinga Norman is not going to be held in jail while the courthouse isn't built or is being built. I'm waiting, when his own fundamental human right to have a speedy trial is being abused.

VICTOR: Okay.

HN: I'm not going to accept that and I've sent word to my men that I told them to wait and give chance to justice. Now I see that justice has been abused under the Special Court that has no right to be in Sierra Leone in the first place. If I'm charged with Geneva Convention crimes, then I should be tried under the Geneva Convention court, not a Special Court. So that is not a legal implication. I'm refusing to associate myself with whatever that they are trying to do now. But I'm refusing to accept whatever condition that I'm being held under and I'm telling my men that the time for justice is over.

VICTOR: But you don't accept the authority of the Special Court?

HN: The Special Court has no authority in Sierra Leone. It has no authority. The Special Court came as a result of our own constitution being abused. It is a violation of our constitution for which soldiers, Paramount Chiefs, politicians, SL have been executed at Pademba Road. The

President knows that.

VICTOR: But Chief, what my problem is is that some negotiations

(indiscernible - 082) with the President (indiscernible -082) were also a part of --

HN: I tell you, I tell you, negotiation or no negotiation whether I was part of government or I was not part of government, somebody abusing the constitution does not have to obtain excuse because of me being part of this government. Can you accept that as a Sierra Leonean, as an educated Sierra Leonean?

VICTOR: I was just wondering why you didn't raise the objection before --

HN: Because, because I was not part of the -- of the cabinet, and I did not discuss this matter. It was not discussed with me. And Sierra Leoneans did not know it. I'm telling you that Sierra Leoneans ought to have known that their constitution was being amended, and they should have given the rights to that --

VICTOR: Well --

HN: -- Victor.

VICTOR: You sound very, very angry.

HN: I am. I am angry because for ten months I've been held here. I have not been asked one question whether I did anything or I did not. Can you imagine? And they deny me every right to be seen by the public or the press. Can you imagine? And I've not been taken to court to be tried. Can you imagine?

VICTOR: Maybe the justice of the trial you should be --

HN: That is what you're saying, "maybe." Is maybe a justice what? Victor, can you -- you use the word "maybe" to substitute the right

of every individual being abused. Huh? He told the RUF, they did not put their guns down, there was nothing. He had no reason beating -- defeating them. He did not defeat them. That is what is now presupposing. If he has defeated them, then when they go back to bush, let us see how he is going to defeat them.

VICTOR: But the President said at one stage that you were not arrested because you acted as Defence Minister.

HN: This is what I'm saying. What I was arrested of and why haven't they asked me up to now or told me anything? What have I done? What do you think I did? If I defended the constitution of Sierra Leone like, like, like Abraham -- like General Montgomery did in Britain or like General McArthur did in America, like a general I know did in America and then became president. Why didn't they indict them when they were trying the Germans? Why? You tell me now. You are the people who have been searching.

VICTOR: Well, because now, did you -- did you have other difference of opinion, anything different with respect to the President?

HN: Whether I had any difference of opinion with the President or not, all he needed to do was to sack me from his cabinet or his government, but not to have me indicted on charges that are flimsy and illusive and can not be sustained. And everybody wants me to appear in

the court that is not usual. Have you ever seen law being made after the event is over to try somebody? The statute is new. The court is new, and the court is not part of International Criminal Court. We are saying: Let the impartial commission be set up to inquire into the issue in Sierra

Leone. Everybody should be required who bears what and at what grade level. Let them be charged. We are not saying that we don't like this, we don't like a court. We like a court, but not a special court for special people and for special reasons and therefore special money.

VICTOR: All right, chief, is it so that you were given the opportunity of appearing before the TRC so that you could broadcast your right and I will say --

HN: Why should my own be an exception to the rule? Because I'm not a Sierra Leonean, so I am less opportune to have human right, so it should be abused or denied or conditioned or limited?

VICTOR: But they say you have -- you might have some sensitive information which would not be good for the public domain.

HN: Oh, good, good, so for his own protection I should lose my own opportunity of liberty? Is that what you are saying? That is my question in retort. Oh, you want to protect the President or Geoffrey Robertson wants to protect the President so that sensitive information which Chief Hinga Norman has he should not go to the TRC, so he should be tried for crimes against humanity, huh? He is the sacrificial lamb, huh? No, no, I mean, this is a joke, but when you prick the donkey's ass with a needle, you will be asking for a nasty kick.

VICTOR: So, Chief, you think you will be made the sacrificial lamb?

HN: Yes. I am not only thinking, that is what they are attempting to do. But we are all going to be sacrificed, beginning now.

VOICE 2: All right, Chief, thank you very much.

HN: Thank you, Victor.

VICTOR: It's been ages.

HN: Yes. And I would like to be hearing from you occasionally because, you see, when you people want to write about Sierra Leone, you should write authentically. You should not write like the armchair academicians sitting far away from where the actual fights are taking place on the ground, and they are just surmising or theorising issues. This would not be good for Sierra Leone. We ended the issue on the note of reconciliation, not prosecution. It has taken Sierra Leone ten months to answer my question. Do they want reconciliation or they want prosecution? Nobody has answered that. I am again asking this question through you. Does Sierra Leone want reconciliation or prosecution? Believe me, if it is prosecution, then we are all going to be prosecuted. If it is reconciliation, we will all reconcile, and that is where I stand. I will not negotiate anything.

VICTOR: All right. Well, thank you, thank you very much. It's been good talking to you.

HN: Thank you.

VICTOR: Bye-bye.

HN: Thank you.

(End at counter 144)

R. Kerekes
30 January 2004

ANNEX 36:

Transcript of telephone interview conducted by Sam Hinga Norman from the detention center (2).

Man: How are you?

Norman: Thanks be to God

Man: I have prepared that thing but its 17 and I have ..... 8 (unclear statement) and I want to deal with the others tomorrow.

Norman: That's not bad. But you should do it quickly so that I can sign it. Once I sign one of them you can "deal" with the others.

Man: Did you say I should give them to Alpha?

Norman: If you give it to Alpha, he'll give it to one of my lawyers(the female lawyer) so she will bring it to me so that I can sign it and she'll take it back to him. So you should try to see her in the evening.

Man: That's not bad. Whatever the case may be, I would like to send seven or eight of them tomorrow.

Norman: Well, but you should wait for me to sign it. You should send it to Arthur and others tomorrow for their approval. I'll try to telephone them this evening and inform them that you'll be taking the documents to them this evening and that they should go through them quickly. You should only send a copy to them.

Man: Who? Arthur?

Norman: Yes. In Kenema. Send the other copy to Alieu in Bo. Tell them to read through quickly and give whatever suggestions they have. If they want to write a different version, let me know but I don't want them to write it because they are out there. They could be arrested. I want to write it because I am already a detainee so I can't be arrested anymore.

Man: Okay. You know what I'll do, I am going to give Mamie two copies so that she can send them to Bo and Kenema.

Norman: Do it quickly and send it to Alpha. Or do you know what to do? Send two copies to upcountry, keep two copies ..... No, the copies that you'll be giving to Mamie are the ones she'll have to send Upcountry. Keep another copy safely and send the others to me so that I can sign them.

Man: Okay.

Norman: But was it done well?

Man: Yes.

Norman: Are there not any mistakes? Did you check it thoroughly?

Man: Yes.

Norman: Okay, thank you very much.

Man: In fact, that is why I want to give it to you for your perusal. That way, you can make your own suggestions.

Norman: It doesn't matter as long as you have checked it properly. Are you sure that its okay.

Man: Yes.

Norman. Okay, thank you.

Man: So tomorrow, I'll try to speak to the media.

Norman: No wait a minute! Wait for me to check it tomorrow. After checking it, you can send it to where you wish to.

Man: No, I wanted to speak to the media (BBC)

Norman: No. Don't send it to the media yet.

Man: No. That's not what I intend discussing with the media. I just want to grant them a special interview. Because I've already got a journalist willing to interview me tomorrow.

Norman: All right. That's good. Just tell them that we are asking whether they want peace or war. We have already asked them this question before but we've not got a response and time is far spent. And we have now been in detention for bout 11 months. More importantly, there were people who didn't benefit from the war and they are waiting for another conflict to compensate for what they lost.

Man: Okay. See you later. Bye bye.

ANNEX 37:

Category A witnesses.

TF2 - 108

TF2 - 109

TF2 - 187

TF2 - 188

TF2 - 189

TF2 - 129

TF2 - 126

TF2 - 133

TF2 - 128

TF2 - 134

TF2 - 135

TF2 - 136

TF2 – 206

TF2 - 204

TF2 - 208

TF2 - 205

TF2 - 207

TF2 - 209

Total: 18

ANNEX 38:

Category B witnesses.

TF2 - 004

TF2 - 009

TF2 - 021

TF2 - 038

TF2 - 060

TF2 - 064

TF2 - 067

TF2 - 069

TF2 - 080

TF2 - 081

TF2 - 118

TF2 – 140

Total:12

ANNEX 39:

Category C witnesses

TF2 - 005

TF2 – 008

TF2 – 011

TF2 - 013

TF2 – 014

TF2 – 017

TF2 - 034

TF2 – 043

TF2 – 051

TF2 – 068

TF2 – 079

TF2 – 082

TF2 – 087

TF2 – 103

TF2 - 111

TF2 – 148

TF2 – 149

TF2 - 190

TF2 – 191

TF2 - 201

TF2 – 219

Total: 21