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SCSL-2003-02-I-2P-017

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

(92-215)

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 7 April 2003

THE PROSECUTOR

Against

FODAY SAYBANA SANKOH

also known as (aka) POPAY aka PAPA aka PA

CASE NO. SCSL – 2003 – 02 – PT

**PROSECUTION MOTION
FOR IMMEDIATE PROTECTIVE MEASURES
FOR WITNESSES AND VICTIMS
AND FOR NON-PUBLIC DISCLOSURE**

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions
Brenda J. Hollis, Senior Trial Counsel

Defence Counsel:

Claire Carlton-Hanciles, Duty Counsel
Ibrahim Yillah, Duty Counsel
Hadijatu Kah-Jallow, Duty Counsel

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I. INTRODUCTION

1. Consistent with Articles 16 and 17 of the Statute of the Special Court for Sierra Leone (the Statute) and pursuant to Rules 53, 54, 69, 73 and 75 of the Special Court's Rules of Procedure and Evidence (Rules), the Prosecution respectfully submits a Motion for Protective Measures for witnesses and victims and for non-public disclosure.
2. The Prosecution submits that for the purposes of this motion:
 - (a) “the Prosecution” means and includes the Prosecutor of the Special Court for Sierra Leone (the Court) and his staff;
 - (b) “the Defence” means and includes the Accused, the defence counsel and their immediate legal assistants and staff, and others specifically assigned by the Court to the Accused’s trial defence team in conformity with Rule 44;
 - (c) “witnesses” means and includes witnesses and potential witnesses of the Prosecution;
 - (d) “protected witnesses” means and includes the witnesses in the categories as set forth in paragraph 16 below;

- (e) “victims” means and includes victims of sexual violence, torture as well as all persons who were under the age of 15 at the time of the alleged commission of the crime;
- (f) “the public” means and includes all persons, governments, organizations, entities, clients, associations and groups, other than the Judges of the Court and the staff of the Registry, the Prosecution, the Defence, as defined above. “The public” specifically includes, without limitation, family, friends and associates of the Accused, and the Defence in other cases or proceedings before the Court.
- (g) “the media” means and includes all video, audio, print media personnel, including journalists, authors, television and radio personnel, their agents and representatives.

3. The Prosecution requests the Designated Judge or Trial Chamber to order immediate measures to protect the identity of witnesses and to protect confidentiality of all non-public materials disclosed to the Defence. The Prosecution submits that it is necessary to take adequate measures to safeguard the security and privacy of witnesses and victims and the integrity of the evidence and these proceedings. In case it is not possible to decide this motion before the end of the initial Rule 66(A)(i) disclosure period, the Prosecution has filed a separate motion. The purpose of the separate motion is to protect the identity of witnesses and the confidentiality of all non-public materials until protective measures are ordered.

4. The Prosecution will provide timely disclosure by handing over relevant witness statements, interview reports and summaries of expected testimonies. In order to comply with the requirement to provide timely disclosure and with the requirement to protect vulnerable witnesses and victims, the Prosecution has redacted the names and any other identifying data of the witnesses from these materials presented to the Defence. This procedure provides the Defence with the substance of the statements and reports but protects the identity of the witnesses.

II. ARGUMENT

A. Witnesses

i. Statute and Rules

5. Articles 17.2 and 16.4 of the Statute recognise the need for and importance of protective measures for victims and witnesses.

6. Rule 69 states that a party may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.

7. Rule 75(A) authorises a Judge or Trial Chamber to order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. Rule 75(B) provides a wide range of measures for protecting the identity of victims and witnesses ranging from the use of pseudonyms to the use of closed circuit television during testimony in court. The Prosecution submits that providing redacted material, which means the blackening of any information in witness statements and interview reports which could reveal the identity of witnesses and victims, is an appropriate measure for the privacy and protection of victims and witnesses consistent with the rights of the Accused. Where redaction would effectively render a witness statement or an interview report useless, the

Prosecution will disclose summaries of points the points to which the witnesses are expected to testify.

8. Rule 69(C) states that the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.

9. It is worth noting that the language in Rules 69 and 75 is highly similar to Rules 69 and 75 of the Rules of Procedure and Evidence for both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Pursuant to its Statute and Rules, both the ICTR and the ICTY have issued several orders in the matter of the protection of witnesses. (See e.g. *Prosecutor v. Akayesu*, ICTR-96-4-T, 27 September 1996; *Prosecutor v. Rutaganda*, ICTR-3-T, 26 September 1996; *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 25 April 2001; *Prosecutor v. Tadic*, IT-4-I-10, 10 August 1995; see also paragraph 15. below).

ii. Factual Bases for the Motion

10. The future of this and all other cases before the Special Court for Sierra Leone depends on the ability and willingness of witnesses to give testimony and provide evidence. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Court's ability to accomplish its mandate. The protective measures requested by the Prosecution would protect witnesses and victims against this kind of misconduct and are designated to ensure their safety, as well as that of their families. (See paragraphs 4 and 6.d of the UN's *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly Resolution 40/34 on 29 November 1985).

11. As related in the attachments, the situation in Sierra Leone threatens not only witnesses and their families but also all victims of the crimes under the jurisdiction of the Court. This is due to the presence throughout West Africa of large numbers of members of the armed factions involved in this conflict, including the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC), and of other people who collaborated with such factions. Therefore witnesses and victims living in Sierra Leone, and also those living in other countries in West Africa are directly affected by this situation and feel threatened. This includes people living outside the continent of Africa who have special reason to feel threatened and who therefore have requested protective measures.

12. The conditions in Sierra Leone are difficult. The perpetrators, victims, and witnesses are not separated. They are co-habitants of the same communities. They live and work in a closely-knit setting. This phenomenon significantly increases the unacceptability of open disclosure of identifying information of witnesses and victims, under which the likelihood of risk and harm is heightened.

13. In the past weeks, there have been increasing instances involving interference with and intimidation of Prosecution's witnesses. The situations range from witnesses having their lives threatened either individually or by group, 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 Court.

14. As an example, the attached declaration of Morie Lengor (cf. attachment 1) refers to real and well founded fears expressed by potential witnesses. This declaration attests that the witnesses in this case face a high potential for reprisals and that the fears expressed by witnesses for testifying and collaborating with OTP are real and serious, and that therefore they must be adequately addressed.

iii. Legal Bases for the Motion

15. The Prosecution submits that the protective measures sought are consistent with Rules 66, 67 and 69. Further, the Prosecution submits that the requirements of Rule 69(C) are met by disclosure of identifying information 21 days prior to the testimony of the witness at trial. In certain cases the Prosecution may file individual requests for specific protective measures for specific witnesses, if necessary. However, this 21 day period of time, as a general rule, is a sufficient balance between the rights of the Defence and the need for protective measures for witnesses. The Chambers of ICTR found that such “rolling disclosure” affords the appropriate level of protection and allows adequate time for preparation of the Defence. The Prosecution submits that such “rolling disclosure” has crystallised as the prevailing practice of the ICTR. (See *Nsengimana*, ICTR-2001-69-T, 2 September 2002; *Nyiramasuhuko*, ICTR-97-21-T, 20 March 2001; *Kamuhanda*, ICTR-99-50-I, 7 July 2000; *Kajelijeli*, ICTR-98-44-I, 6 July 2000; *Nzirorera*, ICTR 98-44-I, 12 July 2000; *Prosecutor v. Semanza*, ICTR-97-20-I, 10 December 1998). Because the language in this Court’s Rules 69 and 75 is highly similar to Rules 69 and 75 of the Rules of Procedure and Evidence of the ICTR, the Prosecution requests that this Court adopt the practice of the ICTR concerning the “rolling disclosure”. Thus, such “rolling disclosure” upholds both the rights of the Accused and the witnesses under Article 16 and 17, and Rules 66, 67 and 69. The measures requested are appropriate and similar to measures that have been granted by the ICTR and the ICTY in the past and are designed to give due regard to the protection of victims and witnesses while at the same time safeguarding the rights of the Accused.

iv. Witnesses Categorization

16. For the reasons discussed above, the Prosecution seeks protection for persons who fall into three different categories, all of whom require protective measures. These three categories are:

- (a) Witnesses who presently reside in Sierra Leone and who have not affirmatively waived their right to protective measures;
- (b) Witnesses who presently reside outside Sierra Leone but in other countries in West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their rights to protective measures, and;
- (c) Witnesses residing outside West Africa who have requested protective measures.

B. Non-Public Material (including witness statements, interview reports and summaries)

17. The Prosecution requests that the Defence be prohibited from disclosing to the public or media any non-public materials which are provided to them as part of the disclosure process. The disclosure provided to the Defence pursuant to Rules 66, 67 and 68 is given for one purpose only, to enable the Defence to prepare to defend the Accused against the charges which the Accused faces, either at trial or on appeal. To that end, as in this case, the Defence will be provided with non-public

materials, including witness statements, interview reports, and summaries relevant to the case. The disclosure of such material by the Defence, except to the limited extent necessary for their investigation of this case, may compromise ongoing investigations, existing indictments and the integrity of the system. Some Accused are still at large and public disclosure of Prosecutions information could provide them with the means to obstruct justice or fabricate evidence.

C. Return of Materials

18. As noted above, the Prosecution is obliged to disclose materials to the Defence for one purpose only, so that it may prepare to defend against the charges which its client faces. Given the limited purpose for which these materials are provided, the on-going security and privacy concerns of witnesses and victims, and the concern that other non-public materials may be used to undermine the course of justice if disclosed to the public, the Prosecution submits the Defence should be under an obligation to return all disclosed materials at the conclusion of the proceedings of this case. The materials would be returned to the Registry, thus preventing the Prosecution from being privy to any Defence work product that may be contained within the said materials.

III. ORDERS SOUGHT

19. In light of these serious and immediate problems and concerns, the Prosecution 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 and statements are prematurely disclosed under circumstances in which they cannot be protected. In addition, the Prosecution has grave concerns that public disclosure of non-public materials of any sort would undermine the Prosecution's investigative efforts and the integrity of proceedings before this Court.

20. In order to provide immediate protection for these witnesses, victims and non-public materials, the Prosecution requests the Designated Judge or the Trial Chamber to issue the following eleven (11) orders:

- (a) An Order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for as set forth in paragraph 16 or any other information which could lead to the identity of such a person to the Defence until twenty-one (21) days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at trial, unless otherwise ordered;
- (b) An Order requiring that the names and any other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;
- (c) An Order permitting the Prosecution to designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aide any person to attempt to determine the identity of any such person;

- (d) An Order that the names and any other identifying information concerning all witnesses described in paragraph 20(a), be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;
- (e) An Order 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, and this order shall remain in effect after the termination of the proceedings in this case;
- (f) An Order prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;
- (g) An Order that the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;
- (h) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 20(f) above, have access to any information referred to in paragraphs 20(a) through 20(e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;
- (i) An Order requiring the Defence to ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;
- (j) An Order requiring the Defence to 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;
- (k) An Order that the Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

Moreover, the Prosecution reserves its right to apply the Chamber to amend the protective measures sought or seek additional protective measures, if necessary.

IV. PRAYER

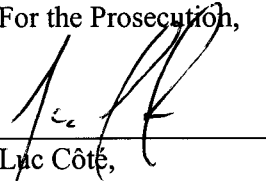
21. In view of the foregoing, the Prosecution prays that the Designated Judge of the Trial Chamber grants this Motion and issues the Orders sought, as set out above in paragraph 20.

In case it is not possible to decide this motion before the end of the initial Rule 66(A)(i) disclosure period, the Prosecution has filed a separate motion to request alternatively

- (a) to be allowed to disclose the material to the Registry within the period of disclosure; and
- (b) to order the Registry to keep the disclosed material under seal until the Designated Judge or the Trial Chamber has decided this motion and issued the relevant orders.

Freetown, 7 April 2003.

For the Prosecution,



Luc Côté,
Chief of Prosecutions

PROSECUTION ATTACHMENTS

PROSECUTION ATTACHMENTS

1. Declaration of Morie Lengor, Investigator, Office of the Prosecutor
2. Declaration of Dr. Alan W. White, Chief of Prosecutions, Office of the Prosecutor
3. Draft Order

PROSECUTION ATTACHMENTS

1. Declaration of Morie Lengor, Investigator, Office of the Prosecutor

INVESTIGATOR'S STATEMENT

05 March 2003

I, MORIE LENGOR, Investigator in the Office of the Prosecutor, Special Court for Sierra Leone at 1A Scan Drive, Off Spur Road, Freetown, in the Western Area of the Republic of Sierra Leone affirmatively state as follows:

1. I work as an Investigator in the Office of the Prosecutor and I have due authority to make this statement.
2. I am also a professionally trained Policeman of the rank of Assistant Commissioner in the Sierra Leone Police Force where I have been working as a Policeman since 1980.
3. I have had considerable experience in detecting and investigating crimes having worked in the Criminal Investigations Department of the Sierra Leone Police Force for about 15 years during my career as a policeman.
4. Since November 2002, I have been working in the Office of the Prosecutor, Special Court for Sierra Leone, where my duties include investigating crimes against international humanitarian Law and Sierra Leonean Law committed within the territory of Sierra Leone from 30th November 1996, during the period of armed conflict in Sierra Leone. My investigative duties include conducting interviews of persons who may appear as witnesses before the Special Court, and reviewing investigator notes and statements of such persons taken by other investigators in the Office of the Prosecutor.
5. I provide the following facts based on my duties as an investigator for the Office of the Prosecutor, Special Court for Sierra Leone, and on my previous experience as a Sierra Leonean police officer. These facts reveal as follows:
6. Members of the civilian population of Sierra Leone who may be called upon to appear as witnesses before the Special Court have expressed concern regarding their safety and security if it becomes 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, before appropriate protective measures can be put in place.

7. These potential witnesses point out that the Government of Sierra Leone is not actively prosecuting those who actually carried out crimes such as those alleged in the Indictments presented for confirmation. As a result, these potential witnesses live among these perpetrators, and fear retaliation from them if the potential witness' identity becomes known to the public. This fear is heightened by the fact that many of the perpetrators now serve as members of the Armed Forces of Sierra Leone.
8. Potential witnesses have expressed fear of reprisals not only from those who actually carried out the crimes, but also from relatives and friends of the Accused, from those who are associated with the Accused, and from those who support the causes or factions the Accused represent.
9. The fears expressed are genuine and, in my opinion, are well founded, especially considering that many of the potential witnesses live in remote areas without any police presence or other semblance of security.
10. I believe that it is essential for the safety and security of these potential witnesses, their family members and for the work of the Special Court that the identifying data regarding these persons be withheld from the public and not be disclosed to any suspect or accused until such time as appropriate protective measures are in place.

I, MORIE LENGOR, 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.


Morie Lengor

Senior Investigator, Task Force 1

Office of the Prosecutor

Special Court for Sierra Leone

PROSECUTION ATTACHMENTS

2. Declaration of Dr. Alan W. White, Chief of Prosecutions, Office of the Prosecutor



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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

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DECLARATION

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

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

I have been working with confidential informants and witnesses for over 25 years, routinely conducting threat assessments of confidential informants and witnesses. As a result, I have extensive experience in providing security for witnesses and confidential informants, which in many cases required some sort of protection measures, including physical relocation. Immediately prior to my current assignment I served as the Director, Investigative Operations, and a Senior Executive Service member within the U.S. Government for the Defense Criminal Investigative Service (DCIS), the executive law enforcement agency within the U.S. Department of 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 investigation by the Office of The Prosecutor.

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

On January 13, 2003, there was an attempted theft of military weapons at the Wellington Army Barracks, later linked to a suspected military coup and attempt to disrupt the Special Court for Sierra Leone. One of the co-conspirators, Johnny Paul Koroma, was arrested by the Sierra Leone Police for subversive activities and later escaped. Koroma was



3/07

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

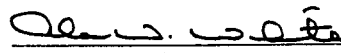
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subsequently indicted by the Special Court for violations of Crimes Against Humanity and International Humanitarian Law and is currently at large.

Based upon the information provided to me by these various sources, I have learned the following about the current security situation in Sierra Leone and the neighbouring countries. The security situation in most of Sierra Leone and the neighbouring countries is volatile. The perpetrators, the victims and the witnesses are not separated. They are co-habitants of the same communities. They live and work in a closely-knit setting. In the past weeks, there have been increasing instances involving interference with and intimidation of Prosecutor's witnesses. The situation ranges from witnesses having their lives threatened either individually or by group, 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 court. This is due to the existence throughout West Africa of large numbers of members of the armed factions involved in the conflict that happened in Sierra Leone, including the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC) and other people who collaborated with such factions. Additionally, there are numerous members with the Republic of Sierra Leone Army and Sierra Leone Police, who are sympathizers and supporters of Johnny Paul Koroma, an indicted war criminal. Further, I have first hand information that supporters and sympathizers of Samuel Hinga Norman, former Chief of the CDF, are actively attempting to identify and intimidate witnesses of the Special Court. Therefore, witnesses living in Sierra Leone, and also those living in other countries in West Africa, are directly affected by this situation and feel threatened.

Signed at Freetown

The 7th day of April 2003


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

PROSECUTION ATTACHMENTS

3. Draft Order

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

Before: Judge Bankole Thompson,
Designated Judge
[Presiding Judge]

Registrar: Robin Vincent

Date filed: 7 April 2003

THE PROSECUTOR

Against

CASE NO. SCSL – 2003 – – PT

ORDERS
FOR IMMEDIATE PROTECTIVE MEASURES
FOR WITNESSES AND VICTIMS
AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:

Defence Counsel:

Luc Côté, Chief of Prosecutions
[Brenda J. Hollis] [James C. Johnson], Senior Trial Counsel

DRAFT

THE SPECIAL COURT FOR SIERRA LEONE (the “Special Court”),

PRESIDED OVER by Judge Bankole Thompson, designated in accordance with the provisions of Rule 28 of the Rules of Procedure and Evidence (“the Rules”);

[THE TRIAL CHAMBER of the Special Court for Sierra Leone,]

BEING SEISED of the Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure filed by the Prosecutor on 7 April 2003 for an order requesting various protective measures to safeguard the security and privacy of victims, witnesses and to safeguard the integrity of the Prosecutions evidence and the integrity of these proceedings;

CONSIDERING that non-public material is disclosed to the Accused for the purpose of allowing him to prepare to meet the charges against him and for no other purpose;

CONSIDERING that the Presiding Judge [Trial Chamber] takes very seriously the rights and concerns of victims and witnesses, is genuinely concerned for their safety, protection and welfare, and will take all appropriate measures to ensure their protection and privacy, and is further concerned in safeguarding non-public materials provided to the Accused in order to enable him to prepare for trial;

CONSIDERING that the material submitted by the Prosecutor shows a clear need for protective measures for witnesses, victims and non-public material in this case;

CONSIDERING that Articles 17.2 and 16.4 of the Statute of the Special Court for Sierra Leone (the Statute) envisions that the Trial Chamber shall issue appropriate orders to protect victims and witnesses;

CONSIDERING the provisions of Rules 69 and 75 of the Rules concerning protection of witnesses;

Consistent with Articles 16 and 17 of the Statute and **pursuant** to Rules 53, 54, 66, 69 and 75 of the Rules;

HEREBY GRANTS THE PROSECUTION MOTION AND ORDERS as follows:

(1) For the purposes of this Order:

- (a) “the Prosecution” means and includes the Prosecutor of the Special Court for Sierra Leone (the Court) and his staff;
- (b) “the Defence” means and includes the Accused, the defence counsel and their immediate legal assistants and staff, and others specifically assigned by the Court to the Accused’s trial defence team in conformity with Rule 44;
- (c) “witnesses” means and includes witnesses and potential witnesses of the Prosecution;
- (d) “protected witnesses” means and includes the witnesses in the categories as set

forth in paragraph 16 of the motion;

- (e) “victims” means and includes victims of sexual violence, torture as well as all persons who were under the age of 15 at the time of the alleged commission of the crime;
- (f) “the public” means and includes all persons, governments, organizations, entities, clients, associations and groups, other than the Judges of the Court and the staff of the Registry, the Prosecution, the Defence, as defined above. “The public” specifically includes, without limitation, family, friends and associates of the Accused, and the Defence in other cases or proceedings before the Court.
- (g) “the media” means and includes all video, audio, print media personnel, including journalists, authors, television and radio personnel, their agents and representatives.

(2) The Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 16 of the Motion and any other information which could lead to the identity of such a person to the Defence, until twenty-one (21) days before the witness is to testify at trial; and may disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at trial, unless otherwise ordered;

(3) That the names and any other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;

(4) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aide any person to attempt to determine the identity of any such person;

(5) That the names and any other identifying information concerning all witnesses described in paragraph 20(a), be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(6) That 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, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;

(7) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(8) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of

disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

(9) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 20(f) above, have access to any information referred to in paragraphs 20(a) through 20(e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(10) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(11) That the Defence 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;

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

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 Freetown, Sierra Leone this ?? day of April 2003

Judge Bankole Thompson
Designated Judge
[Presiding Judge]

Seal of the Special Court for Sierra Leone

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

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 7 April 2003

THE PROSECUTOR

Against

CASE NO. SCSL – 2003 – – PT

ORDER ALLOWING DISCLOSURE
TO THE REGISTRY AND PLACING DISCLOSED MATERIAL UNDER
SEAL UNTIL APPROPRIATE PROTECTIVE MEASURES ARE IN PLACE

Office of the Prosecutor:

Defence Counsel:

Luc Côté, Chief of Prosecutions
[Brenda J. Hollis] [James C. Johnson], Senior Trial Counsel

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THE SPECIAL COURT FOR SIERRA LEONE (the "Special Court"),

PRESIDED OVER by Judge Bankole Thompson, designated in accordance with the provisions of Rule 28 of the Rules of Procedure and Evidence ("the Rules");

BEING SEISED of the Motion to allow Disclosure to the Registry and to Keep Disclosed Material Under Seal Until Appropriate Protective Measures are in Place filed by the Prosecutor on 7 April 2003;

CONSIDERING that the Presiding Judge takes very seriously the rights and concerns of victims and witnesses, is genuinely concerned for their safety, protection and welfare, and will take all appropriate measures to ensure their protection and privacy, and is further concerned for the protection of non-public materials provided to the Accused;

HEREBY ORDERS as an interim measure that:

- (1) The Prosecution make its initial Rule 66(A)(i) disclosure to the Registry;
- (2) The Registry keep the disclosed material under seal until the Designated Judge or the Trial Chamber has issued orders for appropriate protective measures for witnesses, victims and non-public materials.

Done in Freetown, Sierra Leone this ?? day of April 2003

Judge Bankole Thompson
Designated Judge

Seal of the Special Court for Sierra Leone

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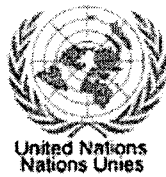
PROSECUTION INDEX OF AUTHORITIES

1. ICTR Rules of Procedure and Evidence, Rules 69, 75
2. ICTY Rules of Procedure and Evidence, Rules 69, 75
3. Prosecutor v. Akayesu, ICTR-96-4-T, 27 September 1996
4. Prosecutor v. Rutaganda, ICTR-96-3-T, 26 September 1996
5. Prosecutor v. Muvunyi, ICTR-2000-55-I, 25 April 2001
6. Prosecutor v. Tadic, IT--4-I-10, 10 August 1995
7. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paragraphs 4 and 6.d
8. Prosecutor v. Nsengimana, ICTR-2001-69-T, 2 September 2002
9. Prosecutor v. Nyiramasuhuko, ICTR-97-21-T, 20 March 2001
10. Prosecutor v. Kamuhanda, ICTR-99-50-I, 7 July 2000
11. Prosecutor v. Kajelijeli, ICTR-98-44-I, 6 July 2000
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1. ICTR Rules of Procedure and Evidence, Rules 69, 75

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

RULES OF PROCEDURE AND EVIDENCE

Adopted on 29 June 1995; as amended on
12 January 1996
15 May 1996
4 July 1996
5 June 1997
8 June 1998
1 July 1999
21 February 2000
26 June 2000
3 November 2000
31 May 2001 and
6 July 2002

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 Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

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

(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 Tribunal'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 control the manner of questioning to avoid any harassment or intimidation.

Rule 69: Protection of Victims and Witnesses

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

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

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

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2. ICTY Rules of Procedure and Evidence, Rules 69, 75

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RULES OF PROCEDURE AND EVIDENCE

(ADOPTED 11 FEBRUARY 1994)
(AS AMENDED 5 MAY 1994)
(AS FURTHER AMENDED 4 OCTOBER 1994)
(AS AMENDED 30 JANUARY 1995)
(AS AMENDED 3 MAY 1995)
(AS FURTHER AMENDED 15 JUNE 1995)
(AS AMENDED 6 OCTOBER 1995)
(AS FURTHER AMENDED 18 JANUARY 1996)
(AS AMENDED 23 APRIL 1996)
(AS AMENDED 25 JUNE AND 5 JULY 1996)
(AS AMENDED 3 DECEMBER 1996)
(AS FURTHER AMENDED 25 JULY 1997)
(AS REVISED 20 OCTOBER AND 12 NOVEMBER 1997)
(AS AMENDED 9 & 10 JULY 1998)
(AS AMENDED 4 DECEMBER 1998)
(AS AMENDED 23 FEBRUARY 1999)
(AS AMENDED 2 JULY 1999)
(AS AMENDED 17 NOVEMBER 1999)
(AS AMENDED 14 JULY 2000)
(AS AMENDED 1 AND 13 DECEMBER 2000)
(AS AMENDED 12 APRIL 2001)
(AS AMENDED 12 JULY 2001)
(AS AMENDED 13 DECEMBER 2001)
(INCORPORATING IT/32/REV. 22/CORR.1)
(AS AMENDED 23 APRIL 2002)
(AS AMENDED 11 AND 12 JULY 2002)
(AS AMENDED 10 OCTOBER 2002)
(AS AMENDED 12 DECEMBER 2002)

(IT/32/REV.26)

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Rule 69
Protection of Victims and Witnesses

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

(B) In the determination of protective measures for victims and witnesses, the Judge or 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.

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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 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.

(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 a victim or witness by such means as:

- (a) expunging names and identifying information from the Tribunal'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) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).

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

(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal.

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:-

(i) shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seized of the first proceedings; or

(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

(H) Before determining an application under paragraph (F) (ii) above, the Chamber seized of the second

proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

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3. Prosecutor v. Akayesu, ICTR-96-4-T, 27 September 1996

UNITED NATIONS **NATIONS UNIES**
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
IN THE TRIAL CHAMBER I

Before: Judge Yakov A. Ostrovsky, Presiding Judge
 Judge Lennart Aspegren
 Judge Navanethem Pillay

Registrar: Mr. Frederik Harhoff
 Ms. Prisca Nyambe

Decision of: 27 September 1996

The PROSECUTOR
vs
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

DECISION ON THE PRELIMINARY MOTION
SUBMITTED BY THE PROSECUTOR
FOR PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor:

Judge Honoré Rakotomanana
 Mr. Yacob Haile-Mariam
 Mr. Mohamed Chande Othman
 Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Johan Scheers

THE TRIBUNAL,

SITTING as the Trial Chamber 1 of the International Criminal Tribunal for Rwanda (Athe Tribunal≡), composed of Judge Yakov A. Ostrovsky as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay,

CONSIDERING the indictment submitted on 13 February 1996 by the Prosecutor against Jean-Paul Akayesu pursuant to Rule 47 of the Rules of Procedure and Evidence (Athe Rules≡) and confirmed by the Tribunal on 16 February 1996,

BEING SEIZED OF the motion and brief dated 16 August 1996 from the Prosecutor for orders for protective measures for witnesses to crimes alleged in counts 1 through 12 of the indictment,

HAVING HEARD the parties to the hearing of this motion held on 26 September 1996, the accused being present,

CONSIDERING the provisions for protection of victims and witnesses contained in Articles 19 and 21 of the Statute of the Tribunal, and in Rules 69 and 75 of the Rules,

TAKING INTO CONSIDERATION the decision taken by the Tribunal on 26 September 1996 in the matter of the Case No. ICTR-96-3-T,

FOR THESE REASONS

DECIDES to grant the following relief:

- (1) That the names, addresses, whereabouts, and other identifying data concerning the persons given pseudonyms in the indictment and the supporting documents shall not be disclosed to the public or the media.
- (2) That the public and the media shall not photograph, video record or sketch witnesses while entering the Tribunal building, exiting from the Tribunal building, or while they are in the Tribunal building, without leave of the Trial Chamber and parties.
- (3) That the names, addresses, whereabouts, and other identifying data concerning the witnesses referred to in the supporting documents and/or any disclosed witness statements shall be divulged neither to the media, the public, nor the defense until such time that the witnesses are brought under the protection of the Tribunal.
- (4) That the names, addresses, whereabouts, and other identifying information concerning the witnesses shall be sealed and not included in any Tribunal public records.
- (5) To the extent that any names, addresses, whereabouts of, and identifying information concerning the witnesses is contained in existing public records, those names, addresses,

whereabouts of, and identifying information concerning the witnesses be expunged from those documents.

(6) That the pseudonyms given to the witnesses in the indictment and supporting documents shall be used whenever referring to these witnesses in the Tribunal proceedings and discussions among the parties to trial.

(7) That the Prosecutor shall disclose the names and unredacted statements of the witnesses to the defense in sufficient time to allow the defense to prepare for trial, subject to Rule 69.

Arusha, 27 September 1996

Yakov A. Ostrovsky
Presiding Judge

Lennart Aspegren
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)

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4. Prosecutor v. Rutaganda, ICTR-96-3-T, 26 September 1996

UNITED NATIONS NATIONS UNIES
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
IN THE TRIAL CHAMBER 1

Before: Judge Yakov A. Ostrovsky, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registrar: Mr. Frederik Harhoff
Ms. Prisca Nyambe

Decision of: 26 September 1996

The PROSECUTOR
vs
GEORGES ANDERSON NDERUBUMWE RUTAGANDA

Case No. ICTR-96-3-T

**DECISION ON THE PRELIMINARY MOTION
SUBMITTED BY THE PROSECUTOR
FOR PROTECTIVE MEASURES FOR WITNESSES**

The Office of the Prosecutor:

Judge Honoré Rakotomanana
Mr. Yacob Haile-Mariam
Mr. Mohamed Chande Othman
Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Luc de Temmerman
Mr. Kennedy Ogeto
Mr. Evans Monari

THE TRIBUNAL,

SITTING as the Trial Chamber 1 of the International Criminal Tribunal for Rwanda (Athe Tribunal≡), composed of Judge Yakov A. Ostrovsky as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay,

CONSIDERING the indictment submitted on 13 February 1996 by the Prosecutor against Georges Anderson Nderubumwe Rutaganda pursuant to Rule 47 of the Rules of Procedure and Evidence (Athe Rules≡) and confirmed by the Tribunal on 16 February 1996,

BEING SEIZED OF the motion and brief dated 23 August 1996 from the Prosecutor for orders for protective measures for witnesses to crimes alleged in counts 1 through 8 of the indictment,

HAVING HEARD the parties to the hearing of this motion held on 26 September 1996 without the presence of the accused, who has been hospitalized,

CONSIDERING the provisions for protection of victims and witnesses contained in Articles 19 and 21 of the Statute of the Tribunal, and in Rules 69 and 75 of the Rules,

TAKING INTO CONSIDERATION the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, notably its decisions of 10 August 1995 and 14 November 1995,

NOTING the decision taken by the Tribunal on 25 September 1996 to postpone the beginning of the trial against the accused until 6 March 1997 and to dismiss the request made by the Defense for provisional release of the accused,

FOR THESE REASONS

DECIDES to grant the following relief:

- (1) That the names, addresses, whereabouts, and other identifying data concerning the persons given pseudonyms in the indictment and the supporting documents shall not be disclosed to the public or the media.
- (2) That the public and the media shall not photograph, video record, or sketch witnesses while entering the Tribunal building, exiting from the Tribunal building, or while they are in the Tribunal building, without leave of the Trial Chamber and parties.
- (3) That the names, addresses, whereabouts, and other identifying data concerning the witnesses referred to in the supporting documents and/or any disclosed witness statements shall be divulged neither to the media, the public, nor the defense until such time that the witnesses are brought under the protection of the Tribunal.

- (4) That the names, addresses, whereabouts, and other identifying information concerning the witnesses shall be sealed and not included in any Tribunal public records.
- (5) To the extent that any names, addresses, whereabouts of, and identifying information concerning the witnesses is contained in existing public records, those names, addresses, whereabouts of, and identifying information concerning the witnesses be expunged from those documents.
- (6) That the pseudonyms given to the witnesses in the indictment and supporting documents shall be used whenever referring to these witnesses in the Tribunal proceedings and discussions among the parties to trial.
- (7) That the Prosecutor shall disclose the names and unredacted statements of the witnesses to the defense in sufficient time to allow the defense to prepare for trial, subject to Rule 69.

Arusha, 26 September 1996

Yakov A. Ostrovsky
Presiding Judge

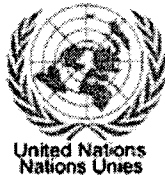
Lennart Aspegren
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)

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5. Prosecutor v. Muvunyi, 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

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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

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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 or 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

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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)

6. Prosecutor v. Tadic, IT--4-I-10, 10 August 1995

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Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

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

The Office of the Prosecutor:

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

Counsel for the Accused:

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

DECISION

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

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

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

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

HEREBY ISSUES ITS DECISION

DISCUSSION

I. Factual Background

1. Dusko 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 than 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

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

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

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

III. The Powers of the International Tribunal

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

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

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

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

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

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

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a

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

- (a) expunging names and identifying information from the Chamber's public records;
 - (b) non-disclosure to the public of any records identifying the victim;
 - (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
 - (d) assignment of a pseudonym;
- (ii) closed sessions, in accordance with Rule 79;
- (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
- (C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

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

- (A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
- (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.
- (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

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

- (A) The Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of:
 - (i) public order or morality;
 - (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
 - (iii) the protection of the interests of justice.

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

(A) . . .

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

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

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

(E) . . .

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

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

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

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

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

SITTING AS Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan (the "Trial Chamber") ;

CONSIDERING the indictment submitted by the Prosecutor against the accused, Laurent Semanza, which was confirmed on 23 October 1997 by Judge Lennart Aspegren pursuant to Rule 47 of the Rules of Procedure and Evidence (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that the accused committed genocide, incitement to commit genocide, crimes against humanity and violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II thereto;

CONSIDERING that the initial appearance of the accused took place on 16 February 1998;

BEING SEIZED of the Prosecutor's motion, filed on 24 November 1998, requesting protective measures for potential witnesses and the supporting documentation attached thereto (the "Prosecution motion");

MINDFUL OF the imperative need to adhere to the provisions of the Statute of the Tribunal ("the Statute") and the Rules made thereunder;

TAKING INTO ACCOUNT the provisions of articles 21 and 20(4)(e) of the Statute (Protection of Witnesses and Rights of the Accused to Examine Adverse Witnesses, respectively) and of rule 69 and 75 of the Rules (Protection of Victims and Witnesses);

HAVING HEARD the parties on 8 December 1998.

PLEADINGS BY THE PARTIES

1. The Prosecutor submitted that the persons for whom protection was sought could be divided into three categories; the first consisting of victims and potential prosecution witnesses presently residing in Rwanda, the second being those who reside in other African countries and the third comprised of those residing outside the African continent and who have requested that they be granted the protection of the Tribunal.

2. For all the abovementioned potential witnesses the Prosecutor under paragraph 3 of its motion sought the following orders:

a. Requiring the names, addresses, whereabouts of and other identifying information concerning these persons be kept under seal and excluded from the records of the Tribunal, other than the confidential material provided to the Trial Chamber in support of the instant motion and communicated to the Victims and Witness Support Unit in accordance with established procedure and only to implement the requested measures;

b. Requiring that, to the extent that any names, addresses whereabouts of and any other identifying information, concerning such persons is contained in existing records of the Tribunal, other than the confidential material provided to the Trial Chamber in support of this motion, that such identifying information be expunged from those documents;

c. Prohibiting the disclosure of the names, addresses, whereabouts of and any other identifying data, regarding these persons, to the public or the media even after the termination of the present trial;

d. Prohibiting the Defense Counsel or other persons working on the immediate defense

team and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or any information contained in any documents or any other information which could lead to the identification of the potential witnesses;

e. Requiring the Defense to provide the Trial Chamber and the Prosecutor a designation of all persons working on the immediate Defense team who will have access to information referred to in paragraphs (a) through (c) above and for the Defence Counsel to inform the Trial Chamber, in writing of any changes in the composition of this team to ensure that any departing member of the said team has remitted all documents and information that could lead to the identification of protected witnesses;

f. Prohibiting the photographing, audio and/or video recording or sketching of any protected witnesses at any time or place without leave of the Trial Chamber and the parties;

g. Prohibiting the disclosure to the Defense 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, until such time as the Trial Chamber is assured that the witnesses are adequately protected, allowing the Prosecutor to disclose redacted pertinent materials, and in any event that the Prosecutor will not be required to reveal the identifying data to the Defense sooner than seven (7) days prior to the testimony of a particular witness;

h. That the accused or his Defense Counsel shall make a written request, on reasonable notice to the Prosecution and to the Trial Chamber or a Judge thereof, to contact any protected witness 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 Defense the Prosecution shall undertake the necessary arrangements to facilitate such contact;

i. Requiring that the Prosecutor designate a pseudonym for each prosecution witness, which will be used whenever referring to each such witness in the proceedings, communications and discussions between the parties to the trial, and the public;

j. Prohibiting any members of the Defense team referred in paragraph (e) 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;

k. Prohibiting the accused individually from personally possessing any material which includes or might lead to discovery of the identity of any protected witness, including, but not limited to, redacted witness statements, unless the accused is at the time of the possession, in the presence of his Counsel, and instructing the United Nations Detention Facilities authorities to ensure compliance with the prohibition set out in this Paragraph.

3. The Prosecutor, in paragraph 5 of her motion, also reserved the right to apply to the Trial Chamber to amend the protective measures, if necessary.

4. At the audience, the Defence Counsel noted that in general he did not object to the Prosecutor's requests, however, he stated that the first and second categories of persons mentioned by the Prosecutor, in paragraph one above, had not asked for the protection of the Tribunal. Next, he submitted and that, in accordance with rule 69 of the Rules, protection should only be granted under exceptional circumstances and that the Prosecutor carried the burden of proof.

5. Finally the Defence Counsel raised objections with regard to measures sought in paragraphs (g) and (k) above. With regard to paragraph (g) he contended that the seven day period requested would not allow the Defence team sufficient time to conduct proper investigations and ultimately obstruct the preparation of adequate cross examination. He suggested that instead of the Prosecutor's proposal of "seven days before the witness is to testify

PROSECUTION INDEX OF AUTHORITIES

13. Prosecutor v. Semanza, ICTR-97-20-I, 10 December 1998



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Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John Kiyeyu

Decision of: 10 December 1998

**THE PROSECUTOR
VERSUS
LAURENT SEMANZA
Case No. ICTR-97-20-I**

**DECISION ON THE PROSECUTION MOTION FOR THE
PROTECTION OF WITNESSES**

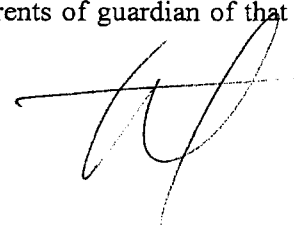
The Office of the Prosecutor:

Mr. David Spencer
Mr. Chile Eboe-Osuji

The Counsel for the Accused:

Mr. Gaetan Bourassa

- 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 or 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.

RESPONSE OF THE DEFENCE

5. Counsel for Nzirorera submits that it does not object to the supporting documentation showing that the security situation of Rwanda is deteriorating.

6. Counsel for Nzirorera objects to point (f) of the Motion unless it applies to the Prosecution team in respect of the Defence Witnesses according to the principle of « equality of arms ».

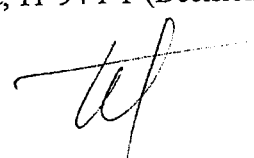
7. Counsel for Nzirorera further contends, *inter alia*, that point (h) of the Motion about the non disclosure of the identity of a witness until seven days before he shall testify is unreasonable to prepare a proper line of cross-examination of the witness and could result in an unfair trial breaching Articles 19 and 20 of the Statute. Thus, in order to assess the quality of the evidence, he submits that the period of disclosure of the witness' identity should be equivalent to the provisions of Rule 66(A), namely 60 days before the start of the trial.

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):

8. 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.

9. 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 Tribunal in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses, 20 November 1998) quoting the findings of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in *Prosecutor v. Tadić*, IT-94-I-T (Decision



on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 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.

10. 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 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. The Chamber notes that Counsel for Nzirorera agrees with the supporting documentation showing a deterioration of the security situation in Rwanda. 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

11. 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.

12. 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".

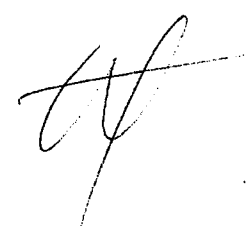
On points 3(g) and 3(i) of the Motion

13. 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):

14. Counsel for Nzirorera submitted that the seven day period was unreasonable considering that Rule 69(c) provides that subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow for the preparation of the Defence, and submitted that the period should be extended to 60 days.

15. 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.



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);).

On the Use of Pseudonyms (point 3(j) of the Motion)

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:

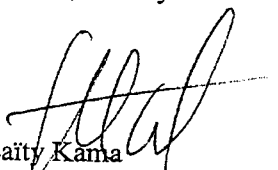
GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

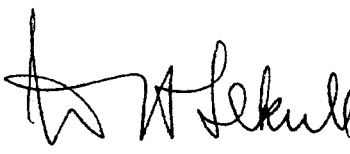
MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials";

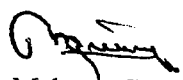
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

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, 12 July 2000


Laity Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)

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.

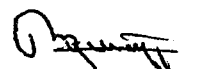
Arusha, 6 July 2000



Laity Kama
Presiding Judge



William H. Sekule
Judge



Mehmet Güney
Judge

(Seal of the Tribunal)



PROSECUTION INDEX OF AUTHORITIES

12. Prosecutor v. Nzirorera, ICTR 98-44-I, 12 July 2000

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12/7/2000
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Original: English

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

Registry: John Kiyeyeu

Decision of: 12 July 2000

THE PROSECUTOR

v.

JOSEPH NZIRORERA

ICTR-98-44-I

JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED

2000 JUL 12 P 3 43

**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 Andrew Mc Cartan

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. Joseph Nzirorera* (the "Motion"), filed 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;

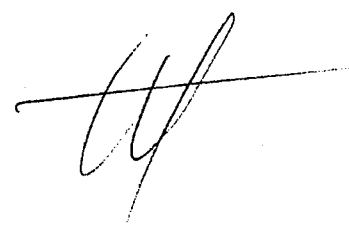
WHEREAS Defence Counsel for Joseph Nzirorera filed a response to the Motion on 9 June 2000 « Defence objections and response to Prosecutor's motion for orders for protective measures for victims and witnesses to crimes alleged in the indictment for Joseph Nzirorera » (« the Response ») and a brief in support of it, submitting that the Motion was only notified to him on 6 June 2000 and that he acted timeously considering this delay;

CONSIDERING the specific circumstances that accompanied the change of Defence counsel for Nzirorera, the Chamber decides *proprio motu*, that it is in the interests of justice to grant relief for the waiver of this time limit and to consider the Defence Response despite its late filing;

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, on the basis of the following 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;



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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

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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 Cyanguu 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 or 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.

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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.

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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);

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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)

PROSECUTION INDEX OF AUTHORITIES

10. Prosecutor v. Kamuhanda, ICTR-99-50-I, 7 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: 7 July 2000

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

ICTR-99-50-1

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**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 :

Ms Aicha Condé

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- 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. Tadić*, 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 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 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.



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";

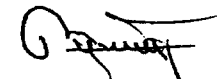
MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

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, 7 July 2000


Laiti Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

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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

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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;

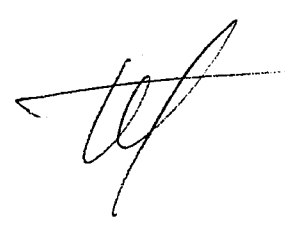
CONSIDERING that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

WHEREAS Defence Counsel for Juvénal Kajelijeli has not responded to the Prosecution's Motion;

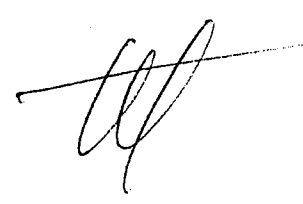
NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69 and 75 of the Rules of Procedure and Evidence (the "Rules");

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 or 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. Tadić*, 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 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 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.



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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.

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 prosecution¹.

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. B.J.F.*, 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*

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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 (*Stamincarbone, 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

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

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

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

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

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

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

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

B. Victims and Witnesses in Cases of Sexual Assault

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

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

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

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

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

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

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

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

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

VI. Anonymity

A. General principles and application

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

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

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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 inculcating 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.

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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.

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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;

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- (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.

05/04/2003

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[Seal
of
the
Tribunal]

PROSECUTION INDEX OF AUTHORITIES

7. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paragraphs 4 and 6.d

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United Nations

A/RES/40/34



General Assembly

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29 November 1985

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29 November 1985
96th plenary meeting

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The General Assembly,

Recalling that the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended that the United Nations should continue its present work on the development of guidelines and standards regarding abuse of economic and political power,

Cognizant that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognized,

Recognizing that the victims of crime and the victims of abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders,

1. Affirms the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power;

2. Stresses the need to promote progress by all States in their efforts to that end, without prejudice to the rights of suspects or offenders;

3. Adopts the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, annexed to the present resolution, which is designed to assist Governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power;

4. Calls upon Member States to take the necessary steps to give effect to the provisions contained in the Declaration and, in order to curtail victimization as referred to hereinafter, endeavour:

(a) To implement social, health, including mental health, educational, economic and specific crime prevention policies to reduce victimization and

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encourage assistance to victims in distress;

(b) To promote community efforts and public participation in crime prevention;

(c) To review periodically their existing legislation and practices in order to ensure responsiveness to changing circumstances, and to enact and enforce legislation proscribing acts that violate internationally recognized norms relating to human rights, corporate conduct, and other abuses of power;

(d) To establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes;

(e) To promote disclosure of relevant information to expose official and corporate conduct to public scrutiny, and other ways of increasing responsiveness to public concerns;

(f) To promote the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, medical, social service and military personnel, as well as the staff of economic enterprises;

(g) To prohibit practices and procedures conducive to abuse, such as secret places of detention and incommunicado detention;

(h) To co-operate with other States, through mutual judicial and administrative assistance, in such matters as the detection and pursuit of offenders, their extradition and the seizure of their assets, to be used for restitution to the victims;

5. Recommends that, at the international and regional levels, all appropriate measures should be taken:

(a) To promote training activities designed to foster adherence to United Nations standards and norms and to curtail possible abuses;

(b) To sponsor collaborative action-research on ways in which victimization can be reduced and victims aided, and to promote information exchanges on the most effective means of so doing;

(c) To render direct aid to requesting Governments designed to help them curtail victimization and alleviate the plight of victims;

(d) To develop ways and means of providing recourse for victims where national channels may be insufficient;

6. Requests the Secretary-General to invite Member States to report periodically to the General Assembly on the implementation of the Declaration, as well as on measures taken by them to this effect;

7. Also requests the Secretary-General to make use of the opportunities, which all relevant bodies and organizations within the United Nations system offer, to assist Member States, whenever necessary, in improving ways and means of protecting victims both at the national level and through international co-operation;

8. Further requests the Secretary-General to promote the objectives of the Declaration, in particular by ensuring its widest possible dissemination;

9. Urges the specialized agencies and other entities and bodies of the

United Nations system, other relevant intergovernmental and non-governmental organizations and the public to co-operate in the implementation of the provisions of the Declaration.

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ANNEX

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

A. Victims of Crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

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(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

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17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. Victims of abuse of power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

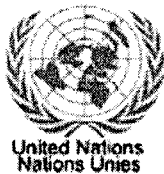
20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

PROSECUTION INDEX OF AUTHORITIES

8. Prosecutor v. Nsengimana, ICTR-2001-69-T, 2 September 2002

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:

Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 2 September 2002

The PROSECUTOR
v.
Hormisdas NSENGIMANA

Case No. ICTR-2001-69-T

**DECISION ON THE PROSECUTOR'S MOTION
FOR PROTECTIVE MEASURES FOR WITNESSES**

The Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Gregory Townsend
Adesola Adeboyejo
Faria Rekkas

Duty Counsel for Nsengimana:

Bharat Chadha

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

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

BEING SEIZED of:

- (i) the "Prosecutor's Motion for Protective Measures for Victims and Witnesses,"

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of 15 May 2002 to which are attached fourteen (14) annexes (the "Motion");

(ii) the "Reply to the Prosecutor's Motion for Protective Measures for Victims and Witnesses", of 14 June 2002 (the "Defence Response");

(iii) The "Prosecutor's Response to Nsengimana's Reply to the Prosecutor's Motion for Protective Measures" filed on 20 June 2002 (the "Prosecutor's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), particularly Article 21 and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69, 75 and 79 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

Prosecutor's Submissions

1. The Prosecution seeks protective measures for its potential witnesses before they testify because there is real and substantial danger that victims and potential Prosecution witnesses will be threatened assaulted or killed if their identities are made known. The Prosecutor submits that the danger described threatens not only witnesses living in Rwanda, but also those living in other countries on the continent of Africa and outside of Africa. The Prosecution thus seeks protective measures for:

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

(ii) 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

(iii) Victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted protective measures as was the case in *Prosecutor v. Musabyimana*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 19 February 2002.

2. In support of its request, the Prosecution relies upon the documents attached to its Motion, which outline the security situation for victims and potential Prosecution witnesses. In the Affidavit of Commander Samuel Akorimo, dated 9 May 2002, the affiant attests that, "[w]itnesses [being residents of Butare Province and its environs] who have been selected to testify in the ICTR case of the *Prosecutor v. Hormidas Nsengimana* experience and continue to experience fear of reprisals for their impending testimony." On 25 March 2002, *Hirondelle* Press reported that three witnesses who testified in the trial of *Prosecutor v. Kajelijeli* have received death threats causing them to seek refuge in Kigali where they have no homes, close relatives or means of survival. In a BBC News Online report of 2 March 1999, it is reported that, "[c]lose to five years on, the Interahamwe militia are still fighting their own war, sometimes inside Rwanda but now more often just across the border."

3. In order to provide protection for these victims and potential prosecution witnesses, the Prosecutor requests the Trial Chamber to issue the following twelve (12) orders:

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[a] An Order requiring that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential witnesses described herein after be sealed by the Registry and not included in any records of the Tribunal; that the said witnesses bear the pseudonyms: **CAN, CAO, CAP, CAQ, CAR, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG, CBH** and any other additional witnesses will also be assigned pseudonyms which will be used during the course of the trial;

[b] An order that the names, relations, addresses, whereabouts of, and other identifying information concerning all victims and potential prosecution witnesses described in measure [a] above, be communicated only to the Witness and Victims Support Section personnel by the Registry or Prosecutor in accordance with established procedure and only in order to implement protective measures for these individuals;

[c] An order requiring that any names, relations, addresses, whereabouts of and any other identifying information concerning such victims and potential prosecution witnesses contained in existing records of the Tribunal be placed under seal;

[d] An order prohibiting the disclosure to the public or the media of the names, relations, addresses, whereabouts of, and any other identifying data in 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 after the termination of this trial and any appeal;

[e] An order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or information contained in any documents, or any other information which could reveal or lead to the identification of any individuals specified in measure [a] above, to any person or entity other than the Accused, assigned Counsel or other persons the Registry designates as working on the Defence team;

[f] An order requiring the Defence to provide to the Chamber and the Prosecutor a designation of all persons working for the Defence who, pursuant to measure [a] above have access to any information referred to in measures [a] through [d] above and requiring the Defence to advise the Chamber in writing of any changes in the composition of the Defence team and requiring the Defence to ensure that any member departing the Defence team has remitted all materials that could lead to the identification of persons specified in measure [a] above;

[g] An order prohibiting the photographing, audio and/or video recording, or sketching of any prosecution witnesses at any time or place without leave of the Chamber;

[h] An order prohibiting that disclosure to the Defence of the names, addresses, relations, whereabouts of, and any other identifying data which would reveal the identities of victims or potential prosecution witnesses, and any other information in the supporting material on file with the Registry, until such times as the Trial Chamber is assured that the witnesses are protected. Provided that protective measures are put in place, all redacted statements and identities of the witnesses shall be disclosed by the Prosecution to the Defence prior to commencement of the trial and no later than 21 days before the testimony of the witness to allow adequate time for the preparation of the Defence;

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

[j] An order 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] An order prohibiting any person working for the Defence from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

[l] An order prohibiting the Accused individually or any person working for the Defence from personally possessing any material which includes or might lead to discovery of the identity of any protected witness.

Defence's Submissions

4. The Defence objects to the Motion submitting that because the Accused is a Roman Catholic priest who is not affiliated with the military or the government, there is no real or substantial danger to victims and potential witnesses.

5. The Defence notes that the witnesses listed for whom the Prosecutor seeks protective measures all reside in Rwanda. The Defence submits that the material adduced by the Prosecution to support the volatile security situation is outdated insofar as it pertains to the period between 1997 and 2001. Other documents dated 2002 such as the 25 March 2002 *Hirondelle* Press article entitled "Survivors Accuse 14 Defence Investigators of Genocide Crimes" mentions people who occupied high positions in government, and the Accused is not mentioned among them. Similarly, the affidavit of Commander Samuel Akorimo does not give any description of the Butare region and the allegations of fear described therein are vague and without basis.

6. The Defence further submits that because the Accused has not been assigned Counsel and is thus represented by Duty Counsel, measures [e], [f], [g], [h], [i], [j] and [k] are improper and premature, and any order passed in that respect will be unfair and unjust.

HAVING DELIBERATED

7. The Chamber notes that the Prosecutor brings the Motion pursuant to Article 21 of the Statute and Rules 54, 69, 73 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 in Rules 69 and 75 of the Rules. Such protective measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber *proprio motu* or at the request of either party or of the victims or witnesses concerned or of the Tribunal's Witness and

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Victims Support Section (the "WVSS"), may 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. 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.

10. 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.

11. In order to establish the exceptional circumstances, the Chamber recalls the findings in *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defence Witnesses" rendered on 13 July 1998 (the "Rutaganda Decision"), 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." The Chamber further recalls its findings in *Prosecutor v. Nteziryayo*, Case No. ICTR-97-29-T, "Decision on the Defence Motion for Protective Measures for Witnesses" of 18 September 2001, that to determine the appropriateness of each protective measure, the Chamber must be satisfied that, "[a]n objective situation exists whereby the security of the said witness is or may be at stake."

12. In this case, the Chamber takes note of the annexes to the Motion, which the Prosecutor uses to describe a particularly volatile security situation at present for victims and potential witnesses who may have, in one way or another, witnessed the events of 1994 in Rwanda. The Prosecutor submits that this situation affects victims and potential witnesses who reside in Rwanda, neighbouring countries such as Uganda, Burundi and the Democratic Republic of Congo (the "DRC"), other parts of Africa and outside of Africa. The Chamber notes that although the Defence maintains that documents attached in support of the Motion date between 1997 and 2001, nonetheless, the documents dating 2002 indicate that there is currently great risk. In particular the Affidavit of Commander Samuel Akorimo states in connection with this case that "[in] the provinces of Gisenyi, Ruhengeri, Kibuye, and Cyangugu [...] ICTR prosecution witnesses who reside in [those] provinces and ICTR prosecution witnesses who reside in other provinces of the Republic of Rwanda face a very high potential of reprisals [...] in the form of death threats and actual physical harm [...] for their participation in ICTR processes."

13. On the basis of the aforementioned affidavit, the Chamber considers that the Prosecutor has indeed demonstrated the volatile situation, which could affect victims and potential witnesses residing in Rwanda. [1] Similarly, the Chamber, after noting the attachments to the Motion, in particular the article of 7 June 2001 on the Rwandan Government's Official website entitled "Interahamwe Killers Launch New Attacks on Rwanda," is of the opinion that this volatile situation could also affect those victims and potential witnesses who reside in the neighbouring countries such as Uganda, Burundi and the DRC.

14. Regarding victims and potential witnesses residing in other parts of Africa and outside of Africa, the Chamber notes that the Prosecutor has not provided substantive evidence of threats to their lives. However, the Chamber reiterates its reasoning in a number of its Decisions and holds that, although the Prosecutor has not demonstrated the existence of threats or fears in regard to victims and potential witnesses residing in other parts of Africa and outside of Africa, the present security situation would affect any victim or potential witness even if residing outside the region. [2]

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15. Bearing in mind the aforesaid, the Chamber shall consider the merits of the specific protective measures sought for victims and potential witnesses as requested in the Motion.

16. As a preliminary matter, the Chamber notes the Defence's specific objections to measures [e], [f], [g], [h] and [i] as being unfair because the Accused has yet to be assigned Defence Counsel. On this issue, the Chamber notes that the Defence has not demonstrated how, if at all, the granting of such measures would be in violation of the rights of an Accused who, though he has not yet been assigned Defence Counsel, has been assigned Duty Counsel. The Chamber thus dismisses the Defence objections to the granting of the above-mentioned measures on that basis specifically.

Regarding measures [a], [b], [c], [d], [e], [f] and [g] for anonymity of the victims and potential witnesses

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as those requested in the Motion in measures [a], [b], [c], [d], [e], [f] and [g].

18. On the issue of anonymity, the Chamber recalls the reasoning in *Prosecutor v. Nsabimana*, Case No. ICTR-97-29-I, "Decision on the Defence Motion to Obtain Protective Measures for the Witnesses of the Defence", 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." In the present case, the Chamber, following this reasoning, and considering the submissions of the Prosecutor, is of the opinion that there is sufficient showing of a real fear for the safety of the potential Prosecution witnesses, were their identity to be disclosed.

19. The Chamber notes that under measure [a] the Prosecutor seeks the Chamber's order to provide the pseudonyms "CAN, CAO, CAP, CAQ, CAR, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG, CBH [and that] any other additional witnesses should also be assigned pseudonyms, which will be used during the course of the trial." Considering the Chamber's opinion at para. 18 above that there is sufficient showing of a real fear for the safety of the potential Prosecution witnesses, were their identity to be disclosed, the Chamber finds it proper to grant the Prosecutor's further request to provide the above-mentioned pseudonyms to prosecution witnesses and any other additional witnesses.

20. Consequently the Chamber grants measures [a], [b], [c], [d], [e], [f] and [g], as requested.

Regarding measure [h] on disclosure of the identity of the victims and potential witnesses

21. In regard to measure [h], the Chamber notes that the Prosecutor requests that disclosure of identifying data, which would reveal *inter alia* the identity of potential witnesses, be prohibited to the Defence. However, the Prosecutor further submits "[p]rovided that protective measure are put in place all the redacted statements and identities of witnesses shall be disclosed by the Prosecution to the Defence prior to the commencement of trial and no later than 21 days before the testimony of the witness to allow adequate time for preparation of the Defence."

22. The Chamber notes that the Prosecution is in fact requesting that disclosure be made on a rolling basis and conditioned to the implementation of protective measures, as has been some of the jurisprudence of the Tribunal on the timing of disclosure. [3] The Chamber further notes that the Prosecution submits that "21 days before the testimony" is adequate time for the preparation of the

Defence.

23. In light of the necessity to strike a balance between the rights of the Defence and the demonstrated need for protective measures for witnesses, the Chamber allows the Prosecution to temporarily withhold identifying information concerning its witnesses and grants the order sought under measure [h].

Regarding measure [i] on the notification to the Prosecution of any contact between Defence and a victim or potential witness

24. As regards measure [i], the Chamber notes the Tribunal's jurisprudence, [4] notably in *Prosecutor v. Nahimana*, "Decision on Defence's Motion for Witness Protection" of 25 February 2000, and grants the said measure requiring the Defence and its representatives who are acting under its instructions to notify the Prosecutor of any request to contact the victims and potential Prosecution witnesses, and that the Prosecutor shall make arrangements for such contacts. Nevertheless, the Chamber finds that it is not necessary for the Defence to notify the Trial Chamber when requesting to contact victims or potential witnesses.

25. Accordingly, the Chamber grants the said request but modifies it by deleting the words, "[t]o the Trial Chamber or a Judge thereof."

Regarding measure [j] on assignment of pseudonyms to victims and potential witnesses

26. As regards measure [j], the Chamber recalls that such a request has been made under measure [a]. The Chamber therefore denies this measure as it has already been requested and granted.

Regarding measure [k] on prohibiting the Defence and the Accused from making a determination of the identity of a victim or potential witness

27. As regards the requests made in measure [k], the Chamber recalls its jurisprudence [5], to the effect that granting the said measure will not in any way lessen either party's ethical obligations. The Chamber, therefore, grants the order stipulated in measure [k].

Regarding measure [l] on prohibiting the Accused from possessing material which might lead to the discovery of the identity of a victim or potential witness

28. As regards the request made in measure [l], the Chamber notes that this measure conflicts with measure [e]. Measure [e] assumes that the Accused and the Defence have in their possession documents or information which could reveal the identity of victims or potential witnesses and prohibits their sharing these documents with anyone other than members of the Defence and the Accused. Measure [l], however, prohibits the Accused and the Defence from possessing documents that reveal the identity of victims and potential witnesses. The Chamber notes that measure [l] does not specify what should be done by the Accused and the Defence once they have in their possession the documents. Accordingly, the Chamber denies the request made in measure [l].

As to When the Requested Protective Measures Take Effect

29. The Chamber decides, in conformity with the Tribunal's well-established jurisprudence, that such protective measures are to be granted on a case by case basis, and shall take effect only once the particulars and locations of the witnesses have been forwarded to the WVSS. The Chamber adds that

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the Prosecutor shall provide the WVSS with all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Prosecutor's requests and orders that:

I Measures [a], [b], [c], [d], [e], [f], [g], [h] and [k] of the Motion be made for victims and potential prosecution witnesses.

IV **MODIFIES** measure [i] as follows, "An order that the Accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, 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."

DENIES the orders sought in measures [j] and [l].

Arusha, 2 September 2002

William H. Sekule

Winston C. Matanzima Maqutu

Arlette Ramaroson

Presiding Judge

Judge

Judge

(Seal of the Tribunal)

[1] See Para 11 of the Affidavit of Commander Samuel Akorimo, which specifies the following witnesses as deserving protective measures under the Rules; "CAN, AO, CAP, CAQ, CAS, CAT, CAU, CAV, CAZ, CAX, CAW, CAY, CBA, CBB, CBC, CBD, CBE, CBF, CBG and CBH being residents of Butare province and its environs."

[2] See "Decision on Pauline Nyiramasuhuko's Motion for Protective measures for Defence Witnesses and Family members," of 20 March 2001 in the case of *the Prosecutor v. Nyiramasuhuko, et al* (the "Nyiramasuhuko Decision"); "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 19 February 2002 in the case of *the Prosecutor v. Musabyimana* (the "Musabyimana Decision").

[3] See *Kamuhanda*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 7 July 2000; *Kajelijeli*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 6 July 2000; the Nyiramasuhuko Decision; *Nzirorera*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," of 12 July 2000; the Musabyimana Decision.

[4] See also the Rutaganda Decision and the Nyiramasuhuko Decision.

[5] See "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses," of 17 June 1999 in the *Prosecutor v. Nsabimana and Nteziryayo*; the Nyiramasuhuko Decision; the Musabyimana Decision.

PROSECUTION INDEX OF AUTHORITIES

9. Prosecutor v. Nyiramasuhuko, ICTR-97-21-T, 20 March 2001

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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

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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*