045

SCSL-2003-05-PT-045
(909-961)

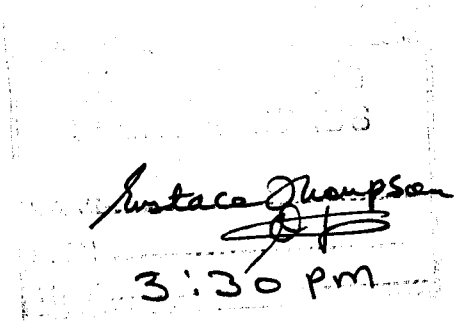
909

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

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 9 June 2003



THE PROSECUTOR

Against

ISSA HASSAN SESAY also known as ISSA SESAY

CASE NO. SCSL – 2003 – 05 – PT

PROSECUTION RESPONSE TO THE DEFENCE APPLICATION FOR RECONSIDERATION OF AND/OR LEAVE TO APPEAL REGARDING THE ORDER OF JUDGE BANKOLE THOMPSON (PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS) RENDERED ON THE 23RD MAY 2003

Office of the Prosecutor:

Mr Luc Côté, Chief of Prosecutions
Mr Stefan Wehrenberg, Trial Counsel
Ms Sharan Parmar, Assistant Trial Counsel

Defence Counsel:

Mr William Hartzog, Lead Counsel
Ms Alexandra Marcil, Co-Counsel

910

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INTRODUCTION

The arguments raised in the submission filed by Defence should be rejected. The Defence requests a reconsideration and/or leave to appeal within the same application. The Defence should have either filed a separate application for reconsideration or request for leave to appeal. Should the request for reconsideration be accepted formally, it should be rejected materially, because the Defence failed to show new facts which would warrant the reconsideration as requested. Should the request be accepted formally as a request for leave to appeal, it should be rejected materially, because such would not be in the interest of a fair and expeditious trial. Finally, the Court should strongly reject the practice of any party to adopt the pleadings of another proceeding before the Court in lieu of filing such arguments within the pleading itself.

911

ARGUMENT

I. Procedural matters

1. On 23 May 2003 His Honour Judge Bankole Thompson, Presiding Judge of the Trial Chamber and Designated Judge, rendered his "Decision on the Prosecutor's Motion for immediate protective measures for witnesses and victims and for non-public disclosure" (the "**Decision**"). The Decision is based upon the "Prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure" dated 7 April 2003 (the "**Prosecution Motion**"), the Response of the Defence Office to this motion dated 23 April 2003 (the "**Defence Response**") and the Prosecution's Reply to the Defence Response dated 29 April 2003 (the "**Prosecution Reply**"). With the Application of 30 May 2003, received by the Office of the Prosecutor on 2 June 2003 the Defence brings an "Application for Reconsideration of and/or Leave to Appeal Regarding the Order of Judge Bankole Thompson (Protective Measures for Witnesses and Victims) Rendered on the 23rd May 2003" (the "**Application**").

2. In its Application, the Defence requests "that Judge Bankole Thompson reconsider" the Decision and in the alternative, the Defence seeks "leave to appeal the Decision." The Prosecution submits that the Defence has incorrectly incorporated two separate matters into one application, which yields an improper pleading that must be rejected.

II. Reconsideration

3. Should the learned Judge address the Application's request for reconsideration, the Prosecution submits that the request be rejected since the motion has been fully argued and the Application does not raise any new fact or argument that was not considered by the learned Judge in the rendering of the Decision. The pleadings of the Prosecutions and the Defence Office fully considered the matters relating to striking an appropriate balance between witness protection and the right of the accused to a fair and expeditious trial, including providing the Accused with sufficient time and facilities to adequately prepare his defence, issues at the heart of

the current Defence Application and these issues were duly considered by the learned Judge within his Decision.

4. Notwithstanding, the Prosecution does not deny that a Judge or Chamber has an inherent power to reconsider its own interlocutory procedural decisions (See *Prosecutor v. Semanza,* ICTR-97-20-T, 9 May 2002, para. 7; *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva v. the Prosecutor*, ICTR-98-41-A, 2 May 2002, para. 10). However, the Prosecution submits that the interest of finality mandates that this power be exercised with discretion since, as held by the Appeals Chamber of the ICTY, "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal" (See *Prosecutor v. Delacic et al. (Celebici Case)*, IT-96-21-A, 1 June 1999; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, 15 February 1999, consideration 2).

5. The International Tribunals have held that this discretion be exercised in the presence of "new facts that would warrant further consideration by the Trial Chamber" (See *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, 15 February 1999, consideration 1; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-T, 25 February 2003). Similarly, reconsideration of a decision on a motion may not be sought upon a fact, circumstance or argument that the party could have reasonably been expected to raise prior to the rendering of the decision. The Prosecution submits that the Defence fails to demonstrate any new material fact, circumstance or argument in its Application that would warrant a reconsideration of the Decision. In fact, all of the issues raised by the Defence in its Application have been duly considered by the learned Judge in his Decision dated 23 May 2003.[1]

[1] See *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, 15 February 1999 (where the matter was "fully argued before the Trial Chamber" and no new facts asserted to warrant further reconsideration); *Prosecutor v. Kupreskic,* IT-95-16-T, 8 January 1999 (indicating that where a motion is simply a resubmission to the Trial Chamber of an earlier motion which has already been rejected on its merits, the subsequent motion must also be rejected on its merits if it raises no new arguments or analysis).

913

IV. Leave to Appeal

6. Should the learned Judge accept the Application as a formal request for leave to appeal, the Prosecution submits that pursuant to Rule 73(B), the Application be rejected since the Defence has failed to demonstrate how an appeal of Decision of the learned Judge is in the interest of a fair and expeditious trial (Rule 73(B)).

7. The Defence Application argues that the designated Judge erred in ordering under para. (a) of the Decision that the Prosecution may withhold data of the persons the Prosecution is seeking to protect until 42 days before the witness is to testify at trial because it violates the rights of the Accused to a fair and expeditious trial. Specifically, the Defence Application submits that the said measure will deny them full knowledge of the Prosecution's case, resulting in incomplete cross examination of Prosecution witnesses and thus the potential recall of witnesses and delays in the proceedings. The Application also argues that the said measure imposes a significant limit to the ability of the Defence "to lead truly efficient investigations."

8. The Prosecution submits that the Application fails to consider that the substance of the witnesses' testimony will have been previously disclosed to the Defence and that only the identifying data will be withheld for a certain period prior to testimony. The Prosecution submits that 42 days before testimony providing more than sufficient time to allow the Defence to conduct any inquiries relating to remaining issues. This is an additional 21 days to the general disclosure practice established under the jurisprudence of the ICTR (See *Prosecutor v. Zigiranyiazo*, ICTR-2000-73-I, 25 February 2003. para. 17; *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 25 April 2001, para. 26; *Prosecutor v. Rwamakuba*, ICTR-98-44-T, 22 September 2000, para. 15 f.).

9. The Prosecution submits that the Defence appeal of para. (a) of the Decision be rejected since the said measure is well grounded upon the prevailing jurisprudence of the International Tribunals concerning witness protection, and strikes an appropriate balance between the interest of witness and victim protection and the eminent interest of effectively protecting the right of the Accused to a fair and expeditious trial,

914

including the prospect of potential delays in the proceedings that may result from such measures. Therefore, since it is not expected that the Appeal Chamber would render a decision contrary to such, the leave to appeal raises no grounds that would be in the interest of a fair and expeditious trial within the meaning of Rule 73(B).

10. The Defence Application also objects to the orders outlined in the Decision at para. (g), (h) and (k). These measures are not suggested to control the identity or operations of the Defence team members. The Prosecution submits that it is in the legitimate interest of the Court and the Prosecution to have precise knowledge of those persons dealing with confidential and sensitive information, such as the identifying data of protected witnesses, as well as those in contact with such witnesses generally.

11. The Defence proposal that this objective is better served through supervision by the Victims and Witness Unit (the "**Unit**") does not reflect a full understanding of the capacity and functioning of the Unit, whose tasks as mandated by the Registrar currently solely concern witness protection. Indeed, the Prosecution anticipates calling hundreds of witnesses for all of the proceedings before the Court, whose complete supervision would result in a more laborious process that than envisaged by para. (k) of the Decision.

12. These provisions also provide the Court with the most direct means to exercise oversight regarding the implementation of protective measures, including, if necessary, the means by which to pursue alleged violations of the protective orders. Therefore, the Prosecution submits that a reconsideration of these particular aspects of the said order would not be "in the interest of a fair and expeditious trial".

III. Adoption of outside argument

13. In its Application, the Defence "fully endorse" the submissions in the Application for Reconsideration of and/or Leave to Appeal "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure" filed by Mr Kallon, which is included in the Appendix to the Application.

The Defence later refer to and rely upon the argument of Mr Kallon concerning para. (a) and (g) of the Decision. In turn, the application of Mr Kallon seeks "to support and adopt" the arguments on behalf of Mr Gbao as their response to the Prosecution motion for protective measures in the case of *Prosecutor v. Gbao*.

14. The Prosecution requests that the Court strongly admonish the practice of adopting corresponding arguments of pleadings of other proceedings before the Court, outside of explicit reference thereto within the body of the pleading itself. This practice by the Defence has yielded an unreasonable situation as the Prosecution can no longer identify, follow, or be expected to reply to, all of the arguments as adopted by the Defence within the confines of its Response.

15. Furthermore, the Prosecution submits that the Rules do not permit parties to simply adopt the arguments of another application in lieu of filing such arguments within the pleading itself. Under to the *Practice Direction on Filing Documents before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003 (the "**Practice Direction**"), pleadings before other proceedings may not be adopted within an appendix since "an appendix or book of authorities will not contain legal or factual arguments" (Article 9.4). In turn, consideration of the pleadings of Mr Kallon and Mr Gbao as adopted by the Defence within the Application itself in turn extends the present Defence Application from six (6) to thirty (30) pages. The Prosecution submits that in adopting the argument of Mr Kallon and Mr Gbao, the Defence has clearly disregarded the word and page limitation of the Practice Direction in significant scale, and thus they should be disregarded (Practice Direction, Article 9.3(C)).

V. CONCLUSION

The Court should reject the Defence request for reconsideration and leave to appeal.

Freetown, 9 June 2003
For the Prosecution,

Luc Côté
Chief of Prosecutions

Stefan Wehrenberg
Trial Counsel

917

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Semanza*, ICTR-97-20-T, 9 May 2002
2. *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva v. the Prosecutor,* ICTR-98-41-A, 2 May 2002
3. *Prosecutor v. Delalic et al. (Celebici Case)*, IT-96-21-A, 1 June 1999
4. *Prosecutor v. Kordic and Cerkez*, IT-95-14-2-T, 15 February 1999
5. *Prosecutor v. Nahimana, Barayagwiza and Ngeze,* ICTR-99-52-T, 25 February 2003
6. *Prosecutor v. Kupreskic,* IT-95-16-T, 8 January 1999
7. *Prosecutor v. Zigiranyiazo*, ICTR-2000-73-I, 25 February 2003
8. *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 25 April 2001
9. *Prosecutor v. Rwamakuba*, ICTR-98-44-T, 22 September 2000

918

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date: 9 May 2002

THE PROSECUTOR
v.
LAURENT SEMANZA

Case No. ICTR-97-20-T

DECISION ON DEFENCE MOTION TO RECONSIDER DECISION DENYING LEAVE TO CALL REJOINDER WITNESSES

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

Counsel for the Accused:
Mr. Charles A. Taku
Mr. Sadikou A. Alao

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal") sitting as Trial Chamber III composed of Judge Yakov Ostrovsky, Presiding, Judge Lloyd G. Williams, Q.C., and Judge Pavel Dolenc (the "Chamber");

BEING SEISED of the "Requête en extrême urgence de la défense pour demander le reexmimen [sic] de la Chambre III en date du 30 Avril 2002 intitulée 'Decision on Defence Motion for Leave to Call Rejoinder Witnesses' en vue de permettre a la défense de présenter ses témoins en Duplique" filed 2

May 2002 (the "Motion");

919

NOTING that the Prosecution has not filed a response within the time set out in Rule 73(D) of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the "Decision on the Defence Motion for Leave to Call Rejoinder Witnesses" dated 30 April 2002 (the "Decision") in which the Defence was denied leave to call evidence in rejoinder;

NOW DECIDES the matter solely on the written brief of the Defence pursuant to Rule 73(A);

SUBMISSIONS OF THE DEFENCE:

1. The Defence requests that the Chamber reconsider the Decision and permit the Defence to bring evidence in rejoinder.

2. The Defence submits that the impugned Decision reproaches the Defence for failing to notify the Prosecutor of the Defence's intention to bring evidence of an alibi pursuant to Rule 67(A)(ii)(a). The Defence argues that this violates Rule 67(B), which provides that such a failure shall not limit the right of the Defence to rely on the defence of alibi.

3. According to the Defence, the Chamber erred by relying on Rule 89(B) and on common law and ICTY jurisprudence regarding the admissibility of evidence in rejoinder. Instead, the Chamber should have applied Rule 85(A)(iv), which explicitly provides that the Defence has a right to bring rejoinder evidence. The Defence draws support for this position from certain remarks of the Presiding Judge during the hearing of 28 February 2002.

4. In the Motion, the Defence submits that the preconditions for admissibility of rejoinder evidence were nevertheless met, because the Prosecutor in rebuttal introduced new evidence that the Defence is entitled to challenge in rejoinder. The Defence therefore proposes that the Chamber reconsider its refusal to permit rejoinder evidence relating to the Accused's alibi and to the credibility of the Prosecutor's rebuttal witnesses.

5. In particular, the Defence argues that it should be permitted to bring rejoinder witnesses whose expected testimony would fall within the common law exceptions to the rule that no rejoinder evidence is permitted in relation to collateral facts. Rebuttal Witness XXK testified that her husband died on a date other than that presented by the Defence witnesses. The Defence proposes a rejoinder witness KKN to verify the date and to thereby establish that XXK has a reputation for not telling the truth. The Defence similarly argues that it is entitled to call witnesses to prove DCH's criminal record and to prove that DCH is an inveterate liar.

6. The Defence also proposes to bring witnesses to clarify an alleged inconsistency in the expert witness' testimony. During his testimony in rebuttal expert witness Guichoua said that the Accused fled from Bicumbi on 19 or 20 April 1994, while during the Prosecutor's case-in-chief he testified that the Accused was already in Murambi on 11 April 1994. The Defence's proposes witnesses in rejoinder to confirm the earlier dates and to provide further eyewitness testimony to support the Accused's alibi.

DELIBERATION:

7. The Rules do not explicitly provide for reconsideration of a previous decision. Nevertheless, according to the jurisprudence of the Tribunal, the Chamber possesses an inherent power to reconsider.

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920

8. In light of the principle of finality, which mandates that the parties should be able to rely and act on the binding decisions of the Tribunal without fear that the decisions will be lightly overturned, this inherent discretion to reconsider a decision should be sparingly exercised. Frequent motions to the Trial Chamber for review or reconsideration of its decision are not desirable. Reconsideration of a previous decision may be appropriate only in exceptional circumstances, "where, through no fault of a party, he or she has been subjected to an unfair procedure."[2] In deciding whether to exercise its discretion in a given case, the Chamber may consider, *inter alia,* any new facts or legal arguments brought to the attention of the Chamber, and the possibility and gravity of prejudice to a party. Reconsideration cannot be used to circumvent the inadmissibility of an appeal or a review of an interlocutory decision.

9. For the reasons set forth in the Decision, the Chamber applied the criteria for admission of evidence in rejoinder as they are established in the common law. The Motion does not present any new legal arguments in favour of the Defence position that rejoinder is admissible as a matter of right where there has been evidence in rebuttal. The Trial Chamber is of the view that the presentation of rejoinder evidence requires leave of the Chamber, which will not be granted automatically or unconditionally, but will depend on the particular circumstances of each case. The Chamber, therefore, does not intend to reconsider its legal findings.

10. In this context the Chamber also rejects the Defence submission that the Chamber and the Presiding Judge had already adopted the Defence position that rejoinder is an automatic right. The remarks of the Presiding Judge, to which the Motion refers, may be understood only to mean that the Defence has the right to apply for leave of the Chamber to call evidence in rejoinder. Moreover, in the Status Conference of 22 April 2002 the Presiding Judge repeatedly urged the Defence to file a motion including a list of proposed rejoinder witnesses.

11. The Motion does not explain the significance of the Chamber's alleged "reproach" for failing to notify the Prosecutor of the alibi defence or why this would justify the variation of the Decision. The Motion refers to Rule 67(B), however, there is no question that the Defence was permitted to rely on the defence of alibi and to present evidence in support of its alibi. This is expressly stated in paragraph 9 of the Decision.

12. Even if the Defence could establish that its proposed rejoinder evidence falls within a recognised exception to the collateral fact rule, the Chamber is still required to determine whether rejoinder evidence is appropriate in the circumstances. The Defence has not adduced any new fact or convincing argument why the Chamber should reconsider this assessment.

13. Moreover, there is no prejudice to the Defence since the Chamber has afforded both parties an opportunity to be heard on the issue of alibi. Accordingly, there is no necessity for the Defence to call rejoinder evidence in respect of alibi.

14. The Defence has not advanced any satisfactory ground for reconsideration of the previous decision. In accordance with Rule 73(E), the Chamber finds that the Motion is frivolous.

15. For these reasons the Chamber:

(a) Denies the motion in its entirety; and

(b) Directs the registry, pursuant to Rule 73(E), to not pay to the Defence any fees or costs associated

with this Motion.

921

Arusha, 9 May 2002.

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

(Seal of the Tribunal)

[1] *Proseuctor v. Semanza* Case No. ICTR-97-20-A, Decision on the Appeal against the Oral Decision Dismissing the Motion for Review, 16 April 2002.

[2] *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex. Parte Pinochet Ugarte* (No 2), [1999] 1 All ER 577 (HL) at pp. 585-586, per Lord Browne-Wilkinson, as cited in *Prosecutor v. Barayagwiza* Case No. ICTR-97-19-AR72, Separate Opinion of Judge Shahabudeen Decision on Prosecutor's Request for Review on Reconsideration, 31 March 2000, paragraphs 2 – 9.

927

BEFORE A BENCH OF THE APPEALS CHAMBER

Before :
Judge Mehmet GÜNEY, Presiding
Judge David HUNT
Judge Theodor MERON

Registrar : Mr Adama DIENG

Decision of: 2 May 2002

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA
(Appellants)
v
THE PROSECUTOR
(Respondent)

Case ICTR-98-41-A

INTERLOCUTORY APPEAL FROM REFUSAL TO RECONSIDER DECISIONS RELATING TO PROTECTIVE MEASURES AND APPLICATION FOR A DECLARATION OF "LACK OF JURISDICTION"

Counsel for the Appellants
Mr Raphael CONSTANT for Théoneste Bagasora
Mr Jean Yaovi DEGLI for Gratien Kabiligi
Mr Clemente MONTEROSSO and Mr André TREMBLAY for Aloys Ntabakuze
Mr Kennedy OGETTO and Mr Gershom Otachi BW'OMANWA for Anatole Nsengiyumva

Counsel for the Prosecutor
Mr Chile EBOE-OSUJI
Mr Drew WHITE
Mr Segun JEGEDE
Ms Christine GRAHAM

1. This interlocutory appeal arises out of a joint trial in which the four appellants, who had been indicted separately in three different indictments, were joined in accordance with Rule 48 of the

923

Tribunal's Rules of Procedure and Evidence ("Rules").[1] Prior to the Joinder Decision, orders had been made in each of the three separate trials for protective measures which differed in detail one from the other as to the time at which the prosecution was obliged to disclose to the accused the identity of its protected witnesses (the "Extant Orders"). The appellants' appeal proceeds upon the basis that each of the Extant Orders had been made by a Trial Chamber which was differently constituted from the Trial Chamber to which the joint trial was assigned,[2] a basis which has not been challenged by the prosecution.

2. Following the Joinder Decision, the prosecution sought to have the different times for disclosure harmonised so that all four accused would obtain disclosure of the identity of the prosecution witnesses at the same time. Counsel for the accused indicated that they would be agreeable to a harmonised order in conformity with the Rules which required the prosecution to disclose unredacted statements of the protected witnesses at least sixty days before the trial.[3] The Trial Chamber concluded that each of the Extant Orders should be varied to conform with what it described as "the least restrictive or more liberal order" among them, and which it identified as that in the trial of appellant Theoneste Bagosora ("Bagosora"),[4] as interpreted in the reasons which the original Trial Chamber gave for the order it made.

3. The Extant Order made in the Bagosora trial was that all material which identified the protected witnesses be kept under seal and not disclosed to the accused until further order.[5] In its reasons for that Extant Order, the Trial Chamber said:[6]

> The Trial Chamber is of the considered opinion that the Prosecutor should disclose the identity of the witness in sufficient time prior to the trial to allow the defence to rebut any evidence that the prosecution witnesses may raise [...].

The formal order made by the Trial Chamber which was to hear the joint trial was:[7]

> [...] that the names, addresses and other identifying information of the protected victims and witnesses, as well as their locations, shall be kept under seal of the Tribunal and shall not be disclosed to the Defence until further orders [...].

There was no appeal brought against this Decision.

4. Further orders were subsequently made by the Trial Chamber by which the prosecution was required to disclose the identity of its protected witnesses no later than thirty-five days before the protected witness is expected to testify at the trial, or until such time as the protected victims or witnesses are brought under the protection of the Tribunal, whichever is earlier.[8] Judge Dolenc dissented from this Order, upon the basis that Rule 69(C) requires the disclosure to be made "prior to the trial",[9] that it was inconsistent with Rule 82(A) and that it ran contrary to the assertion made in the First Decision that the accused would not be prejudiced by harmonisation.[10] There was no appeal brought against the Second Decision. The trial was fixed to commence on 2 April 2002.

5. On 7 March 2002, the accused filed an application to the Trial Chamber to reconsider both the First and Second Decisions, upon the basis, *inter alia*, that:

(i) the Trial Chamber did not have the power to alter the decisions previously made by the other Trial Chambers in relation to protective measures;[11]

(ii) it had disregarded the requirements of Rule 69(C);[12] and

924

(iii) its decisions were *ultra vires* by misconstruing Rule 69(C).[13]

Despite the reference in the title of the application to a Declaration of "Lack of Jurisdiction", no such relief was sought in the prayers pleaded, although the Trial Chamber was requested to "find" that the First and Second Decisions were made "in excess of jurisdiction".[14]

6. The application was unanimously rejected by the Trial Chamber. It held that it possessed an inherent discretionary power to reconsider its decision, but it did not consider it to be an appropriate case in which to do so.[15]

7. The interlocutory appeal, filed on the day before the trial was fixed to commence, is brought against the Reconsideration Decision only. The grounds of appeal are expressed repetitively, and they are all to the effect that the Trial Chamber had erred by failing to find that it had exceeded its jurisdiction in making the First and Second Decisions.[16]

8. The only appeals available from decisions on interlocutory motions are from decisions upon a preliminary motion dismissing an "objection based upon lack of jurisdiction".[17] A preliminary motion constituting such an objection must be brought within thirty days of the prosecution's compliance with its obligations under Rule 66(A)(i) to disclose the supporting material which accompanied the indictment when confirmation was sought.[18] The phrase an "objection based upon lack of jurisdiction" is exclusively defined as a motion which challenges an indictment on the ground that it does not relate to (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute; (ii) the territories indicated in Articles 1, 7 and 8 of the Statute; (iii) the period indicated in Articles 1, 7, and 8 of the Statute ; or (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.[19] If a Bench of three Judges of the Appeals Chamber decides that an interlocutory appeal is not capable of satisfying the definition of an "objection based upon lack of jurisdiction", that appeal may not be proceeded with, and it shall be dismissed.[20]

9. This interlocutory appeal fails to comply with these requirements at every stage:

(a) The motion which led to the impugned Reconsideration Decision did not challenge the indictments in any way – and, in particular, it raised no issue as to the jurisdiction of the Tribunal as defined for the purposes of an interlocutory appeal. Nor was it brought within thirty days of the prosecution's compliance with its obligations under Rule 66(A)(i).

(b) The interlocutory appeal, so far as it impermissibly seeks to challenge the First and Second Decisions, was not filed within seven days of those decisions, as required by Rule 75(E), and the failure to comply with that time limit constitutes a waiver of the appellant's rights unless good cause is shown. [21] No attempt has been made to explain why no appeal was filed within the time limit. Indeed, the timing of the motion to reconsider and of this appeal suggests strongly that the appellants were merely endeavouring to avoid the trial which was fixed to commence within days.

(c) In any event, neither of the First and Second Decisions was one challenging the indictment in any way, and they concerned no issue as to the jurisdiction of the Tribunal as defined for the purposes of an interlocutory appeal.

10. An appellant cannot seek to challenge a decision of a Trial Chamber after the time for filing an appeal from that decision has expired by the simple expedient of seeking to have that decision reconsidered. Whether or not a Trial Chamber reconsiders a prior decision is itself a discretionary decision. The issue in an appeal from such a decision is not whether the prior decision sought to be

reconsidered was correct, or whether the decision not to review it was correct, in the sense that the Appeals Chamber agrees with either decision, but rather whether the Trial Chamber had correctly exercised its discretion in refusing to reconsider the prior decision.[22] 925

11. Following the response filed by the prosecution to the Appellant's Brief, in which it was submitted that no appeal lay from the Reconsideration Decision,[23] the appellants filed a further document which, although it purports to be a "Further Brief", is in effect a reply to the prosecution's submission.[24] They submit that, insofar as Rule 72(H) limits the meaning of jurisdiction for the purposes of the availability of an interlocutory appeal, it is inconsistent with the Tribunal's Statute and it ignores "established legal norms and available jurisprudence"; it is therefore invalid.[25] The prosecution objected, correctly, that this document was an unauthorised filing, that it was filed outside the period allowed for a reply and that its length exceeded the page-limit for a reply; it has requested that the document be rejected.[26] The prosecution made no submissions as to the merits of the challenge to the validity of the Rule upon which it relies.

12. A challenge to the validity of the Rule upon which the prosecution relies should not be rejected merely because of procedural irregularities. It is too significant a submission to be ignored, as the prosecution has suggested, and it deserves a proper consideration of its merits despite those procedural irregularities. It would have been more helpful to the Appeals Chamber if the prosecution had responded to the merits of the submission, at least in the alternative.

13. Article 24 of the Tribunal's Statute ("Appellate Proceedings") provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision; or
>
> (b) An error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

It is in the same terms as Article 25 of the Statute of the International Criminal Tribunal for the Former Yugoslavia. In neither Tribunal has it ever been contemplated that the Article gave the parties a right to appeal against every interlocutory decision, or even a right to seek leave to appeal against every interlocutory decision.[27] Both Tribunals have recognised a right to argue in an appeal against a final judgment the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.

14. Nor is a right to an interlocutory appeal against every decision dictated by the international human rights norms. Article 14.5 of the International Covenant on Civil and Political Rights provides:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Article 2.1 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

926

Recent jurisprudence in the European Court of Human Rights recognises that even appeals against conviction or sentence (for which the International Covenant and the European Convention provide) may be the subject of limitations such as a requirement of leave.[28] There is no provision in any of the accepted international human rights norms giving a party the right to an interlocutory appeal or to seek leave to appeal against an interlocutory decision. Moreover, interlocutory appeals are rarely permitted in national criminal proceedings, except in the most stringent circumstances.[29]

15. Rules 72 and 73 postpone but do not deny to the parties the right to appeal interlocutory decisions. The parties are entitled to argue in an appeal against a final judgmentthe correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules. The Appeals Chamber therefore rejects the appellants' challenge to the validity of Rule 72 insofar as it restricts the right to an interlocutory appeal. There is no interlocutory appeal against a decision of a Trial Chamber either to vary protective measures or to refuse to reconsider such a decision. The Appeals Chamber is satisfied that the interlocutory appeal filed by the appellants is incapable of satisfying the definition in Rule 72(H) of an "objection based upon lack of jurisdiction".

16. Accordingly, the appeal is dismissed.

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

Dated this 2nd day of May 2002,

At The Hague,

The Netherlands.

Judge Mehmet Güney
Presiding Judge

[Seal of the Tribunal]

[1] Decision on the Prosecutor's Motion for Joinder, 29 Jun 2000 ("Joinder Decision"), pars 100, 157.

[2] Notice of Appeal Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 1 Apr 2002 ("Interlocutory Appeal"), Brief in Support of Notice of Appeal, par (C)(i)(c).

[3] Decision on the Prosecutor's Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 Nov 2001 ("First Decision"), par 13.

[4] *Ibid,* par 22.

[5] *Ibid,* par 23.

[6] *Ibid,* par 24.

927

[7] *Ibid,* par 43(f).

[8] Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 Dec 2001 ("Second Decision"), par 27.

[9] Separate Dessenting [*sic*] Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Mofication [*sic*] of Protective Measures for Witnesses, 7 Dec 2001, par 3.

[10] *Ibid*, par 5.

[11] Defence Motion for Reconsideration of the Trial Chamber's Decisions Rendered on 29 November 2001, *"Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses"* and 5 December 2001, *"Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses,"* and for a Declaration of Lack of Jurisdiction, 7 Mar 2002, par 52.

[12] *Ibid*, pars 60, 70.

[13] *Ibid*, par 102-106.

[14] *Ibid,* p 28 (Second Prayer).

[15] Decision on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 28 Mar 2002 ("Reconsideration Decision"), pars 21-22.

[16] Interlocutory Appeal, Brief in Support of Notice of Appeal, par (A).

[17] Rule 72(D).

[18] Rule 72(A).

[19] Rule 72(H).

[20] Rule 72(I).

[21] Rule 75(F).

[22] *Prosecutor v Milošević*, ICTY-99-37-AR73, ICTY-01-50-AR73, ICTY-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 Apr 2002, par 4.

[23] Prosecutor's Response in the Defence "Notice of Appeal Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Trial Chamber's Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction" (Filed on 2 April 2002), 11 Apr 2002, par 9.

[24] Defence Further Brief to the Notice of Appeal and Brief Filed on 2nd April 2002, Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 17 Apr 2002 (Filed 19 Apr 2002).

[25] *Ibid*, par C.

[26] Prosecutor's Response to the "Defence Further Brief to the Notice of Appeal and Brief Filed on 2nd April 2002, Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction" (Filed on 19 April 2002), 23 Apr 2002.

[27] The references in the Article to appeals by "persons convicted" and the prosecutor mean only that appeals may be

928

taken by either of the parties in the proceedings; it does not mean that an appeal may be brought only after a conviction: *Barayagwiza v Prosecutor*, ICTR-97-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 Mar 2000, pars 47-48; *Prosecutor v Delić*, ICTY-96-21-R-R119, Decision on Motion for Review, 25 Apr 2002, par 7, footnote 19.

[28] *Affair Krombach c/ France*, Requête n° 229731/96, Arrêt, 13 février 2001, at par 96; *Eliazer v The Netherlands*, Application 38055/97, Judgment, 16 Oct 2001, at par 30.

[29] "The final judgment rule reflects a determination that, on balance, postponing an appeal until a final judgment is reached best protects the interests of the litigants in a fair and accessible process while conserving judicial resources.": *Criminal Procedure*, La Fave et al (2000), par 27.2. In Germany, for example, interlocutory appeals are permitted only concerning issues related to the liberty of the accused: German Code of Criminal Procedure, par 305 (StrafProcess Ordnung).

UNITED
NATIONS

929

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

Case No. IT-96-21-A

Date: 1 June 1999

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge Fouad Riad (Presiding)**
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge David Anthony Hunt
Judge Mohamed Bennouna

Registrar: **Dorothee de Sampayo Garrido-Nijgh**

Order of: **1 June 1999**

The Prosecutor

v.

ZEJNIL DELALI]
ZDRAVKO MUCI] a/k/a "PAVO"
HAZIM DELI]
ESAD LAND@O a/k/a "ZENGA"

ORDER OF THE APPEALS CHAMBER ON HAZIM DELIC'S EMERGENCY MOTION TO RECONSIDER DENIAL OF REQUEST FOR PROVISIONAL RELEASE

Office of the Prosecutor:
Mr. Yapa Upawansa
Mr. Christopher Staker
Mr. Rodney Dixon

Counsel for the Accused
Mr. John Ackerman for Zejnil Delali}
Mrs. Nihada Butorovi}, Mr. Howard Morrison, for Zdravko Muci}
Mr. Salih Karabdi}, Mr. Thomas Moran, for Hazim Deli}
Ms. Cynthia Sinatra, for Esad Land`o

930

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

NOTING that the convicted Hazim Delić ("Appellant") filed a Notice of Appeal before the Appeals Chamber on 24 November 1998;

NOTING the "Request by Hazim Delic for Provisional Relase" filed on 31 May 1999 ("Original Request") in which the Appellant sought provisional release for the purpose of attending the funeral of his mother, scheduled to take place in Konjic, Bosnia-Herzegovina, on 1 June 1999;

NOTING the "Prosecution Response to the Request by Hazim Delić for Provisional Release", filed the same day, in which the Office of the Prosecutor opposed the Request;

NOTING the "Order of the Appeals Chamber on the Request by Hazim Delic for Provisional Release" issued on 31 May ("Order") in which the Appeals Chamber by four votes, Judge Mohamed Bennouna dissenting on the question of the Appeals Chamber's jurisdiction to entertain the Original Request and declining to pronounce on its merits, denied the Original Request on the ground that it failed to disclose any material that satisfied the conditions under which provisional release may be granted pursuant to Sub-rule 65(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

NOTING that the majority of the Appeals Chamber in the Order specifically held that it could not be satisfied, notwithstanding its power under Sub-rule 65(C) and Rule 107 of the Rules to impose such conditions upon the provisional release of an accused or convicted person as it determines appropriate, that Hazim Delić, if released, would appear for appeal proceedings and would not pose a danger to any victim, witness or other person;

BEING SEISED of "Hazim Delic's Emergency Motion to Reconsider Denial of Request for Provisional Release", filed by Counsel for Hazim Delić on 31 May 1999 ("Emergency Motion");

931

NOTING that the Appellant in the Emergency Motion asserts that the Appeals Chamber by fashioning appropriate conditions of release pursuant to Sub-rule 65(C) of the Rules could guarantee both that Hazim Deli} would appear before it as scheduled and that he would not pose a danger to any person during the time of his provisional release;

NOTING the "Prosecution Response to Hazim Deli}'s Emergency Motion to Reconsider Denial of Request for Provisional Release", filed on this day;

CONSIDERING that the funeral of a close relative may constitute an exceptional circumstance within the meaning of Sub-rule 65(B);

CONSIDERING that humanitarian aspects may in the particular case weigh in favour of granting a request for temporary provisional release sought for such a purpose;

CONSIDERING ALSO that Hazim Deli} has been convicted of the following serious violations of international humanitarian law: wilful killing and murder, severe beating constituting cruel treatment and wilfully causing great suffering or serious injury to body or health, rape constituting torture, inhuman acts involving the use of an electrical shock devise constituting inhuman and cruel treatment, and, because each of the aforementioned crimes contributed to an atmosphere of terror and thus to the creation and maintenance of inhuman conditions in the ^elebi}i prison-camp, wilfully causing great suffering or serious injury and cruel treatment;

CONSIDERING that the Trial Chamber in its Judgement[1] characterised the crimes of which Hazim Deli} was found guilty as "some of the most serious offences that a perpetrator can commit during wartime"[2] and declared that "[t]he manner in which these crimes were committed are indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity"[3];

CONSIDERING that the Appeals Chamber at the present time must base its assessment of the risk of flight, and the danger that the Appellant may pose if released, on the facts as found

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[1] Judgement, Case No, IT-96-21-T, 16 November 1998.
[2] Id., at para. 1268.
[3] Id.

952

by the Trial Chamber in its Judgement which until otherwise held by the Appeals Chamber must be taken to be correct;

CONSIDERING MOREOVER that Hazim Delić for the crimes of which he was found guilty was sentenced to a number of concurrent prison terms, the most severe of which was for twenty years' imprisonment;

CONSIDERING that the Appellant, if released, would need to be transported to Bosnia-Herzegovina by commercial airliner in the presence of the general public;

CONSIDERING that in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal;

CONSIDERING that the Emergency Motion does not disclose any new material facts not available to the Appellant at the time of the Original Request;

CONSIDERING that the majority of the Appeals Chamber in reaching its decision on the Original Request considered and accorded due weight to all aspects of the present situation, including those raised by the Appellant in the Emergency Motion;

FINDING that under these circumstances it would not be appropriate to consider the Emergency Motion and that it therefore must be rejected;

CONSIDERING ALSO that, even if the Appeals Chamber had been inclined to consider the merits of the Emergency Motion, this would not have resulted in a decision to grant the provisional release sought;

HEREBY, unanimously, **REJECTS** the Emergency Motion.

933

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

Fouad Riad
Presiding Judge

Dated this first day of June 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

IN THE TRIAL CHAMBER

934

Before: Judge Richard May

Judge Mohamed Bennouna

Judge Patrick Robinson

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 15 February 1999

PROSECUTOR

v.

DARIO KORDIC
MARIO CERKEZ

DECISION ON PROSECUTOR'S MOTION FOR RECONSIDERATION

The Office of the Prosecutor:

Mr. Geoffrey Nice
Ms. Susan Somers
Mr. Patrick Lopez-Terres
Mr. Kenneth Scott

Counsel for the Republic of Croatia

Mr. David B. Rifkin, Jr.
Mr. Lee A. Casey

Counsel for the Accused:

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

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

935

BEING SEISED of the "Prosecutor's Motion for reconsideration concerning binding Order to the Republic of Croatia for the production of documents" and the confidential *ex parte* Memorandum in support thereof ("the Motion for Reconsideration"), filed by the Office of the Prosecutor ("Prosecution") on 29 January 1999 and the Opposition of the Republic of Croatia to the Motion for Reconsideration filed on 4 February 1999,

NOTING that the Prosecution argues that the documents requested by it but rejected by the Trial Chamber in its Order to the Republic of Croatia for the production of documents issued on 22 January 1999 "are directly relevant to the prosecution of this case" and asks that the Trial Chamber "reconsider and grant the remaining parts of [the] 24 July 1998 application",

NOTING that the Republic of Croatia objects to such reconsideration on the basis that the Rules of Procedure and Evidence of the International Tribunal ("Rules") do not provide for such motions and that the Motion for Reconsideration is impermissible and, further, that the Trial Chamber's decision not to order production of the documents was correct,

NOTING that the Prosecution does not refer to any provision of the Statute of the International Tribunal nor to any Rule in support of its request for reconsideration,

CONSIDERING that the matter was fully argued before the Trial Chamber and the Prosecution does not assert that there are any new facts that would warrant further consideration by the Trial Chamber,

CONSIDERING that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal,

HEREBY REJECTS the Motion for Reconsideration.

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

_____

Richard May

Presiding

Dated this fifteenth day of February 1999

At The Hague,

The Netherlands

[The seal of the Tribunal]

936

TRIAL CHAMBER I

OR: ENG

Before:
Judge Navanethem Pillay, Presiding
Judge Asoka de Zoysa Gunawardana
Judge Erik Møse

Registry:
Ms Marianne Ben Salimo

Decision of: 25 February 2000

THE PROSECUTOR
v.
FERDINAND NAHIMANA

Case No. ICTR-96-11-T

DECISION ON THE DEFENCE'S MOTION FOR WITNESS PROTECTION

The Office of the Prosecutor:
M.William T. Egbe

Counsel for Ferdinand Nahimana:
M. Jean-Marie Biju-Duval

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

CONSIDERING the motion filed on 17 January 2000 by the Defence for protective measures for witnesses, along with a United Nations Report on Human Rights in Rwanda and a final Report from the International Commission;

CONSIDERING that no objections were filed by the Prosecutor;

937

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

HEREBY DECIDES the said Defence motion.

The Legal Basis

1. The Defence motion is based on Article 21 of the Statute and Rules 69 and 75 of the Rules.

2. Article 21 of the Statute obliges the Tribunal to provide in its Rules 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. To this end, Rule 75 of the Rules provides, *inter alia*, that a Judge or a Chamber may *proprio motu,* or at the request of either party, or of the victims or witnesses concerned, or of the Tribunal's Witnesses and Victims Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

3. The Tribunal, being mindful at all times of guaranteeing the full respect of the rights of the accused, shall order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of victims and witnesses so as to ensure a fair determination of the matter before it. However, this is subject to the proviso that, in accordance with Rule 69 (C), the identity of the victims and witnesses shall be disclosed in sufficient time prior to the trial, in order to allow adequate time for preparation of the Prosecution and the Defence cases.

4. Measures for the protection of witnesses are granted on a case by case basis, and take effect once the particulars and locations of the witnesses have been forwarded to the Witnesses and Victims Support Section. In order to determine the appropriateness of such protective measures, the Tribunal shall evaluate the general security situation affecting the witnesses concerned.

5. The attachments presented by the Defence in support of its motion, demonstrate the complexity of the security situation in Rwanda and the instability of the region, at the present time. The Defence submits that this precarious security situation endangers the lives of those persons who may be called as witnesses at trial, as well as the lives of their relatives.

6. The Defence further submits that there are three categories of persons who need protection:

- "Potential Defence witnesses currently residing in Rwanda, who have requested protective measures;
- Potential Defence witnesses currently residing outside Rwanda, in other African countries who have requested protective measures;
- Potential Defence witnesses residing outside Africa, who have requested protective measures".

7. According to the Defence, protective measures are a necessary requirement to permit the discovery of the truth.

8. The Trial Chamber considers that the Defence motion is well founded and that there are good grounds for protective measures for Defence witnesses.

938

The Non-Disclosure of the Identity of Witnesses

9. The Defence requests for the non-disclosure of the identity of Defence witnesses.

10. Pursuant 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. However, this is subject to Rule 69(C), whereby the identity of the witness shall be disclosed in sufficient time prior to trial, in order to allow adequate time for the preparation of the prosecution and the defence.

11. In relation to the non-disclosure of witness identity, the Trial Chamber concurs with the reasoning of the International Criminal Tribunal for the Former Yugoslavia in its Decision of 10 August 1995, on the Prosecutor's motion for protective measures for victims and witnesses, in The Prosecutor versus Tadi*f* (IT-94-I-T). In that case, the Trial Chamber held that for a witness to qualify for the protection of his identity from disclosure to the public and media, there must be real fear for the safety of the witness or her or his family, and that there must always be an objective basis to underscore this fear. It further held, that the judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness.

12. In the present case, the Trial Chamber finds that there exist exceptional circumstances warranting the non-disclosure of the identity of witnesses.

13. The measures requested by the Defence have been examined in accordance with current practice of the Tribunal. Defence requests in paragraphs b), f) and k) are not granted. The request in paragraph h) is granted in modified form. The remaining requests are granted.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

HEREBY ORDERS that :

1. The names, addresses and other identifying information concerning all Defence witnesses shall be forwarded by Defence, to the Registry, in confidence and shall be kept under seal by the Registry and not be included in any public records of the Tribunal;

2. Where the names, addresses or any other identifying information concerning potential Defence witnesses appear in the existing public records of the Tribunal, this information shall be expunged from the said records;

3. The names and addresses of the Defence witnesses, their whereabouts or any other identifying information contained in the supporting materials, or any other information filed with the Registry, shall not be disclosed to the public or the media;

4. The Prosecutor shall not, directly or indirectly, disclose, discuss or reveal any document or information contained in any document, or any other information identifying the potential Defence witnesses which is prohibited from being disclosed, to anyone, except members of the Prosecution team;

5. No photographs, audio or video recording, or sketches of any Defence witnesses may be

939

taken at any time or place, without leave of the Trial Chamber and the Parties;

6. The Defence is authorised to withhold disclosure to the Prosecutor, of the identity of the witness and to temporarily redact their names, addresses, locations and other identifying information from the supporting material on file with the Registry, until such time as the said witnesses are under the protection of the Tribunal;

7. The identity of the witnesses shall be disclosed by the Defence to the Prosecutor in sufficient time prior to the trial, in order to allow adequate time for the preparation of the Prosecution case, pursuant to Rule 69 (C) of the Rules ;

8. The Prosecutor and any representative acting on her behalf, shall notify the Defence prior to any contact with any of the protected Defence witnesses, and the Defence shall make arrangements for such contacts ;

9. The Defence shall be permitted to designate pseudonyms for each of its protected witnesses for use in the proceedings of the Tribunal or during discussions between the parties.

Arusha, 25 February 2000

Navanethem Pillay	Asoka de Zoysa Gunawardana	Erik Møse
Presiding Judge	Judge	Judge

Seal of the Tribunal

940

IN THE TRIAL CHAMBER

Before: Judge Antonio Cassese, Presiding

Judge Richard May

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 8 January 1999

PROSECUTOR

v.

Zoran KUPRESKIC, Mirjan KUPRESKIC, Vlatko KUPRESKIC, Drago JOSIPOVIC, Dragan PAPIC, Vladimir SANTIC, also known as "VLADO"

DECISION ON MOTION OF THE ACCUSED VLATKO KUPRESKIC TO THE TRIAL CHAMBER TO ORDER THE ENTRY OF JUDGEMENT OF ACQUITTAL PURSUANT TO RULE 98 *bis* OF THE RULES OF PROCEDURE AND EVIDENCE

The Office of the Prosecutor:

Mr. Franck Terrier
Mr. Albert Moskowitz

Counsel for the Accused:

Mr. Ranko Radovic, for Zoran Kupreskic
Ms. Jadranka Glumac, for Mirjan Kupreskic
Mr. Borislav Krajina, for Vlatko Kupreskic
Mr. Luko Susak, for Drago Josipovic
Mr. Petar Puliselic, for Dragan Papic
Mr. Petar Pavkovic, for Vladimir Santic

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

941

BEING SEISED of a *Motion of the Accused Vlatko Kupreskic to the Trial Chamber to Order the Entry of Judgement of Acquittal, pursuant to Rule 98* bis *of the Rules of Procedure and Evidence* dated 21 December 1998;

CONSIDERING the *Decision on Motion for Withdrawal of the Indictment against the Accused Vlatko Kupreskic* rendered by this Trial Chamber on 18 December 1998 in response to the *Motion for Withdrawal of the Indictment against the Accused Vlatko Kupreskic* dated 7 December 1998, and filed on 9 December 1998, in which the Defence proposed that the Prosecution withdraw the indictment against Vlatko Kupreskic for alleged lack of evidence;

CONSIDERING that the Trial Chamber in its *Decision* of 18 December 1998 stated that it was "of the opinion that there is evidence as to each count charged in the indictment, which were it to be accepted by this Trial Chamber, could lawfully support a conviction of Vlatko Kupreskic";

CONSIDERING that, in the same *Decision*, the Trial Chamber stated that it did not consider it appropriate to apply Rule 98 *bis* to order a judgement of acquittal on one or more charges contained in the indictment against Vlatko Kupreskic;

CONSIDERING the confidential *Prosecutor's Response to the Motion for Judgement of Acquittal against Vlatko Kupreskic* dated 5 January 1999, and the arguments presented therein, notably that "In this latest request, no new analysis or additional reasons were provided to the Trial Chamber to justify a dismissal of charges against Vlatko Kupreskic. S...C therefore S...C there is no reason for this Trial Chamber to alter its original conclusion of 18 December 1998, namely, that the evidence presented by the Prosecutor is sufficient to support convictions against Vlatko Kupreskic." (para. 7).

NOTING the Prosecutor's further submission that the Defence *Motion* was out of time in light of the fact that it was submitted over two months after the Pre-Defence Conference;

CONSIDERING, nonetheless, that had the Trial Chamber, on motion of an accused, found the prosecution evidence to be insufficient, as a matter of law, to sustain a conviction on any of the counts contained in the indictment against any of the accused, it would give due consideration to the motion in the interests of justice, despite its being filed out of time;

CONSIDERING, however, that, on its terms, the Defence *Motion* of 21 December 1998 is simply a re-submission to the Trial Chamber of its earlier *Motion* of 7 December 1998, which had been addressed to the Prosecutor but which the Trial Chamber nevertheless considered on its merits and rejected in the *Decision* of 18 December 1998, and that since the Defence *Motion* raises no new arguments nor analysis, it too must be rejected on its merits;

FOR THE ABOVE REASONS,

REJECTS the *Motion of the Accused Vlatko Kupreskic to the Trial Chamber to Order the Entry of Judgement of Acquittal, pursuant to Rule 98* bis *of the Rules of Procedure and Evidence* dated 21 December 1998.

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

942

Judge Mumba

Dated this eighth day of January 1999

At The Hague

The Netherlands

[Seal of the Tribunal]

943

Or.: Eng.

TRIAL CHAMBER I

Before: Judge Andrésia Vaz

Registrar: Adama Dieng

Date: 25 February 2003

THE PROSECUTOR
v.
PROTAIS ZIGIRANYIRAZO

Case No. ICTR-2001-73-I

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

The Prosecution
Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend
Adesola Adeboyejo

Defence Counsel
John Philpot

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

SITTING as Judge Andrésia Vaz, designated by the Trial Chamber pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED, pursuant to Rules 73, 65 and 79 of the Rules of the following documents (the "Motion") a Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment and Brief in support thereof filed by the Prosecutor on 16 May 2002 and an Addendum to the Motion filed on 10 September 2002;

94 F

CONSIDERING the Defence Responses to the Motion filed on 28 May 2002 and 16 September 2002;

NOW CONSIDERS the matter solely on the basis of the briefs of the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

1. The Prosecutor requests the Chamber to grant protective measures for potential Prosecution witnesses as warranted by a real and substantial fear that they suffer being threatened, assaulted or killed if their identities are made known. In support of her request, the Prosecutor submits the following material:

i) An Affidavit by Mr Samuel Akorimo, Commander of the Investigations at the Office of the Prosecutor in Kigali, dated 9 May 2001, attributing fears expressed by potential witnesses to the general security situation in Rwanda and specifically in the prefectures of Gisenyi, Ruhengeri, Kibuye and Cyangugu.

ii) Press Releases, Newspapers Articles, Reports published by various Organisations between 1997 and August 2001.

These documents describe the volatile nature of the security situation in Rwanda following the events of 1994. They attribute it mainly to 'Hutu rebels' infiltrating the country in its Western prefectures from neighbouring countries. They describe these rebels as former members of the Rwandan Armed Forces and *Interahamwe* militia members who fled Rwanda after the events of 1994. Some of these documents further relate security concerns in respect of Rwandan witnesses appearing before the Tribunal.

iii) Press Releases, Newspapers Articles and Reports published by various Organisations between 1998 and June 2001.

These documents describe the volatile nature of the security situation in the Great Lakes Region since 1994. They pertain mainly to the war in the Democratic Republic of Congo, as fuelled by the participation of 'Hutu rebels' originating from Rwanda, as described above.

2. The Prosecutor submits that the persons who need protection, in light of the above, are:

i) The victims and potential Prosecution witnesses who presently reside in Rwanda and in other countries in Africa who have not affirmatively waived their right to protective measures;

ii) The victims and potential Prosecution witnesses who reside outside Africa and who have requested protective measures.

3. The Prosecutor requests 13 protective measures for them. Most of these pertain to the non-disclosure of their identity to the public and, until 21 days prior to their appearance at trial, to the Defence and the Accused. These measures will be reviewed in the deliberations.

4. The Defence responds:

(i) That the Prosecutor has not proved the existence of exceptional circumstances

warranting the measures sought, for the following reasons:

(a) The Chamber cannot rely on Mr Akorimo's Affidavit. Indeed, Mr Akorimo should testify in court pursuant to Rule 90 of the Rules, thus enabling the Defence to cross-examine him. On the other hand, his statement was not sworn before a person authorised to administer oaths. It therefore has no probative value.

(b) The Affidavit is misleading: some of the witnesses whose pseudonyms are given do not reside in the prefectures of Gisenyi and Ruhengeri or in Kigali-Ville. The Defence believes that SGH is in fact Omar Serushago, a genocide convict currently serving his sentence rendered by the Tribunal in a prison in Mali, and that SGM is currently residing in Paris.

(c) The other evidence submitted is insufficient and largely irrelevant to any specific danger currently facing Prosecution witnesses. Specifically, the supposedly volatile security situation in Rwanda, in the Great Lakes Region is too broad an argument in support of the specific security situation of the witnesses. It is not either documented by updated evidence.

(ii) That the measures sought relating to non-disclosure of the witnesses' identity are not effective;

(iii) That the measures sought should not automatically apply to all witnesses, as identified at paragraph 2 above, but only to those who have been identified at this stage;

(iv) That the request for a full disclosure 21 days prior to the witnesses' testimony would affect their right to properly prepare themselves in a timely manner prior to the witnesses' appearance at trial.

APPLICABLE LAW

5. Pursuant to Article 21 of the Statute, the Tribunal "shall provide in its rules of procedure and evidence for the protection of victims and witnesses". The Accused's right to a public hearing, envisioned in Article 20 of the Statute, is conditional upon the latter disposition. In accordance with the Statute, Rule 69(A) of the Rules 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" while, pursuant to Rule 75(A) of the Rules, "[a] judge or a Chamber may ... 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."

DELIBERATIONS

6. In accordance with the applicable law above recalled, the Chamber shall bear in mind, in deciding this matter, both the need to safeguard the rights of the Accused and the security and the privacy of those victims and witnesses who are in danger or at risk.

7. In respect of the Defence objection to Mr Akorimo's statement, the Chamber notes that Rule 89(C) of the Rules allows for certain discretion in respect of the admission of evidence, subject to assessment of its probative value. This principle applies at the pre-trial stage. [1] According to the

946

statement, Mr Akorimo is Commander of the Investigations within the Office of the Prosecutor. These functions have not been disputed by the Defence. Mr Akorimo states that, among his duties, he is "required to monitor and assess security developments in the Republic of Rwanda and elsewhere as they may impact upon ICTR investigations and witness protection." [2] In light of the above, the Chamber finds that Mr Akorimo's statement has probative value and is admissible. This objection and the ancillary request for a hearing on the Motion are therefore dismissed.

8. The Chamber declares itself satisfied, on the basis of the material referred-to at Sub-paragraphs 1 (ii) and 1 (iii) above, that the security situation in Rwanda and the Great Lakes region has been volatile from 1994 up to August 2001. As contended by the Defence, however, this material is not relevant in respect of the current situation in Rwanda and the Great Lakes region.

9. The Chamber however derives from Mr Akorimo's statement (See Sub-paragraph 1 (i) above) the persistence of the volatile nature of the security situation affecting Rwanda. It is satisfied that this volatile security situation accounts for fears expressed by the witnesses. It further notes that according to Mr Akorimo, "witnesses who participate in ICTR investigation and prosecution processes face a very high potential for reprisals in the form of death threats and actual physical harm" and that this specifically applies to the witnesses in the present case. [3]

10. Contrary to the Defence objection summarised at paragraph 4 (iii) above, the Chamber declares itself satisfied, in the light of the above, that protective measures are warranted in respect of all the potential Prosecution witnesses presently residing in African countries who have not affirmatively waived their right to protective measures and to all other potential Prosecution witnesses, upon their request. These measures shall therefore not be restricted, as suggested by the Defence, to the potential witnesses identified at this stage by the Prosecutor.

11. Turning to the potential issues raised by the Defence at para. 4 (c) above and, specifically, to the Defence objection in respect of Omar Serushago, the Chamber agrees that the non-disclosure measures herein ordered should not extend to the latter, should he be, as the Defence suggests, a potential Prosecution witness in the present case.

12. The Chamber now turns to the measures sought by the Prosecutor.

13. The Defence generally objects to all measures pertaining to the non-disclosure of the witnesses' identities, on the grounds that such measures have supposedly proved ineffective. This objection lacks specificity. Besides, the Tribunal relies on all concerned parties for proper compliance with the orders rendered. This comprises municipal authorities and the Parties themselves who may seize the Chamber should any issue arise in respect of the execution of any non-disclosure orders herein granted. The Prosecution could further request, as the case may be, other protection measures, if warranted, pursuant to Rule 75 of the Rules. This objection is therefore dismissed.

14. Having reviewed the orders requested by the Prosecutor along with all other Defence objections to these measures, the Chamber decides to grant the Orders below which, in its view, conform to the practice of the Tribunal and strike proper balance between the rights of the Accused and the need to safeguard the protection of the witnesses.

15. The Chamber has dismissed proposed orders aiming at 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, including any copy of a witness prior statement even in redacted form, unless the Accused is, at the time of the possession, in the presence of his

947

Counsel. Such measures were deemed unnecessarily restrictive in respect of the rights of the Accused to have adequate facilities for the preparation of his defence and to be fully involved in his defence.

16. As in the *Mpambara* Case (No. ICTR-2001-65-I, Decision on the Prosecutor's Motion for Witness Protection Measures of 30 May 2002, para. 24) the Chamber however clarifies that the Defence is to personally ensure that the Accused does not disclose to anyone else, other than the immediate Defence team, any material comprising identifying information in respect of protected witnesses, or any such information.

17. Finally, contrary to the Defence objection summarized at para. 4(iv) above, the Chamber has accepted to order non-disclosure of the protected witnesses' identifying details until 21 days prior to their testimony. Indeed, pursuant to Rule 66(A)(ii) of the Rules, the Defence has already received or will receive, on a continuous basis, [4] a copy of the statements of the witnesses the Prosecutor intends to call at trial, subject to redactions aimed at protecting the identity of the witnesses hereby protected. By the time the Defence receives full disclosure, it will therefore already have material on the basis of which to prepare a defence. This is in conformity with Rule 69 (C) of the Rules.

FOR THESE REASONS,

THE TRIBUNAL

HEREBY GRANTS the following protective measures in respect of all victims and Prosecution witnesses or potential Prosecution witnesses presently residing in Africa who have not affirmatively waived their right to protective measures and to all other Prosecution witnesses and potential witnesses, upon their request:

I. ORDERS that the names, addresses, whereabouts of, and other identifying information concerning the persons hereby protected, wherever occurring in the records of the Tribunal, be placed under seal by the Registry;

II. ORDERS that the names, addresses, whereabouts of, and any other identifying information concerning all persons hereby protected be disclosed only to the Witness and Victims Support Section personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals;

III. ORDERS that any names, addresses, whereabouts of, and any other identifying information concerning all persons hereby protected contained in existing records of the Tribunal be placed under seal;

IV. PROHIBITS the disclosure to the public or the media of the names, addresses, whereabouts of, and any other information which would reveal the identity of any person hereby protected including, but not limited to, information comprised in the supporting material or otherwise on file with the Registry and **DECIDES** that this order shall remain in effect after the termination of this trial;

V. PROHIBITS the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or any information contained in any documents, or any other information subject to the above non disclosure orders, to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team, as specified in Order VI;

VI. ORDERS the Defence:

948

(i) To provide the Witness and Victims Support Section of the Tribunal with a designation of all persons working on the immediate Defence team who will have access to any protected information pursuant to the non-disclosure Orders above,

(ii) To advise that Section in writing of any change in the composition of this team and,

(iii) To ensure that any member departing from the immediate Defence team has remitted all materials that could lead to the identification of any person hereby protected;

VII. PROHIBITS the public and media from making any audio or video recording, as well as taking photographs or making sketches of persons hereby protected, unless authorised to do so by the Chamber, or with the consent of the witness;

VIII. PROHIBITS the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of any of the witnesses or potential witnesses protected pursuant to this Decision, and any such information in the supporting material on file with the Registry, until twenty-one (21) days before the witness testifies at trial;

IX. ORDERS that the Accused or his Defence Counsel, notify the Prosecution in writing and on reasonable notice of their wish to contact any person hereby protected. Upon receipt of such request, the Prosecution shall immediately, with the prior consent of the person sought to be contacted, undertake the necessary arrangements to facilitate such contact. If the person sought to be contacted is under the age of 18, the Prosecution shall obtain the prior consent of a parent or legal guardian of that person, authorising such contact;

X. ORDERS the Prosecutor to designate a pseudonym for each person hereby protected, which will be used whenever referring to him or to her in Tribunal proceedings, communications and discussions between the parties to the trial, and the public;

XI PROHIBITS any member of the immediate Defence team from attempting to make an independent determination of the identity of any person hereby protected or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

XII. CLARIFIES that Orders V and XI above shall not be construed as preventing the Defence from carrying out normal investigations, in so far as these are not intentionally aiming at unveiling the identity of witnesses known to be protected.

XIII. DISMISSES the Motion and related requests in all other respects.

Arusha, 25 February 2003,

Andrésia Vaz
Judge

(Seal of the Tribunal)

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[1] *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-DP, Decision on the Prosecutor's Request for the Extension

of the Suspect's Detention, 4 November 2002, para. 9.

949

[2] Commander Akorimo's Statement, para. 3.

[3] Commander Akorimo's Statement, para. 8 & 9.

[4] See, in this respect, *The Prosecutor v. Pauline Nyiramasuhuko et Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Décision relative à la requête de la Défense en communication de preuves, para. 40 *in fine*.

950

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

951

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.*

952

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

953

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

954

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

955

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

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

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

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

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

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

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

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

956

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)

957

TRIAL CHAMBER II

Original : English

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

Registry:
John Kiyeyeu

Decision of: 22 September 2000

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

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

Counsel for the Prosecutor:
Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence:
Mr David Hooper

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

SITTING as Trial Chamber II, composed of Presiding Judge Laïty Kama, Judge William H. Sekule and Judge Mehmet Güney;

SEIZED of the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses in *Prosecutor v. André Rwamakuba* (the"Motion"), submitted on 9 March 2000;

CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

958

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

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

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

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69, 75 and Rule 72 of the Rules of Procedure and Evidence (the "Rules").

Arguments of the Prosecution

1. The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.

2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue, on the basis of the points made in paragraph 3 of the Motion, the following orders:

3.a) Requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses be sealed by the Registry and not included in any records of the Tribunal;

3.b) Requiring that the names, addresses, whereabouts of, and other identifying information concerning the individuals cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;

3.c) Requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals is contained in existing records of the Tribunal, that such information be expunged from the documents in question;

3.d) Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry or any other information which would reveal the identity of these individuals, and this order shall remain in effect after the termination of the trial;

3.e) Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

3.f) Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in Paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber

959

in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;

3.g) Prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Chamber and the Parties;

3.h) Prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and authorizing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and, in any event, ordering that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven days before such individuals are to testify at trial unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules;

3.i) Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents of guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

3.j) Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the witnesses in question decide otherwise. Moreover, the Prosecution stipulates in its request that it reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

4. Having cited several decisions rendered by the Trial Chambers ordering protective measures for potential witnesses for reasons of security, the Prosecutor maintains that in the instant case there has been no improvement in the reigning insecurity, which existed when the earlier cases were decided.

Reply by the Defence

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

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

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

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

960

HAVING DELIBERATED,

On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):

9. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be effective until the Chamber determines otherwise, without prejudice, pursuant to Article 69 (C) of the Rule regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

10. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *Prosecutor v. Alfred Musema*, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses on 20 November 1998) quoting the findings of The Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in the *Prosecutor v. Tadic,* IT-94-I-T (Decision on the Prosecutor's Motion for Requesting Protective Measures for Witnesses on 10 August 1995). In these decisions, both Trial Chambers held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decisions, both Trial Chambers determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

11. After having examined the information contained in the various documents and reports that the Prosecutor has annexed to in his brief to support the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation prevalent in Rwanda and neighboring countries could be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. Consequently, the Chamber deems justified the measures required by the Prosecution of Paragraphs 3(a), 3(c), 3(d), 3(e) of the Motion. The Chamber is not of the view that the measure sought in paragraph 3(e) could prevent the reasonable and necessary preparation of the Defence.

On point 3(f) of the Motion

12. The Chamber takes note of the Defence's submissions. The Chamber grants the measures requested by the Prosecutor, with a modification of the measure which provides that any member leaving the Defence team remit "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted.

13. The Chamber endorses the holding in *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000), concerning the Prosecutor's Motion for Protective Measures for Victims and Prosecution Witness, in which the Trial Chamber substituted the words "all materials" in place of "all documents and information."

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

14. ***Regarding the measures sought in points 3(g) and 3(i), the Chamber considers that these are normal protective measures which do not affect the rights of the Accused and decides to grant them as they stand.***

961

On the Period of Disclosure of the Identity of the Prosecution Witnesses to the Defence before they testify (Point 3(h) of the Motion):

15. Taking note of the Defence's argument that the right of the Accused to have adequate time for preparation of its case would be impaired by a seven days disclosure period, the Chamber considers that the period sought by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial, is not reasonable to allow the Accused requisite time to prepare the case, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

16. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial *(Prosecutor v. Semanza,* ICTR-97-21-I, (10 December 1998); *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I and 36-T, (3 March 2000)*; Prosecutor v. Nsabimana and Nteziryayo*, ICTR, (21 May 1999);).

17. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in *Prosecutor v. Muhimana*, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

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

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

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

MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.

Arusha, 22 September 2000

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

(Seal of the Tribunal)