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

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SCSL-2003-07-PT-3D- 568
(568-600)

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 6 June 2003

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THE PROSECUTOR

Against

MORRIS KALLON also known as (aka) BILAI KARIM

CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE DEFENCE 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"*

Office of the Prosecutor:

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

Defence Counsel:

Mr James Oury
Mr Steven Powles

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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. Thus, the pleading is confusing and inadmissible. The Defence should have either filed a separate application for reconsideration or request for leave to appeal, rather than combining two completely different matters within a single application. 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 its issue does not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber would not materially advance the proceedings.

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**", "Impugned 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 29 May 2003 the Defence requests a "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' (the "**Application**"). This Application was received and certified by the Court Records Office on 30 May 2003 and received by the Office of the Prosecutor on 30 May 2003. Since the Application is similar to a motion, Rule 7(C) is applicable, thus allowing the Prosecution to file a response within 7 days.

2. In para. 4 and 5 of its Application, the Defence seeks consideration of their additional response to the Prosecution Motion, in addition to the submissions made by the Defence Office on behalf of the Accused. The Prosecution submits that the Defence is precluded from such measures in the interests of finality of the proceedings. The Accused was duly provided with a fully argued response to the Prosecution Motion by the Defence Office; alternatively, had the Accused indicated a preference for handling the response by assigned counsel, a motion for delay ought to have been filed by the Defence Office in order to allow assigned counsel the opportunity to prepare the response on behalf of the Accused.

3. The Defence relies upon para. 3 of the Defence Response of 23 April 2003, where the Defence Office stipulates that their Response was filed on behalf of the Accused "without prejudice to the position that might be taken by their assigned counsel once such counsel is assigned". The Defence Application submits that the assigned counsel for the Accused now wish to address the Original Prosecution Motion.[1] Para. 28 of the Prosecution Reply submits that the Defence Office simply cannot be allowed to file a full response to the Prosecution Motion with the caveat that each and every subsequent counsel appointed for (or hired by) the Accused will be permitted to revisit the issue and file an additional application. The Prosecution maintains that such a procedure would unduly delay the final disposition of preliminary matters, inappropriately interject uncertainty into the proceedings, and is not required by fundamental fairness or international standards of justice.

4. Therefore, the Prosecution submits that the Accused can not be given unlimited opportunities to respond to the Prosecution Motion. By filing the Defence Response of 23 April 2003, the Accused filed and fully argued a response to the Prosecution Motion, rather than choosing to file a request for delay in the filing of the response until the assignment of Defence Counsel. There has been no suggestion that the Defence Office was not empowered to represent the Accused at the time that the Defence Office filed the Response to the Original Prosecution Motion.[2] Accordingly, the Prosecution submits that the Accused is bound by that response. The fact that there has been a change in the legal representation of the Accused does not mean that the Accused is no longer bound by acts taken on his behalf by a previous legal representative, or that the Accused has a right to redo procedural steps that have already been taken on his behalf by a former legal representative.

5. The Prosecution submits that when the learned Judge, having been aware of this issue and the submissions of the Defence and the Prosecution (cf. para. 6 of his Decision),

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1 Defence Application, paras. 3-6, especially para. 6.

2 Rule 45(A) of the Rules provides, inter alia, that "The Defence Office shall ... *provide ... representation to* ... (ii) accused persons before the Special Court" (emphasis added). See also *Prosecutor v. Sesay, Decision on Request of Defence Office for Order Regarding Contact with Accused*, SCSL-2003-05-PT, Designated Judge, 30 May 2003, para. 16.

accepted the Response of the Defence Office as filed on behalf of the Accused, it was in turn accepted that the Defence Office had locus standi to file a response for the Accused (See *Prosecutor v. Sesay*, SCSL-2003-05-PT, Decision on request of defence office for order regarding contact with Accused dated 30 May 2003, para. 16). As a result, the Prosecution submits that the Response of 23 April 2003 be recognized as the Response on behalf of the Accused, and that any further submissions by the Defence on first instance in this matter be rejected.

6. Furthermore, even if the Accused did have the right to make additional submissions on the Original Prosecution Motion via his new legal representative, it is clear that there was an opportunity to do so before the Impugned Decision was rendered. The Defence Objection was filed by the assigned counsel for the Accused on 12 May 2003, some 11 days prior to the Impugned Decision. There was ample opportunity during that period for the assigned counsel for the Accused to seek leave to file a further response to the Original Prosecution Motion, if that was what the Defence had desired. Instead, the Assigned Counsel merely confined himself to filing the Defence Objection, which objects to the Admission of the Four Attachments. Having refrained from seeking leave to make additional submissions on the Original Prosecution Motion at the appropriate time, such leave cannot be sought now.

II. Reconsideration

7. In its Application, the Defence makes a request "for reconsideration of and/or leave to appeal". The Prosecution submits that the Defence has incorrectly incorporated two separate matters into one application, which yields a improper pleading that must be rejected.

8. Should the learned Judge address the Application's request for reconsideration, the Prosecution submits that motions to reconsider a rendered decision are not provided for in the Rules and do not form part of the procedures of the Court, either under the Statute, Rules or jurisprudence. The Defence Application argues that the designated Judge is still [*sic*] *functus officio* in relation to the Impugned Decision, and has the

power to issue a variation of the Impugned Decision during a reasonable time-frame.[3] While jurisprudence of the ICTY and ICTR have made findings that "motions to reconsider [a rendered decision] are not provided for in the Rules and do not form part of the procedures" (See *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, 15 February 1999, consideration 2), nevertheless, they have likewise recognized an inherent power to reconsider prior decisions as a matter of discretion where the facts so warrant (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).

9. Should the learned Judge similarly find such a power within the authority of the Trial Chamber, the Prosecution submits that he adopt the criteria for such as adopted according to the jurisprudence of the ICTY and ICTR. The International Tribunals have held that the criteria for reconsideration must be 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).

10. The Prosecution submits that a party seeking reconsideration of a prior interlocutory decision of a Judge or Chamber must therefore identify some particular fact, circumstance or argument that was not considered by the Judge or Chamber when rendering the original decision. Reconsideration of a decision on a motion should not be sought on the basis of a fact, circumstance or argument that the party could reasonably have been expected to raise before the decision was given, in that party's motion, or response to a motion. The Prosecution submits that the Defence fails to demonstrate any new fact, circumstance or argument in its Application that would warrant a reconsideration of the Decision. In fact, all of the issues raised by the

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[3] Defence Application, paras. 2 and 3. The Prosecution notes that the Defence Application appears to use the expression "*functus officio*" to express the opposite of its meaning: the expression "functus officio" means that a decision-maker, having made a decision, is no longer seized of the matter and has no further power or jurisdiction in relation to it. See, e.g., Osborn's Concise Law Dictionary (7th ed., Bird (ed.), 1983), p. 155: "*functus officio.* [Having discharged his duty.] Thus once a magistrate has convicted a person charged with an offence before him, he is *functus officio*, and cannot rescind the sentence and re-try the case".

Defence in its Application have been duly considered by the learned Judge in his Decision dated 23 May 2003.

11. In para. 6 of the Application, the Defence seeks "to support and adopt the arguments on behalf of Mr Gbao as their response to the Prosecution Motion in Mr Kallon's case". Fact is, that a decision has not yet been given on a Prosecution motion for protective measures in the case of Prosecutor v. Gbao. The Defence Application for Reconsideration argues that if different measures are ordered in the Gbao case to those ordered in the present case, the Impugned Decision should be varied to make it consistent with the order in the Gbao case. The Defence argued that it would be unfair for different protective measures and disclosure regimes to exist for each accused.

12. This argument must be rejected. First, it is premature, because no order has yet been made in the Gbao case. Secondly, it is incorrect as a matter of law that the regime of protective measures and disclosure must be identical in each case.

13. Finally, the Prosecution submits that the Rules do not permit parties to simply adopt the arguments of another application, as the Defence seeks for in its Application regarding the arguments on behalf of Mr Gbao, in lieu of filing such arguments within the pleading itself. Such a practice would be tantamount to including additional pleadings as an appendix to the present application and violative of the Practice Directions. According to Article 9.4. of 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**"), "an appendix or book of authorities will not contain legal or factual arguments ...". Thus, e contrario, the adoption of corresponding argument in the present case ought to be considered to fall within the Application itself and thus attracts the word and page limitations under Article 9 of the Practice Direction.

14. Since the Defence is not permitted to adopt corresponding arguments of another application, the Prosecution submits that reference to such arguments must be considered to be within the body of the pleadings themselves. The present Defence

Application is eight (8) pages long. The response of the Defence on the "Prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure" in the case of Mr Gbao, dated 26 May 2003, is sixteen (16) pages long and in excess of 3,000 words. By adopting the said arguments made on behalf of Mr Gbao, the Defence is in effect filing 24 pages of argument. According to Article 9.3(C) of the Practice Direction "Motions, replies and responses before a Chamber will not exceed 10 pages or 3,000 words, whichever is greater". The Prosecution submits that by adopting the corresponding arguments of Mr Gbao, the Defence has clearly disregarded the Practice Direction in significant scale.

III. Leave to Appeal

15. Should the learned Judge accept the Application as a formal request for leave to appeal, the Prosecution submits that pursuant to Rule 73 (B) such decisions are not subject to interlocutory appeal, except "on the grounds that a decision would be in the interest of a fair and expeditious trial"(Rule 73 (B)).

16. The Prosecution submits that the Defence has failed to demonstrate how an appeal of Decision of the learned Judge has the significant effect of ensuring a fair and expeditious trial. The Defence alleges that in the Impugned Decision, the designated Judge erred in two respects.

17. First, it is argued that the designated Judge erred in not allowing the Defence to address and comment on the Four Attachments. The Prosecution notes that this argument, in effect, involves a challenge to the Order on the Defence Objection rather than the Impugned Decision itself.

18. The Defence Application for Leave to Appeal begins by arguing that the designated Judge "correctly took this new and additional material [the Four Attachments] into consideration in reaching his decision in this case", and that the designated Judge "was right to admit and take into consideration all relevant evidence in the making of his decision".[4] The Prosecution notes that this argument directly contradicts the

[4] Defence Application, para. 10.

argument made in the Defence Objection, which was that the Four Attachments should not be admitted. The Defence Application for Leave to Appeal thus now concedes that the designated Judge was correct in rejecting the Defence Objection to the extent that it sought to have the Four Attachments excluded. It seeks to challenge only the designated Judge's decision not to allow the Defence to file a response to the Four Attachments.

19. The Prosecution submits that if the Order on the Defence Objection and the Impugned Decision are read together, it is evident that although the designated Judge did not exclude the Four Attachments, they were not considered by the designated Judge to have any effect at all on his decision. The Order on the Defence Objection stated that the Four Attachments "cannot be considered as fresh evidence, but may only be considered as evidence of a rebutting character, as the [Four Attachments] only add and strengthen the line of argument in the [Original Prosecution] Motion, and ... the [Four Attachments] do not initiate an entire new line of argument". At paragraph 11 of the Impugned Decision, the designated Judge refers to and relies on two documents attached to the Original Prosecution Motion, but makes no reference at all to the Four Attachments. Because the Four Attachments had no effect on the designated Judge in rendering the Impugned Decision, the inability of the Defence to comment on them cannot have caused any prejudice to the Defence. In the absence of any prejudice to the Defence, it cannot be said that an appeal against the Impugned Decision would be "in the interest of a fair and expeditious trial" within the meaning of Rule 73(B).

20. Secondly, the Defence Application for Leave to Appeal argues that the designated Judge erred in ordering 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. In relation to this argument, the Defence Application for Leave to Appeal relies on two decisions of Trial Chambers of the ICTY.[5] However, it is submitted that the order made in this case was not necessarily inconsistent with the practice of the ICTY

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[5] Defence Application, paras. 12-16.

in certain other cases.[6] In any event, as the Impugned Decision expressly found, the precedents of the ICTY and ICTR in matters of witness protection cannot be applied in the Special Court without regard to the different socio-cultural and juridical dynamics prevailing in the locus of the Special Court.[7]

21. Finally, the Prosecution submits the Impugned Decision 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 trial. It is not to be expected that the Appeal Chamber would render a decision contrary to such. Therefore, the Prosecution submits that the leave to appeal raises no grounds as to how it could significantly affect the conduct of the proceedings. There is no reason for which an immediate resolution by the Appeals Chamber of the Application could materially advance the proceedings.

22. The Defence objects the order sought in para. 23 (h) of the Prosecution Motion. The said order is not being suggested to control the identity 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. Since the requirement sought-after also provides 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, the Prosecution submits that a reconsideration of this particular aspect of the said order would not be "in the interest of a fair and expeditious trial" within the meaning of Rule 73(B).

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[6] See *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, 19 March 1999 (permitting the Prosecution to delay disclosure of the name and statements of the relevant witnesses until 10 days before the witness was due to testify in the case). See also *Prosecutor v. Kunarac*, IT-96-23-PT, 20 November 1998.

[7] Impugned Decision, para. 12.

V. CONCLUSION

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

Freetown, 6 June 2003
For the Prosecution,

Luc Côté,
Chief of Prosecutions

Stefan Wehrenberg
Trial Counsel

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. Kordic and Cerkez*, IT-95-14-2-T, 15 February 1999
4. *Prosecutor v. Nahimana, Barayagwiza and Ngeze,* ICTR-99-52-T, 25 February 2003
5. *Prosecutor v. Kunarac,* IT-96-23-PT, 20 November 1998

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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");

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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[1]

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

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with this Motion.

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.

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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

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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

(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

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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]

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.

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]

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[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.

[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

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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).

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IN THE TRIAL CHAMBER

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"),

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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.

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Richard May

Presiding

Dated this fifteenth day of February 1999

At The Hague,

The Netherlands

[The seal of the Tribunal]

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TRIAL CHAMBER I

Original : English

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

Registry: Mr. Adama Dieng

Date: 25 February 2003

THE PROSECUTOR
V.
FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE

Case No. ICTR-99-52-T

DECISION TO RECONSIDER THE TRIAL CHAMBER'S DECISION OF 24 JANUARY 2003 ON THE DEFENCE EXPERT WITNESSES

The Office of the Prosecutor:
Mr. Stephen Rapp
Ms. Simone Monasebian
Ms. Charity Kagwi
Mr. William Egbe

Counsel for Hassan Ngeze:
Mr. John Floyd III
Mr. Rene Martel

Counsel for Jean-Bosco Barayagwiza:
Mr. Giacomo Barletta-Caldarera
Mr. Alfred Pognon

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

Ms. Diana Ellis QC

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;

BEING SEIZED of a Defence motion to allow Ngeze's Expert Witnesses' Report and Testimony filed, on 11 February 2003, requesting a reconsideration of the Trial Chamber's decision of 24 January 2003 on the Defence Expert Witnesses;

CONSIDERING the Chamber's "Decision on the Expert Witnesses for the Defence" made on 24 January 2003;

CONSIDERING the status conference held on 30 January 2003 at which the Defence for Ferdinand Nahimana, Hassan Ngeze and Jean Bosco-Barayagwiza applied for reconsideration of the above-mentioned decision;

CONSIDERING the Curriculum Vitae and report furnished in respect of Expert Witness Dr. Roger Shuy filed on 30 January and a document containing his most recent Curriculum Vitae filed on 31 January 2003;

CONSIDERING the Curriculum Vitae of Mr. John Adams and Professor Edwin Baker filed on 31 January 2003;

CONSIDERING the Report of Professor Edwin Baker filed on 7 February 2003 and his re-disclosed Curriculum Vitae filed on 11 February 2003;

CONSIDERING the Reports and Curriculum Vitae of Prof. Goffoul and Dr. Jiri Toman, filed on 10 February 2003 on behalf of Jean Bosco Barayagwiza;

CONSIDERING the Prosecution's written responses to the proposed testimony of Dr. Roger Shuy and Professor Edwin Baker filed on 7 February 2003 and 18 February 2003 respectively, in which the Prosecution opposes the calling of both witnesses;

CONSIDERING the Curriculum Vitae of Dr. Helmut Strizek and that of Mr. Barrie Collins filed by the Defence for Ferdinand Nahimana on 6 February 2003;

CONSIDERING Rules *94bis* of the Rules concerning Testimony of Expert Witnesses;

HEREBY DECIDES the motion upon written briefs of the parties.

SUBMISSIONS BY THE PARTIES

The Defence for Hassan Ngeze has now filed the Curriculum Vitae and Reports of Professor Edwin Baker and Dr. Roger Shuy. The Defence submits that both Experts have published numerous books and are internationally recognized in their fields of Press Freedom and Socio-Linguistics respectively. Dr. Shuy has evaluated the testimony of the Prosecution's Socio-Linguist Expert, Dr. Mathias Ruzindana, and he has conducted his own research. Furthermore, Dr. Shuy will testify about the science of the Prosecution Expert Witnesses while Professor Baker will testify on aspects of Freedom of Speech.

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On behalf of the Defence for Ferdinand Nahimana, during the status conference, Counsel Ellis argued that the Defence seeks to counter the Prosecution case, which was a "one-sided interpretation of the role of the various political parties." The Defence submits that, through Dr. Strizek, it seeks to put before the Trial Chamber evidence on the negotiations which led to the Arusha Peace Accords and an analysis of their content. Dr. Strizek will dispute the relevant portions of Dr. Alison Des Forge's evidence. Concerning the documents, the Defence submits that this is a very central matter to this case because a conspiracy is a plan to commit genocide yet the Prosecutor relies on Dr. Des Forges as an Expert to produce documents and show that a plan existed. The Defence asserts that there is no evidence that supports the Prosecution contention of a plan, and that the evidence relied upon by Dr. Des Forges in fact can be, and should be, viewed in an entirely contrary manner. Dr. Strizek is the only witness that can testify to this fact. Additionally, even if the Chamber does not have to decide who shot down the plane, if a plan existed, then the people who formulated the plan would be expected to provide the catalyst and that is the way in which Dr. Strizek uses the hypothesis. He will present another hypothesis and is speaking to the documents relied upon by the Prosecutor.

The Defence will also use Dr. Strizek to give an independent contrary view of Ferdinand Nahimana's writings. Furthermore, Dr. Strizek lived in Rwanda in the late '80s, worked there, knows the country and subsequently visited the country. He will therefore be in a position to support the defence contention that Rwanda was not ethnically divided in the years prior to the RPF attack. He is also able to give evidence about the political and historical events of the period.

The Defence for Jean Bosco-Barayagwiza complained that the Chamber was applying double standards and biased against the Defence expert witnesses when the Chamber challenges their status. The Defence Expert witnesses are screened, in advance, whereas those of the Prosecution were not given the same treatment. Toman was refused in advance before he even appeared and before the Tribunal could determine whether he is good or not.

Submission by the Prosecution

The Prosecution argues, inter alia, that based upon Dr. Shuy's Curriculum Vitae filed on 30 January 2003, it is now clear that Dr. Shuy claims no expertise or study of Kinyarwanda and his report also reveals that he is not familiar with the context of Rwanda, 1990-1994. The Prosecution also submits that Dr. Shuy's own lack of knowledge of Rwanda or its language demonstrates the impossibility of finding someone who combines ideal general sociolinguistic and specific Kinyarwanda qualifications. The Prosecution contends that matters to be testified upon by Dr. Shuy were covered by the Defence in cross-examination of Dr. Ruzindana.

The Prosecution submits that the Report of Professor Baker "cannot be seen to be anything other than a law review article covering: a) the general importance of freedom of the press; b) U.S. legal standards of freedom of the press; c) Nuremberg law; d) European Court of Human Rights law; and, e) a review of the ICTR's law." The Prosecution submits that such matters cannot in any way be considered expert testimony, and are to be argued in closing arguments.

During the status conference, the Prosecution submitted, inter alia, that the Trial Chamber, in its recent decision, made its own determination in regard to Dr. Strizek, to which the Prosecution adheres. The submission made by Ms. Ellis is "a preview of closing arguments in this case," which are yet to come. The Defence's summary of Dr. Strizek indicates that he will insist on the fact that there existed a planning of the genocide and is based on the hypothesis that the President's plane was shot down by RPF. Indeed, the position of the Prosecution is that there was a plan. According to the Prosecution, the idea of litigating the issue of the plane crash is irrelevant to the role of the RTLM during the events in Rwanda. The Prosecution states that "the issue of the plane crash is irrelevant to the question of

propaganda that came before and after in which the Tutsis were dehumanised." Prosecution adds that "it can be the RPF, it can be the Hutu extremists, and it makes no difference to the proof that we are putting on."

On Professor Baker's anticipated testimony, the Prosecution argued that it pivots upon a legal issue, namely "what standard this Court adopts in the context of the laws of various nations and the relevant international covenants." Therefore, to have an Expert on that legal issue, an American one in particular, is not something that is helpful to the Chamber and moreover, the Chamber has been repeatedly reminding Mr. Floyd about this fact. Therefore, there is no need for an Expert on the law.

In respect of Professor Toman, his summary indicates that he was responding to why Mr. Barayagwiza did not want to participate in the Trial and how unfair it was that the Appeals Chamber reviewed that initial decision. This is clearly not an appropriate subject for determination by this Trial Chamber or re-determination by this Trial Chamber.

DELIBERATIONS

The Chamber has reviewed the matter and now has the Curriculum Vitae and the Reports of Dr. Roger Shuy and Professor Edwin Baker on behalf of Hassan Ngeze; the Curriculum Vitae and the Reports of Dr. Goffoul and Dr. Jiri Toman, on behalf of Jean Bosco-Barayagwiza.

With respect to the Ngeze Expert witnesses, the Chamber has reviewed the Reports which have been disclosed subsequent to its decision and is satisfied that Dr. Shuy has sufficient relevant expertise. On the basis of the new Report, it is clear he has conducted independent research to enable him to testify generally and in relation to Dr. Ruzindana's testimony. However, the Report submitted by Professor Baker does not lead to a similar conclusion. The Chamber is not persuaded to change its earlier assessment that Professor Baker's testimony covers law-related issues for interpretation by the Chamber and that should appropriately be addressed in Counsel's Closing Brief.

Concerning Experts for Ferdinand Nahimana, namely Dr. Helmut Strizek and Mr. Barrie Collins, the Chamber is of the view that no additional information has been furnished to persuade it to reconsider its decision and yet all Defence Counsel were reminded by the presiding Judge, at the status conference, to furnish all the material available by 7 February 2003 in order to boost up their cases. The Chamber reiterates its earlier decision for the reasons stated therein.

With regard to the request to restore Dr. Jiri Toman to testify for Jean Bosco Barayagwiza, the Chamber finds that no new information has been furnished by the Defence Counsel to persuade it to reconsider its decision.

FOR THE ABOVE REASONS, THE TRIBUNAL VARIES ITS DECISION OF 24 JANUARY 2003 AS FOLLOWS:

1. **ADDS** Dr. Roger Shuy, a Socio-Linguist and Mr. John E. Adams, a Forensic Pathologist to the list of witnesses for Hassan Ngeze, pursuant to Rule 73*ter(E)* of the Rules.

2. **MAINTAINS** its Order of 24 January 2003 in all other respects.

Arusha, 25 February 2003.

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Navanethem Pillay	Erik Møse	Asoka de Z. Gunawardana
Presiding Judge	Judge	Judge

Seal of the Tribunal

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IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding

Judge Antonio Cassese

Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 20 November 1998

PROSECUTOR

v.

DRAGOLJUB KUNARAC

DECISION GRANTING PROTECTIVE MEASURES FOR WITNESS FWS-191

The Office of the Prosecutor:

Mr. Franck Terrier
Ms. Peggy Kuo
Ms. Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr. Slavisa Prodanovic

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 ("the International Tribunal"),

NOTING the "Order On Prosecution Motion Requesting Protective Measures for Witnesses At Trial" issued by the Trial Chamber on 5 October 1998 ("the Protective Measures Order"),

NOTING ALSO the oral presentations made by the parties to the Trial Chamber in relation to witness FWS-191 in *ex parte* hearings on 11 November 1998, and

REMAINING SEISED of the request for protective measures in respect of witness FWS-191 in the confidential "Motion Requesting Protective Measures for Witnesses at Trial" together with the "Prosecutor's Document of Witness Information" annexed thereto, filed by the Office of the Prosecutor ("the Prosecution") on 4 September 1998 ("the Request"),

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CONSIDERING Articles 20, 21 and 22 of the Statute of the International Tribunal and Rules 75 and 79 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"),

CONSIDERING that the relief requested by the Prosecution in the Motion is appropriate for the privacy and protection of the witness but is still consistent with the rights of the accused,

PURSUANT to Rules 69, 75 and 79,

HEREBY GRANTS the Request, and **ORDERS** as follows:

1. The Prosecution shall be released from the obligation to disclose the name and unredacted statement of witness FWS-191 until such time as the arrangements currently being made by the Victims and Witnesses Unit of the International Tribunal have been fully implemented;
2. The Prosecution shall inform the Trial Chamber and the Defence when those measures have been fully implemented and shall disclose the unredacted statement of witness FWS-191 to the Defence within seven days thereof and, in any event, not less than 30 days before the date set for trial;
3. All provisions of the Protective Measures Order relating to pseudonymed witnesses shall apply also to witness FWS-191;
4. The Defence counsel, the accused and their representatives who are acting pursuant to their instructions or requests, shall notify the Prosecutor of any requested contact with witness FWS-191 or the relatives of this witness. The Prosecutor shall make arrangements for such contact as may be determined necessary and may allow contact by the Defence counsel only;
5. The testimony of witness FWS-191 shall be heard in closed session; however, edited recordings and transcripts of the sessions shall be released to the public and to the media after review by the Prosecution in consultation with the Victims and Witnesses Unit.

Any breach of this Order shall be dealt with in terms of Rule 77 of the Rules.

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

_____

Florence
Ndepele
Mwachande
Mumba
Presiding

Dated this twentieth day of November 1998

At The Hague

The Netherlands

[Seal
of

the
Tribunal]

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