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SCSL-2003-06-PT-024

(262-343)

262

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

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 29 April 2003

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL – 2003 – 06 – PT

PROSECUTION REPLY TO RESPONSE OF THE DEFENCE TO THE PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions

Brenda J. Hollis, Senior Trial Counsel

Defence Office:

Terence Michael Terry
Defence Counsel

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INTRODUCTION

The arguments raised in the submission filed by Defence Counsel should be rejected. Defence Counsel's assertions fail to appreciate the difference between Rule 69 (C) of this Court's Rule's of Procedure and Evidence (Rule) and Rule 69 (C) of the ICTY' Rules of Procedure and Evidence (Rule). In addition, the assertions are either incorrect or are not supported by the jurisprudence of the international ad hoc tribunals.

ARGUMENT

I. Rule 69 (C)

1. Rule 69 (A) states that, in exceptional circumstances, a Judge or Trial Chamber may order the non-disclosure of the identity of a victim or witness.

Rule 69 (C) states that "the identity of the victim or witness shall be disclosed in sufficient time before the witness **is to be called** to allow adequate time for preparation of the prosecution and the defence." (Emphasis added.) The ICTY Rule 69, on the other hand, states that "the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence." *See* Authority No. 2 to the Prosecution motion. There is a significant difference between sub-part (C) of the two rules. This Court's Rule reflects the determination that the appropriate triggering event for disclosure of the protected witnesses' identity is the time they are being "called" to testify, not the commencement of trial as is the case in the ICTY. Defence Counsel's assertions fail to deal with this critical difference, rather relying on decisions of the ICTY which must deal with disclosure in the context of that Tribunal's Rules.

2. Current Rule 69 (C) of the ICTR Rules of Procedure and Evidence is consistent with the approach taken by this Court and the relief requested by the Prosecution. The Judges of ICTR amended the language of Rule 69(C) during their 12th Plenary Session, held on 5-6 July 2002. They replaced the existing language, *"shall be disclosed in sufficient time prior to the trial"* with "shall *be disclosed within such time as determined by the Trial Chamber"*. This amendment reflected the common practice of the ICTR , and was done to afford The Chamber "*the discretion to regulate the disclosure of identifying information of protected witnesses as it deems fit and proper", (See Prosecutor v. Emmanuel Rukundo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, ICTR- 2001-70-I, 24 October 2002, paragraph 22).

3. Delaying the disclosure of identifying data until no later than 21 days before the witness testifies is consistent with the language of this Court's Rule 69 (C). Reasonable minds may differ as to how much time constitutes "sufficient time ... to allow adequate time for preparation of ... the defence." However, the triggering event for such calculation is clearly the date on which the witness will testify, not the commencement of trial. As to what constitutes sufficient time before the witness testifies, the Prosecution reiterates its position that 21 days prior to such testimony is sufficient time. Given that the substance of the witness' testimony will have been previously disclosed to the Defence, 21 days is sufficient time to allow the Defence to conduct any remaining investigation, e.g., inquiries relating to credibility of the identified witness. *See Prosecutor v. Protais Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003.

II. Five conditions for anonymity set forth in the decisions in *Tadic* and *Blaskic*

4. Defence Counsel incorrectly relies on the five conditions set forth in the *Tadic* and *Blaskic* decisions and misapprehends the meaning of anonymity as defined in those decisions. The five conditions are in fact, requirements that

must be met before a witness will be allowed to **testify anonymously**, i.e. before the Court will allow testimony from a witness whose identity is **never made known** to the Accused or the Defence. *See Prosecutor v. Tadic*, ICTY, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paragraphs 53 – 86, in particular paragraphs 62 – 66; *Prosecutor v. Blaskic*, ICTY, IT-95-14, Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996.

5. In the motion now before the Court, the Prosecution is not seeking anonymity for any witness; rather, the Prosecution seeks delayed disclosure of identifying data. As for delayed disclosure of identifying data, such is common practice before both ad hoc tribunals, as shown by the cases cited herein and in the Prosecution motion, and as reflected in the language of *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, ICTY, IT - 02-54 & IT-01-50, 19 February 2002, paragraph 28. Even though the *Milosevic* Trial Chamber found it regrettable in the context of former Yugoslavia, the Trial Chamber noted "... the granting of such protective measures [delayed disclosure of identifying data of protected witnesses] ... has become almost the norm in proceedings before the Tribunal."

III. Conditions which must be met for the requested relief to be granted

6. Defence Counsel has made no showing that the practice of either the ICTY or ICTR requires proof of each of the five conditions set forth in *Tadic* and *Blaskic, supra*, before granting delayed disclosure of identifying data. Indeed, the Prosecution submits such is not the practice. However, the jurisprudence of the ICTY and ICTR does indicate that the party seeking protective measures must show the existence of a real fear for the safety of a witness or the witness' family, an objective basis for the fear. In addition, the plain language of Rule 69 establishes a requirement that there be a showing of exceptional circumstances.

7. The existence of these conditions is established by Mr Lengor's Investigator's Statement, dated 05 March 2003, and the 7 April 2003 Declaration of Dr. White, Chief of Investigations.

8. However, to further assist the Court in response to Defence Counsel's submission, the Prosecution provides four additional attachments, the Declaration of Allan Quee, Director of Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE), a national NGO which deals directly with ex-combatants, dated 25 April 2003 (Attachment A); Declaration of Saleem Vahidy, Chief of the Witness and Victims Unit, SCSL, dated 28

April 2003 (Attachment B); letter from President Kabbah to the President of the UN Security Council, dated 14 March 2003, and enclosures (Attachment C); Declaration of Keith Biddle, Inspector General of Sierra Leone Police, dated 29 April 2003 (Attachment D). All these attachments support the relief requested by the Prosecution.

The Investigator's Statement of Morie Lengor

9. The existence of real fear for the safety of potential witnesses is set forth in Mr Lengor's Investigator's Statement, dated 05 March 2003, at paragraphs 6, 7 and 8. There is no requirement that the potential witnesses themselves directly express this fear to the Court. As is the case herein, fears for the safety and security of these witnesses and their families may be expressed by persons or entities other than the witness, e.g. the Prosecutor, the Victim and Witnesses Unit. *See Tadic, supra*, paragraph 62; *see also*, *Rwamakuba,* ICTR-98-44-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 22 September 2000, paragraph 10.

10. Paragraphs 9 and 10 of Mr Lengor's statement set forth his assessment that the fears are genuine and well founded. In paragraph 9 and paragraph 7, Mr Lengor sets forth circumstances providing an objective basis for these fears. These circumstances include the presence of perpetrators who actually carried out the crimes alleged in the indictment in the general population, the fact that potential witnesses live among these perpetrators, the fact that the Government of Sierra Leone is not actively prosecuting such perpetrators, and the fact that many potential witnesses live among these perpetrators in remote areas where there is no appreciable police presence or other security available. The Prosecution submits these circumstances are sufficient to reflect a security situation *vis a vis* potential witnesses which supports applying the requested protective measures to the categories listed in the Prosecution motion. *See Rwamakuba, supra*; and the authorities cited in the Prosecution motion. In addition, the objective basis for the fears expressed is provided by the "horrendous nature and ruthless character of the alleged crimes". *See Tadic Decision, supra*, paragraph 62.

11. As to the format of the Investigator's Statement or More Lengor and the language therein, Defence Counsel's objections are unfounded. The Investigator's Statement is dated 05 March 2003. The date appears immediately below the caption "Investigator's Statement". The Prosecution is aware of no Special Court requirement that Mr. Lengor place the date of the document next to his signature line or signature at the end of the document. Jurisprudence from the ICTR indicates that the fact a declarant does not himself date the document does not detract from the validity of the assertions contained therein. *See Prosecutor v. Nyiramasuhuko and Ntahobali*, ICTR-97-21-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 27 March 2001, paragraph 18, cited in Prosecution's

motion, wherein the Trial Chamber rejects the Defence assertion that an Affidavit must be dated by an affiant to be valid. The Trial Chamber determined that the signature of the affiant was sufficient.

12. Defence Counsel places undue reliance on the use of the word "may" in paragraph 4 of Mr Lengor's statement. The word "witnesses", as used by the Prosecution, includes "witnesses" and "potential witnesses". In reality, until such time as the witness is actually called, all "witnesses" are in fact "potential witnesses" or witnesses who "may" appear. That is certainly true at this early stage of the proceedings. Persons change their minds about their willingness to testify, or face changed circumstances which render them unable to testify; trial dynamics may render some persons' testimony irrelevant or unduly cumulative, so that those persons are not called. Protective measures, to be effective, must be proactive; the Court could not put in place effective protective measures if it was forced to wait until the witness was actually called.

13. The use of the word "may" and the term "potential witnesses" merely reflects reality and, in the Prosecution's submission, has no bearing on the appropriateness of the protective measures requested. *See Rwamakuba, supra,* and *Prosecutor v. Nzirorera*, ICTR-98-44-I, Decision on the Prosecutor's Motion for Protective Measures, cited in the Prosecution motion, which grant protective measures for categories of witnesses based on its finding that the security situation could put at risk the lives of victims and **potential** Prosecution witnesses (emphasis added); *see also Nyiramasuhuko and Ntahobali, supra,* wherein the Trial Chamber states that it is convinced that a security situation existed which could endanger the lives of witnesses who **may** be called to testify, and therefore, found that that protective measures were warranted. (Emphasis added)

The Declaration of Chief of Investigations, Dr. White

14. The declaration of the Chief of Investigations also provides information which establishes both a real fear for the safety of witnesses and their families and an objective basis for these fears.

15. Dr. White states in his declaration that his duties include monitoring and assessing security developments in Sierra Leone and neighbouring countries, and that such duties place him in frequent contact with Special Court and Sierra Leonean security personnel and with regional sources. Defence Counsel has not disputed these statements. Dr. White's resultant assessment that the security situation in Sierra Leone and neighbouring countries is volatile is within the scope of his duties and is based on a variety of sources. The Prosecution submits such an assessment is appropriate and should be considered in the resolution of the Prosecution's motion. *See,* for example, *Nyiramasuhuko and Ntahobali, supra,* paragraph 18, wherein the Trial

Chamber found that the Commander in charge of the Witness Management Unit of the OTP, whose duties included constantly monitoring security reports prepared by members of his unit, "can present an updated assessment of the security situation...."

16. As to Defence Counsel's arguments regarding specificity, the Prosecution submits that the Investigator's Statement and Declaration are sufficiently specific to grant the relief sought in the Prosecution motions. *See Rwamakuba, supra*, wherein similar protective measures were granted and the Defence objections to specificity in supporting documents were implicitly rejected by the Trial Chamber.

Additional bases

17. The declaration of the Chief of Investigations also provides information which establishes both a real fear for the safety of witnesses and their families and an objective basis for these fears, as do Attachments A, B and D.

IV. Exceptional circumstances

18. The circumstances set forth by Mr. Lengor, the Chief of Investigations, and in Attachments A through D, not only provide a sufficient basis for the existence of real fear, and an objective basis to support the validity of the fears expressed, but also provide a sufficient basis to find exceptional circumstances exist to support the relief requested, including protective measures for categories of witnesses. The Prosecution submits that, where, as here, the security situation relative to witnesses in a country or region puts all witnesses in that country or region potentially at risk, based on real and objectively validated fears, exceptional circumstances exist to justify providing protective measures for categories of people, as has been done in the ICTR. In addition to the authorities cited in the Prosecution motion, *see also Rwamakuba, supra,* wherein the Trial Chamber found that the security situation **could be** of such a nature to put at risk the lives of victims and potential Prosecution witnesses, and granted the relief for categories of witnesses.

19. Defence Counsel seems to rely on two reports to show the three requirements are not met herein, and to distinguish between the situation in Sierra Leone and that in Rwanda. The two reports state that the security situation in Sierra Leone "remains calm and stable" (UNAMSIL Security Report) and that "the human rights situation in Sierra Leone is improving" (U.S. Department of State Report). However, a closer reading of the U.S. State Department report indicates "there were serious problems in several areas." "There were some reports of abuses committed by former RUF rebels." The report contains many examples of violence by members of former warring groups, which violence was not acted upon by the government of Sierra Leone. It is

interesting to note that the one page of the UNAMSIL report which is attached by Defence Counsel mentions the unstable situation in the neighbouring countries of Liberia and Ivory Coast. Thus, the UNAMSIL submission supports the Prosecution request for protection for witnesses outside of Sierra Leone but within the region of West Africa. Neither the State Department report nor the UNAMSIL report address the real issue before the Court, the concern of the general population of Sierra Leone, including victims and potential witnesses, about their security, but rather, address the overall security and human rights situation in the country.

20. The Prosecution submits there is much commonality between the situation in Sierra Leone and that in Rwanda: The victims, witnesses and the perpetrators live together in close knit communities; the situation in the region surrounding Sierra Leone is still volatile as reflected by recent events in Ivory Coast and Liberia which involve members of the same factions which fought in the Sierra Leone conflict. This commonality supports the application of similar protective measures, such as those requested by the Prosecution.

V. Differences between the jurisprudence of the ICTR and ICTR

21. The potential divergence in the evolving jurisprudence of ICTR and ICTY relate primarily to the granting of requests for protection of categories of potential witnesses. The Prosecution submits the approach taken in the jurisprudence of the ICTR, which has not been struck down by the Appeals Chamber of the ad hoc tribunals, reflects a similar factual situation, supports the Prosecution requests for protective measures for categories of witnesses, and is appropriate here. Furthermore, the Prosecution submits that the fact that the Rules of this Court were originally taken from the Rules of the ICTR, gives great relevancy to ICTR practices. In regard to delayed disclosure of identifying data, the Prosecution submits, as discussed above, such delayed disclosure is common in the practice of the both the ICTR and ICT, though the triggering events for disclosure are different.

VI. Statute of the Special Court

22. Defence Counsel omits very key language when he asserts that the Statute of the Special Court states that the Trial Chamber shall be guided by the jurisprudence of the Supreme Court of Sierra Leone. Article 20 of the Statute states that "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone." The Prosecution concurs with the premise which apparently underlies Defence Counsel's assertion, i.e., the law which guides the Appeals Chamber should also be the law which guides the Trial Chamber and those who practice before it.

23. However, the Prosecution submits the above quoted language means that, in deciding cases brought under Article 2, 3 and 4 of the Statute, the applicable jurisprudence is that of the international ad hoc tribunals. That is appropriate since those articles encompass internationally recognized crimes, and the body of international law that develops regarding such crimes should be consistent and international in character. However, in deciding cases brought under Article 5 of the Statute, the Court would appropriately be guided by the law as determined by the highest court of Sierra Leone, the Supreme Court.

24. As the charges brought against this Accused are alleged as violations of Articles 2, 3 and 4of the Statute, the international jurisprudence of the ICTY/R provides the guidance.

VII. Objections to specific relief requested in Prosecution motion, paragraph 20

25. *a) allowing the Prosecution to withhold identifying data until 21 days before the witness is to testify* : The opposition to this request must relate to the suggestion that such delayed disclosure continue until 21 days before the witness testifies. The other language of the request is fully consistent with Rule 69 (C). Reasonable minds may differ as to how much time constitutes "sufficient time ... to allow adequate time for preparation of ... the defence." The Prosecution reiterates its position that, as the substance of the witness' testimony will have been previously disclosed to the Defence, 21 days is sufficient time to allow the Defence to conduct any inquiries relating to credibility of the identified witness.

26. *c) use of pseudonym for protected witnesses and the understanding that the Defence shall not make or encourage an independent determination of the identity of any protected witness*: The Prosecution submits there is no basis for opposition to this request. The jurisprudence of both the ICTY and ICTR clearly supports the use of pseudonyms for protected witnesses. As for the understanding that the Defence will not attempt to independently identify protected witnesses, in the event the Court grants delayed disclosure of identifying data, the Prosecution submits such attempt would be clearly inappropriate. Such attempt would, in the view of the Prosecution, constitute a violation of the Court order which violation could be subject to contempt proceedings.

27. g*) maintain a Defence log containing the particulars of each person or entity to whom non-public information is disclosed and the date of such disclosure; Defence shall ensure those to whom the material is disclosed comply with non-disclosure requirements*: These measures provide the most direct means by which this Court can exercise oversight regarding the

implementation of protective measures. Maintaining a log will provide the Court a means, if necessary, to pursue alleged violations of its orders. Requiring the Defence to ensure those to whom they provide protected material comply with existing orders is a practical means to maximize the protections the orders provide.

28. *h) provide a list of members of Defence team who have access to protected information and to update that list as the composition of that team changes*: Such requirement also provides this 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.

29. *k) requiring a written request for permission to contact any protected witness or relative of such person*: This provides a very important protection for witnesses. The Prosecution submits that the Defence has no right to conduct pre-trial interviews of Prosecution witnesses. *See* Pros*ecutor v. Kovacevic*, ICTY, IT-97-24, Decision on Prosecution Motion to Protect Victims and Witnesses, 12 May 1998, citing *Prosecutor v. Delalic et al,* ICTY, IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997, and denying pre-trial Defence interviews of Prosecution witnesses. Should the Court be disposed to allow some contact with witnesses who consent to such contact, this provision would permit it. However, the provision ensures that the Court is aware of all requested contacts by the adverse party, and provides the Court a mechanism by which to protect the privacy and security of the witnesses. It prevents an opposing party from appearing uninvited at the residence of a witness and intimidating the witness simply by such unannounced and uninvited appearance. It also protects the wishes of witnesses who wish to have no contact with the opposing party or who consent to such contact only if certain conditions are met, such as contact away from the residence of the witness.

30. As to any remaining points raised by Defence Counsel, the Prosecution relies on the submissions contained in its motion.

CONCLUSION

The Court should grant the relief requested in the Prosecution motion for protective measures.

Freetown, 29 April 2003

For the Prosecution,

Luc Côté,
Chief of Prosecutions

Brenda J. Hollis
Senior Trial Counsel

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A. Declaration of Allan Quee, Director of Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE), a national NGO which deals directly with ex-combatants, dated 25 April 2003.
B. Declaration of Saleem Vahidy, Chief of the Witness and Victims Unit, SCSL, dated 28 April 2003.
C. Letter from President Kabbah to the President of the UN Security Council, dated 14 march 2003 and enclosures
D. Declaration of Keith Biddle, Inspector General of Sierra Leone Police, dated 29 April 2003.

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DECLARATION
FROM
POST-CONFLICT REINTEGRATION INITIATIVE
FOR DEVELOPMENT AND EMPOWERMENT
(PRIDE)

Background

PRIDE is an indigenous non-governmental organization working to advance lasting reintegration and development by ameliorating the socio-economic and mental conditions of ex-combatants and war affected parties. We were formed in April of 2001 and now consist of four staff and 35 volunteers, actively involved in projects throughout the country. Our main projects are (1) an effort to educate and consult with ex-combatants about the TRC and the Special Court, and (2) a project sensitizing ex-combatants about ending cycles of sexual and gender based violence. We are supported by the Open Society Institute for West Africa, the United States Embassy in Sierra Leone, and private individuals. We have also received consultancy contracts from the International Center for Transitional Justice, Global Witness, and the Truth and Reconciliation Commission.

PRIDE's mission is to support ex-combatants from all factions who are committed to reintegration. We work with former rank-and-file fighters and through relationships with former faction leaders in the areas we are active. We continually study ex-combatant attitudes towards the TRC and Special Court and provide policy analysis based on our findings.

In November of 2002, PRIDE launched a project to "Educate and Consult with Ex-Combatants about Accountability Mechanisms" (ECECAM). Since that time, we have reached approximately 7,000 ex-combatants through workshops and other programs. Our efforts have included ex-combatants in every district of the country except Kambia. The ECECAM project has concentrated in the following locations – Freetown, Kailahun, Koidu and Tongo (Kenema district), Pujehun and Makeni. As suggested by this geographical distribution, we work with all factions from the conflict, most notably ex-RUF, ex-AFRC/SLA, and CDF.

In October of 2002, PRIDE released a national survey of ex-combatants awareness of and attitudes towards the TRC and Special Court. The research project included a national survey and focus groups of ex-combatants in four locations around the country. We conducted the research under a consultancy with the International Center for Transitional Justice (available at *http://www.ictj.org/downloads/PRIDE%20report.pdf*).

Since the indictments in early April, we have communicated with ex-combatants in the following areas – Zimmi, Tongo, Kailahun, Bo, Kenema, Magburaka, Makeni, Kabala, Moyamba, and the Western Area (urban and rural). During all of these trips, we have been assessing the threat to and by ex-combatants in relation to the Special Court.

Declaration of Threat to Witnesses

Based on our interactions with ex-combatants from all factions throughout the country, we believe that Sierra Leoneans who give statements to the Special Court are at some

degree of risk. Ex-combatants who provide testimony against former commanders or colleagues fear retribution and we have extensive direct experience to suggest that such perceptions are justified. Furthermore, we hear regularly from non-combatants in these communities that they fear harm if they speak to the Special Court, and our experience with ex-combatants suggests that this perception as well is justified.

Since we began our work relating to the TRC and Special Court, ex-combatants have told us fiercely and consistently that they are worried about being called to testify before the Special Court because they fear being hurt or killed by their former commanders. Since the indictments and arrests in early April, the fear has intensified considerably. For the first time since we began our ECECAM efforts, we have had trouble getting ex-combatants to attend events in some locations because they are scared of being seen as speaking to the Special Court. We discovered this by speaking in informal setting to those ex-combatants who chose not to attend.

All factions express this fear. For the past year, the former RUF fighters have been slightly more concerned, and since the arrests, it is the former CDF members that are the most concerned about being harmed if they testify.

In our survey, we found that willingness of ex-combatants to testify was very low until we told them that the Special Court would be providing witness protection. For example, of ex-RUF members in the survey, before our sessions, only 27% said they would give testimony, but after our session at which witness protection was discussed, that number rose to 55%. PRIDE believes that this change demonstrates a fear of retribution from giving statements to the Special Court.[1] Our subsequent experience with ex-combatants confirms these findings, namely that ex-combatants are extremely concerned about witness protection with regards to the Special Court.

The report also notes that, "A corollary to the rank-and-file's witness protection concern is a continuing economic dependence on their former commanders. The rank-and-file in Bo particularly made it clear in the focus groups that ...[m]any still lack economic independence from commanders and have deeply ingrained fears of disobeying or betraying them."[2] Again, our subsequent experience confirms that most ex-combatants fear their former commanders not only because of physical threats but also because those same individuals still control the NGOs and other sources of jobs, the money, and the distribution of food on which most ex-combatants rely. For these reasons, ex-combatants feel particularly vulnerable because their life can depend on it.

Our assessment of the threat to witnesses also comes from hearing direct threats from individuals, including high ranking ex-combatants and faction loyalists. For example, one former Chief Security Officer in the East who made it clear that there would be

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[1] Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court", page 17 at http://www.ictj.org/downloads/PRIDE%20report.pdf. We believe that this increase in willingness to participate may also result from other information, such as the knowledge that the Special Court is only going after those who "bear the greatest responsibility."

[2] Ibid, page 18.

problems for the Special Court and anyone who was with them. The first time our staff visited Kailahun, a group of ex-combatants threatened to "take our heads off" if we came around talking about the Special Court.

Also, most of our volunteers are ex-combatants, and they are regularly threatened and branded "traitors" for being perceived to cooperate with the Special Court. We explain that our job is to provide accurate information about the Special Court rather than to advocate for it, but the environment is very tense and the threat of violence towards those seen as being with the Special Court are very real.

We also hear from ex-combatants and from non-combatant residents of the many communities that we visit that they are particularly scared because many former high-ranking perpetrators are still in the army and thus can hurt them. Specifically, some of those who have been indicted still have strong allies in the Army, so all people are afraid that those strong men will punish them for helping to put their friends in prison.

Signed,

Allan Quee, Director

25th April 2003

Date

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SPECIAL COURT FOR SIERRA LEONE
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DECLARATION

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

I have served as Chief of the Witness and Victims Unit at the SCSL since 6 January 2003. Essentially I am a police Officer from Pakistan with over 23 years of policing experience, and have held several important and sensitive postings there, including Chief of Karachi Police, a city of over ten million inhabitants. In the years before joining the UN in 1998, I was the Provincial Chief of the Anti-Kidnapping for Ransom Unit, and investigated and prosecuted several high profile cases, and also established a Witness Protection Unit to look after threatened witnesses. From 1998 to December 2002, for over 4 years, I was Chief of the Witness and Victims Support Section (Prosecution) at the International Criminal Tribunal for Rwanda (ICTR), and dealt with over 400 protected witnesses and with all witness management issues, including threat assessments and relocations. I have also written a number of reports on protection issues at the request of the various Trial Chambers of the ICTR.

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

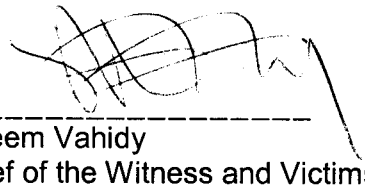
The 10 years of civil war in Sierra Leone has really damaged the whole system of Administration of Justice, and the overall level of protection available to the citizens is generally speaking, less than what it should be, although the Government is making every effort to revamp the Army, Police and Court system, doubts as to the efficacy of the institutions still remain, more so in the minds of the witnesses. The situation in Sierra Leone was further aggravated by the fact that the Government institutions like the Army and Police took sides with various parties to the conflict, and their impartiality became questionable.

In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in the country where the crimes took place, and the witnesses feel particularly vulnerable. The witnesses do not actually trust anyone except the Court itself, operating through its officers. It should be borne in mind that, witnesses either for the Prosecution or the Defence, are always a delicate resource, and always need reassurances, and often times persuasion, before they are willing to testify. Thus, leaving aside issues of personal safety, even a small incident or a perceived threat may discourage the witness from coming to testify.

At present the Unit is already looking after numerous witnesses, and several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested factions to determine their exact locations, probably with a view to carrying out reprisals.

Given the resources at the disposal of the Unit and the overall financial constraints of the SCSL, it is not possible for the Unit to implement complete protective measures for all witnesses, such as relocation to safe premises, change of identity, and other similar methods. Therefore utmost efforts are concentrated on keeping secret and confidential the fact that a person is a potential witness. The longer the witness' identity is withheld, the safer he or she is going to remain.

Therefore, it should be remembered that full un-redacted disclosure at the initial stages of the proceedings implies that witnesses will be completely identified to the accused several months or even longer before they are called for testimony. This certainly increases the risk of threats or even more severe actions being taken against them, and would make the work of the Witness Unit, and indeed the Court itself, much more difficult.



Saleem Vahidy
Chief of the Witness and Victims Unit
The Special Court for Sierra Leone (SCSL)

Date: 28 Apr 03

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Security Council

Distr.: General
18 March 2003

Original: English

03-28729 (E) 210303
0328729

Letter dated 14 March 2003 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council

On instructions from my Government, I have the honour to transmit herewith two letters and an aide-memoire addressed to the Secretary-General by His Excellency, Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone (see annex).

I should be grateful if the present letter and its annex could be issued as a document of the Security Council.

(*Signed*) Joe Robert **Pemagbi**
Ambassador
Permanent Representative

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Annex to the letter dated 14 March 2003 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council

Review of progress made so far in consolidating peace and security in Sierra Leone and in promoting national recovery

14 March 2003

I am pleased to inform you that my Government recently undertook a brief review of the outcome so far of the collective efforts of the Government of Sierra Leone and the international community, particularly the United Nations Mission in Sierra Leone (UNAMSIL), geared towards the consolidation of peace and security in Sierra Leone and the promotion of the recovery of the country from the effects of the war.

The review was presented in the form of an aide-memoire at the latest of a series of high-level group meetings periodically held between the Government and UNAMSIL (see enclosure I).

I have also addressed a separate letter to you with regard to the security needs of the Special Court for Sierra Leone, which has now started issuing indictments (see enclosure II).

(Signed) Alhaji Ahmad Tejan Kabbah
President of the Republic of Sierra Leone

Enclosure I

AIDE MEMOIRE

REVIEW OF PROGRESS ACHIEVED SO FAR IN CONSOLIDATING PEACE AND SECURITY IN SIERRA LEONE AND IN PRQMOTING NATIONAL RECOVERY

INTRODUCTION

1. This Aide Memoire seeks to highlight the progress that has been made in the efforts to restore and consolidate peace and security in Sierra Leone. It also highlights areas of ongoing, new and anticipated difficulties, which would require close monitoring. In this regard, the Government of Sierra Leone will need to continue to work in close collaboration with the international community, particularly UNAMSIL, if it should succeed iii meeting these chaLlenges.

SECURITY ISSUES

2. **Perceived threat to security.** Even with the end of the rebel war and the holding of violence free and successful Presidential and Parliamentary elections, Sierra Leone continues to face the following direct external and internal security threats, among others:

(a) External threats.

(i) the border area between Sierra Leone and Liberia is home to dissident groups whose loyalty is transient and are known to serve as a recruitment poo l for both the LURE) and the Armed Forces of Liberia (AFL), and possibly by factions in the Ivorian conflict. There is also strong intelligence indicating the presence in Liberia of the former RUF battlefield commander. Sam Bockari and 1500/1800 RU F combatants.

(ii) recruitment of ex-combatants from Sierra Leone by warring factions in the sub region poses medium to long-term disarmament and reintegration problems in the event of their returning to the country armed.

(iii) the presence in Liberia of Sam Bockari and his group could provide President Charles Taylor with a significant capability to destabilize Sierra Leone again if the opportunity presented itself

(iv) the fighting in Liberia continually creates tension along the Sierra Leone/Liberian border in Eastern Sierra Leone. It directly causes the movement of displaced persons/refugees into Sierra Leone. This places additional pressures on the already fragile economy of tile country.

(v) the existence of organised units of Sierra Leonean mercenaries engaged in sub-regional conflicts may form the basis of future insurgencies.

(b) Internal threat.

(i) recent attacks on military facilities in the east end of Frcetown involving a former faction leader, J P Koroma suggest that there remain potential dissident groups who would be disposed to staging coup attempts if the opportunity presented itself;

(ii) there are frequent challenges to Government authority by vigilante type groups mainly in the diamond mining areas who take advantage of the inability of Government to enforce its authority because of the continued weakness of its institutions;

(iii) disaffection amongst the unemployed youth groups whose expectations cannot be fulfilled by government because of its weak resource base, leaves them open to exploitation by criminal and anti-democratic elements;

(iv) the commencement of criminal proceedings by the Special Court against key figures of the former waring factors may create new tensions which will further stretch the capacity of government and UNAMSJL to maintain law and order;

(v) there may still be disloyal elements in the Republic of Sierra Leone Armed Forces (RSLAF). Maintaining attractive Terms and Conditions of Service for the forces is therefore critical even as the government resource base is currently weak. Failure to do so could present a catalyst for dissent;

(vi) the RSLAF has not yet developed the capability to provide Military Aid to the Civil Power. This function is currently the responsibility of the Operational Support Division (OSD) in the Police but do not themselves have limited equipment and.training.

3. Government continues to develop the necessary policies and strategies as well as provide resources to effectively address the above-mentioned threats. However, Government's efforts are being undermined by severe resource constraints and other capacity problems arising mainly from a fragile economy, weak political and security institutions as well as weak human resource base.

Strengthening of RSLAF. The RSLAF is still in transition and whilst it is being progressively equipped and trained mainly by the British-led International Military Advisory and Training Team (IMATF), it is also thinly spread around the country and therefore it is not yet in a position to provide enduring, credible and sustainable security to Sierra Leone. The current deployment programme codenamed Operation PERU seeks to re-build and house the RSLAF in approximately I 0 sites as opposed to the current 50 locations. This programme may take 213 years to complete and must run parallel with aligning provincial/district boundaries with brigade boundaries.

Strengthening of the SLP During the almost 11 year civil war in Sierra Leone, the Sierra Leone Police lost many of its personnel either by death or some moved to other countries as refugees. Up to date, it has been difficult to arrive at an exact personnel strength of the SLP.

6. The SLP also suffered heavy damage to its infrastructure as a result of the war. This is now being rebuilt with Government and donor partner resources.

7. There is an uneven and sparse deployment of personnel in the country due to the inadequacy of Police accommodation and stations countrywide.

8. An estimated personnel strength of 9,500 is required for effective nationwide police deployment. The personnel strength is currently only about 7700, and at the current rate of recruitment and training the total strength by 2004 will be only 8884. Therefore both recruitment and training need to be accelerated. This requires substantial resources, improved infrastructure, particularly the expansion of the Police Training School (PTS), and the prompt deployment of training advisers, mentors and strategic advisers promised by UNCIVPOL.

9. Resources are currently being provided by the Government, DFID and the UNOP to address some of' these difficulties, including the rebuilding of police infrastructure. However, these efforts, particularly the expansion of the PTS and the rebuilding of barracks and police stations, need to be accelerated if the efficiency of the police, as envisaged in UNSC Resolution 1436(2002) is to be assured.

10. **Future of ex-Combatants**

a. DDR Completion. Phase-Out and Future of Ex-Combatants

The NCDDR plans to complete its mandate and phase out by 31 December 2003. This was confirmed with donors at the last CG meeting in Paris (Nov 2002).

b. Reintegration.

About 56,751 ex-combatants registered for reintegration support all over the country by the end of 2002. 75% (i.e. 38,689) of these either in ongoing or completed programmes or awaiting to be placed in approved projects. The total outstanding caseload of ex-combatants is estimated to be 14,700. It is planned that they will be placed into programmes before the deadline of 30 June 2003.

c. Challenges

i. The high inter-District mobility of the outstanding caseload of ex-combatants together with their settlement in very dispersed villages/locations is posing serious difficulties for the programme.

ii. Inability in the border areas has prevented the operation of credible agencies capable of providing sustainable reintegration support in the affected chiefdoms.

d. Funding. Additional funding requirement to complete the progranune is about IJSS6 million. No additional pledges of financial support have been received to meet this gap. Although Germany and the EU have indicated they would consider to provide further assistance later.

11. The Way Ahead. Reintegration is a long-term process and really takes place at community level. After NCDDR's short-term support to the ex-combatants, other key players will have to take over the longer-term process of generating jobs and opportunities for them (and the other unemployed). Although we are witnessing some positive developments in this direction in some areas and sectors, more needs to be done to prevent disillusionment among them.

12. A transition programme that focuses on "advocacy" and cautious support post DDR has been developed. This entails identifying some capacity within the National Commission for Social Action (NaCSA) to advise the Commissioner on specific ex-combatant related problems that could be addressed by the existing programmes within the Commission. Discussions are on-going with NaCSA Management.

13. It is anticipated that UNAMSIL's presence during that transition phase would help to provide confidence in the process.

14. **Disbandament of CDF Structures.** In November 2001, the National Security Council chaired by His Excellency the President agreed to dismantle the command structure of the Civil Defence Force (CDF) and dissolved its national coordinating office.

15 This policy has been progressively implemented. All the CDF ex-combatants have now been disarmed and demobilized.

16. However, traces of CDF command structures continue to exist in parts of the rural areas. Government is responding to these challenges with the implementation of its programme for the extension of police presence and the general restoration of government's authority throughout the country.

RESTORATION OF GOVERNMENT AUTHORITY

17. The National Recovery process has been on going since the end of the war in January 2002. The immediate challenge was the restoration of civil authority in the seven districts that were hitherto held by the rebels. Recovery and Restoration processes commenced in April with the establishment of the National Recovery Committee chaired by the Vice President. The NRC had the mandate to coordinate the implementation of the restoration and recovery processes nation-wide.

18. By August 2002 the Recovery framework had been established in the twelve districts to coordinate and give leadership to the process at district level. Appropriate mechanism were put in place to facilitate planning, management and monitoring of developmental activities in every district. The goal was to firm tip the restoration of Civil Authority in all the twelve districts within 12 months but this has been hampered by a number of factors, including delays in the DDR process and the recently held Presidential and Parliamentary elections and resource constraints.

19. In terms of the recovery process, the needs are enormous Key institutions were destroyed. Some of the structures are beyond repair. Schools, hospitals, administrative buildings, chiefdom detention facilities/prisons were all damaged or destroyed. While a lot has been done, much more has yet to be accomplished.

20. Civil Administration. Government is still grappling with the return of key administrative personnel throughout the country. especially to the remote districts of Kailahun, Kono, Pujehun and Koinadugu, to man critical sectors such as health (doctors, nurses and education (teachers). Local administration is functioning only minimally in some areas.

21. The holding of Paramount Chieftaincy elections in 61 vacant Chiefdoms to provide leadership for the decentralization gave strong boost to the restoration of civil authority. Sensitization is currently going on to prepare the population for the proposed decentralization programme. In this regard, Local Government elections are scheduled to be held in December 2003 to widen the democratic sphere nationally and to reinforce the restoration of Government authority at all levels nationally. The successful conclusion of local government elections nationwide will be a test of the viability of-our democracy. However, continued support by UNAMSIL will be critical until-the following:-.

a. That the forthcoming Local Government Elections may pose a threat in remote areas where Government authority has not been firmed up.

b. The resettlement process of ex combatants in certain localities can prove volatile.

c. The recently elected 61 Chiefs will need security support from a neutral body to fully establish their authority in the areas where they have been recently installed as Chiefs

d. The enforcement o mining regulations in some mining districts with Large presence of ex combatants would require neutral security policing to avoid this triggering conflict.

e. Chiefdom administrative penal system has not yet been fully established in most of the Chiefdoms to enforce law and order. Security support is required to preserve peace and stability.

DIAMOND MINING

22. With the relative restoration of Civil Authority in some parts of the country, the Ministry has established some presence in most parts of the country in an effort to restore orderly mining and marketing activities.

23. UNAMS1L has been very helpful in providing logistics support to the Ministry to facilitate monitoring in a bid to discourage illicit mining activities, which have the tendency of disturbing the peace in diamond mining areas.

24. With the presence of UNA.MSJL there has been progress in the control of illicit mining sector activities and law and order have been largely maintained in the mining areas. They have also afforded Government the opportunity to introduce control measures such as proper licensing systems. Consequently government has realized more revenue generated from the mining sector. This steady progress could be affected by the hasty withdrawal of UNAMSIL's presence in the mining areas.

25. It is anticipated that their continued presence will enable government to steadily build on the necessary structures that will ensure more effective enforcement of diamond mining regulations to sustain the sector.

26. Since the imposition of the certification system by UNSC (Resolution 1306 (2000) on 5th July 2000), and the implementation of the Certificate of origin in October 2000, diamond exports through legal channels have improved considerably. Diamond exports in 2000 amounted to US $10 million, US $26 million in 2001 and US$41 million in 2002.

27. Moreover the Kimberly Process Certification System has been recently adopted by over 40 diamond producing and importing countries and this has further created a deterrent to diamond smugglers.

GENERAL ECONOMIC OUTLOOK

28. **Macroeconomic Performance.** Sierra Leone has made remarkable progress in advancing economic recovery, largely facilitated by the full deployment of the UN peacekeeping force (IJNAMSIL). The increasing optimism and confidence generated has boosted economic activity and improved the environment for the normalisation of relations with development partners and the implementation of government's poverty reduction and growth policies. During this period, the economic strategy has focussed on addressing the immediate post-war needs and the longer-term development and poverty reduction issues.

29. Satisfactory progress has been achieved with programmes supported by the key multilateral and bilateral development partners including the International Monetary Fund (IMP), the World Bank. the 13uropean Commission, the African Development Bank, BADEA, Islamic Development Bank, UNDP S/2003/330 and the United Kingdom. At the meeting of the Consultative Group in Paris during November 13-14. 2002, donors committed to providing highly concessional external aid in the order of US$650 million over the next 3-5 years. A donors meeting with the Organisation of Islamic Countries (OIC) early this year has also committed some aid to Sierra Leone.

30. In terms o1 economic performance, the real GDP has improved significantly from —17.6% in 1997 to —8.1% in 1999 and 3.8% in 2000. Real GDP is estimated to have increased further in 2002 by 6.3%, while the rate of inflation further declined to about —3%. Following a steep depreciation in 2001, the leone appreciated slightly against the US dollar during 2002. At the same time, the real effective exchange rate remained relatively stable and the spread between the official and parallel market exchange rates also remained steady in the range of 5-8%. The foreign exchange reserves level has also improved. With strong donor support, substantial structural reforms have been undertaken in the fiscal and financial sectors and have particularly improved public financial management. The external current account deficit is however projected to rise significantly over the medium-term, reflecting the poor export performance and the large import requirements for reconstruction.

31. Macroeconomic Outlook Discussions relating to the third annual review under the three-year poverty reduction and growth facility supported by the IMF were recently concluded with IMP staff. A memorandum of economic and financial objectives and policies of die government for 2003 was negotiated and agreed. A budget profile over the period 2003-2004 was also outlined. The programme targets a real GDP growth rate of about 6.5%, supported mainly by the assumed continued recovery of activities in agriculture, mining, service industry, construction, public works and investment. The budget profile envisages a substantial increase in government revenue through the operationalisation of the newly formed National Revenue Authority and the restructuring of tax administration. Expenditure policies aim to further strengthen fiscal discipline on the part of the government. The challenge for-monetary policy will be to sustain the low level of inflation, maintain a stable exchange rate improve on foreign reserves mobilization and sustain level of economic growth

32. All the objectives defined in the Interim Poverty Reduction Strategy Paper (I3RSP) have been achieved and the lull PRSP is expected to be completed by the end of 2003. The government is focusing on advancing a number of reform programmcs including public enterprise divestiture and restructuring, civil service and procurement reform and strengthening public financial management.

33. Maintaining this impressive progress requires improved security and political stability, since this sustains the investor and consumer confidence that provides the main boost to sustained economic recovery and growth. A growing economy will in turn provide a strong base for the further consolidation of the peace

by creating employment and generating revenue for Government that enhances its ability to provide the necessary public services, including law and order.

ENERGY SUPPLIES

34. Under the liberalization programme, the private sector has assumed full responsibility for the supply of petroleum products and the fixing of pump prices. Government however has a responsibility to guarantee adequate supply of products as well as competitive retail prices free from extortionist influences or practices.

35. However, recent substantial increases in world oil prices have led to unavoidable increases in the retail prices of petroleum products in the country. This has given rise to additional hardship for an already impoverished population. Besides high oil prices are having a direct negative impact on Government's poverty alleviation and post conflict recovery programmes. Government is concerned that ripple effects arising from these difficulties could further weaken the security situation, for which it is necessary to maintain a robust security apparatus.

36. Government intended measures to address current difficulties and stabilize the sector.

a. Government is actively investigating the possibility of creating a six weeks strategic petroleum products stocks programme for Sierra Leone as we need to be sufficiently positioned to ensure continued fuel availability at all times. But the fledgling economic situation with various competing priorities following the end of the war affects the speed with which this can be done.

b. The technical aspects of the pricing structure and its implementation are being closely monitored by an independent Petroleum Unit manned by downstream experts.

c. The Ministry of Trade and Industry in consultation with the Petroleum Unit has set up a "Task Force" to address the uncertainties in the oil market as well as the incidence of illegal cross-border trade in petroleum products in our neighborhood

SITUATION IN LIBERIA

37. Upsurge of fighting in Liberia. There is an upsurge in the fighting in Liberia. Latest reporting indicates that the MANO RIVER BRIDGE, BO WATERSIDE, TIENI, SIN.JE, .IENDEMA BRIDGE and

ROBERTSPORT are occupied by LURD. We can expect that AFL/ATU counter attacks may take place in these areas provoking a variety of border security problems.

38. **The Refugee and IDP Situation.** Government is obliged to always ensure that the repatriation of refugees and resettlement of IDPs are done in conditions which guarantee their safety and dignity. Government has recently signed a tripartite agreement with the UNI-ICR and the Government of Guinea to promote the repatriation of an estimated 60,000 Sierra Leonean refugees in Guinea. A similar agreement

will be signed with various governments in the sub-region to promote the repatriation of another 70,000 refugees from those countries, mainly Liberia, Nigeria, the Ivory Coast etc. Even though much progress has been achieved in the peace process - disarmament of ex-combatants, conduction of peaceful elections, extension of state authority etc. yet the ideal situation for repatriation is not yet met. There are still gaps in the physical and effective presence of the Police and other government functionaries in various parts of the Eastern Province where a good number of the returnees will be resettling. UNAMSIL is therefore filling this gap in various ways as well as acting as a deterrent to cross border incursions from Liberia.

39. **UNAMSIL** also supports Government in the assessment of the safety and security of Chiefdoms for resettlement and provides logistical support (transportation, repairs of roads and bridges) for resettlement.

40. The Liberian crises has also created a large influx of Liberian Refugees who are entering from different crossing points and who are being transported to various camps with a significant support from UNAMSIL. An estimated population of 65,000 refugees are in the country with 46,317 in seven camps in the East and South of the country. These are Bandajuma — 5.979; Gerihun- 6,640; Gondama- 7,362; Jembe- 6,703; Jimmi Bagbo- 6,467; Largo- 5,633; Taiama- 7,534. LJNAMS1L is providing trucks to transport them to camps in Kenema and Bo. A total of about 335 deserters from the Liberian conflict have been interned in Mapeh Camp. UNAMSLL is also playing a deterrent role by helping to police the border and protecting the Mapeh Camp. On various occasions it has had to provide protection in the camps and in some communities,

PRESIDENTIAL LODGE

HILL STATION

FREETOWN

11 MARCH2003

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SPECIAL COURT FOR SIERRA LEONE
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DECLARATION

I Keith Biddle, Inspector-General of the Sierra Leone Police of Spur Road, Freetown in Western Area of the Republic of Sierra Leone declare:

1. That in my position as Inspector General of the Sierra Leone Police and member of the National Security Council of Sierra Leone, I am required to conduct ongoing assessments of the security situation in Sierra Leone and in surrounding countries.

2. In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile. This situation poses a real threat to the security of victims and potential witnesses. Based upon the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have the capacity to guarantee the safety of witnesses or prevent them form injury or intimidation.

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

Done in Freetown, Sierra Leone
On the 29 April 2003

Keith Biddle
Inspector-General of the Sierra Leone Police

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

ORIGIN. English

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 24 October 2002

THE PROSECUTOR
V.
EMMANUEL RUKUNDO

CASE NO. ICTR-2001-70-I

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

Office of the Prosecutor:
Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend

Defence Counsel
Philipe Moriceau

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

SITTING as Trial Chamber III, composed of Judges Lloyd George Williams, Q.C., Presiding, Yakov Ostrovsky and Pavel Dolenc (the "Chamber");

BEING SEISED of the Prosecutor's "Motion for Protective Measures for Victims and Witnesses" filed 11 December 2001 (the "Motion"), the "Additional Authority in Support of the Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed 21 May 2002, and the "Addendum to Prosecutor's Motion for Protective Measures for Victims and Witnesses" filed 10 September 2002;

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CONSIDERING the "Mémoire en Réponse à la Requête du Procureur du 11 décembre 2001" filed 30 May 2002 (the "Response");

NOW CONSIDERS the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules").

Prosecutor's Submissions

1. The Prosecutor submits that the persons for whom protection is sought fall into three different categories, all of which require protective measures:

(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. For all these three categories of persons, the Prosecutor requests the following orders:

a) An Order requiring that the names, relations, addresses, whereabouts and other identifying information described hereinafter, be sealed by the Registry and not included in any records of the Tribunal; that the said witnesses, as well as any other additional witnesses, bear pseudonyms which will be used during the course of the trial;

b) An Order that the names, relations, addresses, whereabouts and other identifying information described in paragraph 2(a), be communicated only to the Witness and Victims Support Section personnel by the Registry or Prosecutor in accordance with the established procedure and only in order to implement protection measures for these individuals;

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

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

e) An Order prohibiting the Defence and the Accused from sharing, discussing or revealing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals specified in paragraph 1, with or to any person or entity other than the Accused, assigned Counsel or other persons the Registry designates as working on the Defence team;

f) An Order requiring the Defence to provide to the Trial Chamber and the Prosecutor a

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designation of all persons working for the Defence who will, pursuant to the Motion, 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 the Defence 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 1 above.

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

h) An Order prohibiting the disclosure to the Defence of the names, addresses, relations, whereabouts and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any such information in the supporting material on file with the Registry, until twenty-one (21) days before the witness testifies at trial;

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

j) An Order requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trial, and the public;

k) An Order prohibiting any person working for the Defence from attempting to make an independent determination of the identity of any protected witness or encouraging or otherwise aiding any person to attempt to determine the identity of any such person;

l) An Order prohibiting the Accused individually or any person working for the Defence from personally possessing any material which includes or might lead to discovery of the identity of any protected witness;

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

3. In support of her request, the Prosecutor submits an Affidavit by Alfred Kwende, the Commander of Investigations in the Office of the Prosecutor in Kigali, dated 7 December 2001 and other documents 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.

Defence Response

4. The Defence submits that, due to delays in translation of the Prosecutor's documents, it has been unable to prepare its response, and requests an extension of time to respond to the Motion.

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5. Addressing nevertheless the substance of the Motion, the Defence submits that under Rule 69 (A), exceptional circumstances must exist before protection is granted to victims and witnesses. Consequently, such protection must not be used as a pretext to undermine the rights of the Defence. Further, the Defence stresses that Article 21 of the Statute provides for equal protection for all victims and witnesses, whether they are for the Defence or the Prosecution.

6. The Defence alleges that it was served with witness statements which were overly redacted, making them impossible to comprehend. Further, the Defence submits that witnesses cannot be completely anonymous as this would affect their credibility. In the absence of identification and reference to other identifying data of the witness, the Defence would not be able to prepare its case effectively.

7. The Defence submits that the protective measures sought by the Prosecutor should not be applied to all the witnesses, since it is up to the Chamber to assess the appropriate measures to be afforded to each witness on a case by case basis.

8. The Defence opposes the Prosecution's request to reduce to twenty-one (21) days the period of disclosure of the identity of witnesses, as it would be contrary to the Rules and this short period of time would not suffice for the Defence to carry out its investigations properly. Moreover, granting the Prosecution prayer in this respect would render the process inequitable and violate Article 21 of the Statute. The Defence requests the Chamber to maintain the period of disclosure of 60 days prior to the trial, in accordance with Rule 66 (A) (ii).

9. The Defence requests the Chamber to deny the Motion for lack of relevant information which would enable the Chamber to order protective measures adequate for each witness.

DELIBERATIONS

Defence Request for Extension of Time

10. The Chamber notes that the Defence request of 27 May 2002 for extension of time to file its response to the Prosecutor's Motion was granted by the President of the Tribunal prior to the assignment of this case to Trial Chamber III. The Defence was then required to file its response by 10 June 2002 [1]. To date no such response has been filed. Moreover, since the Defence has been able to fully argue the substance of the Motion in its submissions wherein it was seeking a delay, there is no need to keep the proceedings on hold awaiting further Defence submissions.

Substance of the Motion

11. The Chamber recalls that Article 21 of the Statute, supplemented by Rule 69, provides for the protection of victims and witnesses when the circumstances so require. The Chamber is also mindful of Article 20 of the Statute which affords the accused the right to have adequate time and facilities to fully prepare his or her defence. Rule 75(A) states that "[a] judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused".

12. The Chamber is sensitive to the need to safeguard both the rights of the Accused and the security and privacy of victims and witnesses who may be in danger or at risk. It is with this in mind that the Chamber considers the Motion.

13. In assessing the fear or the safety of witnesses, which constitutes the basis for the protection sought in the instant case, the Chamber adopts the reasoning of the ICTY [2] and other Chambers of this Tribunal [3] requiring an objective basis for the fear which can be expressed by persons other than the witness.

14. To determine the appropriateness of the protective measures sought, the Chamber has evaluated the security situation affecting the concerned witnesses in light of information annexed to the Prosecutor's Brief. Having considered the objections of the Defence, the Chamber has reviewed the afore-mentioned Affidavit of Alfred Kwende, dated 7 December 2001, which tends to demonstrate the complexity of the security situation in Gitarama Préfecture. The Affidavit emphasises the level of threat in Gitarama and other regions in Rwanda due to the presence and activities of armed infiltrators, composed mainly of elements of *ex-Forces Armées Rwandaises* (EX-FAR) and Interahamwe Militia (in July 2001). As a consequence, potential witnesses experience fear for their lives and have expressed unwillingness to testify, unless appropriate protection measures are put in place by the Tribunal.

15. The Chamber is satisfied that, on the basis of this Affidavit and the other additional information annexed to the Brief, a volatile security situation exists in Rwanda and in neighbouring countries, which could endanger the lives of victims and potential Prosecution witnesses who may be called to testify at trial. The Chamber concludes therefore, that as far as the victims and witnesses living in Rwanda and in neighbouring countries are concerned, there are exceptional circumstances which warrant non-disclosure orders.

16. In relation to witnesses not residing in Rwanda or in neighbouring countries, the Chamber considers that the Prosecutor has not provided evidence of threats to their lives nor has she proposed any explanation whatsoever to justify their protection even under the wide scope of Rule 75. The Chamber is therefore constrained to deny the Prosecutor's request for protection of victims and witnesses not living in Rwanda or in neighbouring countries due to lack of sufficient grounds.

17. Dealing now with the orders sought by the Prosecutor in paragraphs (a), (b), (c), (d), and (i) of the Motion, the Chamber considers that these are normal protective measures which do not affect the rights of the Accused and which accordingly, may be granted as they stand. The Chamber grants also the orders sought in paragraphs (e) and (k), with the understanding that they are not meant to prevent the Defence from carrying out normal investigations to prepare its case, in so far as the investigations are not intentionally designed to reveal the identity of witnesses known to be protected.

18. In relation to paragraph (j), the Chamber takes the view that this request is already covered by the prayer in paragraph (a) which has been granted with the assumption that the pseudonyms are to be applied throughout the Tribunal proceedings. There is therefore no need to grant this order separately.

19. Regarding the Prosecutor's request in paragraph (f) of the Motion, the Chamber finds it to be more suitable if notice of the relevant information is given to the Registry rather than to the Chamber or the Prosecutor, as proposed by the Prosecution. The Chamber therefore, grants this order in an amended form as follows: An order requiring the Defence to provide to the Registry a designation of all persons working on the immediate Defence team who will have access to any information which identifies, or could lead to the identification of any Protected Person and to advise the Registry in writing of any change in the composition of this team. [4] Additionally, the Chamber amends, in the latter half of paragraph (f), the term "all documents and information" to be remitted by any member leaving the Defence team, replacing it with "all materials", because the term "information" can be interpreted to include intangibles, which cannot of course be remitted.

20. In relation to paragraph (g), the Chamber finds the formulation of this measure to be so broad that it would make it difficult to enforce as worded. Consequently, the Chamber grants this measure in an amended form as follows: An order prohibiting the photographing, audio and video recording, or sketching of any Prosecution witness in connection with his or her participation in Tribunal investigations or proceedings, at any time or place without leave of the Trial Chamber.

21. In respect of rolling disclosure requested by the Prosecutor, the Chamber notes the need to strike the balance between the protection of victims and witnesses and the rights of the Accused for a full and unfettered defence. The Chamber recalls that the Defence, pursuant to Rule 66(A)(ii), has already or will receive from the Prosecutor a copy of the statements of witnesses intended to be called, at least 60 days prior to the date set for trial. Only the identifying data of those witnesses will be redacted. The Defence will therefore already have some material on the basis of which to prepare, pending the disclosure of un-redacted statements.

22. The Chamber also recalls that the recently amended Rule 69(C) now affords it the discretion to regulate the disclosure of identifying information of protected witnesses as it deems fit and proper. There would therefore be no violation of the Rules in ordering a rolling disclosure of the identifying data of witnesses, contrary to the Defence contention. The Chamber does not however propose any time frame for the rolling disclosure at this point in time where the details of the trial are not yet known. Accordingly, the Chamber orders that: the names, addresses and other identifying information of the 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 order.

FOR THESE REASONS, THE TRIBUNAL:

For the victims and witnesses living in Rwanda and in neighbouring countries:

GRANTS the orders requested in paragraphs (a), (b), (c), (d), and (i) of the Motion as they stand;

GRANTS the orders requested in paragraphs (e) and (k) within the scope set out in paragraph 17 *in fine*;

GRANTS the orders sought in paragraphs (f), (g) and (h) as amended in paragraphs 19, 20 and 22 respectively;

DENIES the Motion in all other respects.

Arusha, 24 October 2002

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

Seal of the Tribunal

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[1] On 27 June 2002, the Court Management Section informed Mr. Rukundo's Defence Counsel, through e-mail communication, that the Judge President had granted the Defence a time extension of 2 weeks, requiring him to file his response by 10 June 2002.

[2] *Prosecutor v. Tadic,* IT-94-I-T "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses" (10 August 1995)

[3] *Prosecutor v. Kajelijeli,* ICTR-98-44-I, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" (6 July 2000)

[4] The Chamber is relying on its decision in: *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, ICTR-97-34-I "Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses" (19 May 2000) p.3 at paragraph 2.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

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;

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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

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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

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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

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:

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(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)

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

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

[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*.

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar:
Mr. Hans Holthuis

Order of:
19 February 2002

PROSECUTOR

v.

SLOBODAN MILOSEVIC

PARTLY CONFIDENTIAL AND *EX PARTE*

DECISION ON PROSECUTION MOTION FOR PROVISIONAL PROTECTIVE MEASURES PURSUANT TO RULE 69

The Office of the Prosecutor

Ms. Carla Del Ponte
Ms. Hildegard Uertz-Retzlaff
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused

Slobodan Milosevic

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapuskovic
Prof. Mischa Wladimiroff

I. BACKGROUND

1. The Office of the Prosecutor ("Prosecution") filed a confidential and *ex parte* motion entitled "Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69" on 4 January 2002 ("First Motion"). The Motion concerning Indictment IT-01-51 ("Bosnia Indictment") sought orders that

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(a) the Prosecution be permitted to redact identifying information from statements and documents disclosed pursuant to Rule 66 (A)(i), and (b) the accused be prohibited from making public any of the material received from the Prosecution pursuant to the same Rule. The measures sought were said to be necessary to safeguard the safety and privacy of the victims and witnesses and the integrity of the evidence and these proceedings.

2. On 17 January 2002, the Trial Chamber issued an "Order for Further Submissions" ("Provisional Order"), in which it ordered the Prosecution to address the following issues:

> (a) the impact of non-disclosure of the redacted information at this stage of the proceedings upon the right of the accused to a fair and public trial pursuant to Articles 20 and 21 of the Statute;
>
> (b) the number of witnesses for whom such protection is sought;
>
> (c) the time at which it is proposed that disclosure of the identity of the witnesses would be made to the accused; and
>
> (d) the nature of the protective measures granted by other Trial Chambers, in particular , whether any such measures were granted in relation to disclosure pursuant to Rule 66 (A) (i).

3. On 23 January 2002, the Prosecution filed the "Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69: Prosecution Response to Order for Further Submissions" ("Second Motion"), in which it responded to the questions posed by the Trial Chamber in its Provisional Order and reasserted the orders sought in the First Motion.

4. On 31 January 2002, the Prosecution filed a "Corrigendum to Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69: Prosecution Response to Order for Further Submissions" ("First Corrigendum"), dealing with the interpretation of a threat allegedly made by an SPS party member on Belgrade television to people considering testifying for the Prosecution in these proceedings.

5. On 6 February 2002, the Prosecution filed a "Second Corrigendum to Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69" ("Second Corrigendum"), dealing with a misquotation by the Prosecution of a Decision in another Trial Chamber .[1]

II. THE LAW

6. The Prosecution relies upon Articles 20, 21 and 22 of the Statute of the Tribunal ("Statute") and Rules 53, 54, 69, 73 and 75 of the Rules of the Tribunal ("Rules "). The relevant provisions of the Statute which the Trial Chamber must consider in dealing with this Motion are Article 20 dealing with the commencement and conduct of proceedings[2]; Article 21.2 dealing with the rights of the accused[3], and Article 22 dealing with the protection of victims and witnesses[4].

7. Furthermore, Rules 66 (A)(i)[5], 53 (A)[6] and 69 (A)[7] of the Rules are relevant to the determination of this matter by the Trial Chamber . Rules 69 (C) and 75 are not relevant to the determination of this particular application , although they will be relevant to a consideration of future motions for protective measures for particular witnesses in these proceedings. The disclosure requirements under Rule 66 (A)

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(i) are expressly subject to Rules 53 and 69 of the Rules. Rule 53 (A) provides that in "exceptional circumstances" and where the interests of justice require, non-disclosure to the public may be ordered with respect to any documents or information. Rule 69 (A) provides that non-disclosure of the identity of a victim or witness who may be in danger or at risk may in "exceptional circumstances" be ordered until such person is brought under the protection of the Tribunal. Important aspects of the interpretation of these provisions are discussed below.

III. DISCUSSION OF THE PROSECUTION'S APPLICATION

8. The Prosecution seeks the following orders:

> (a) that the Prosecution be permitted to redact identifying information from statements and documents disclosed pursuant to Rule 66 (A)(i); and
>
> (b) that the accused be prohibited from making public any of the material received from the Prosecution pursuant to the same Rule.

The first order sought concerns a consideration of the proper construction of Rule 69 (A) and the Trial Chamber will deal with this matter first.

(A) Redaction of witness statements

9. The Trial Chamber, in its Provisional Order, required the Prosecution to address four matters to assist in determining the application made. We will now deal with each of these four matters.

(i) The impact of non-disclosure of the redacted information at this stage of the proceedings upon the right of the accused to a fair and public trial pursuant to Articles 20 and 21 of the Statute.

10. The Prosecution submits that delayed disclosure of the identities of Prosecution witnesses in need of protection does not adversely effect the rights of the accused to a fair and public trial. The accused would still have access to all of the events and facts provided by the witnesses and would be in a position to prepare his defence . It is also submitted that he will have the identifying information of the witnesses in ample time to investigate their backgrounds enabling him to prepare for cross -examination.

(ii) The number of witnesses for whom such protection is sought

11. The Prosecution attaches an appendix to its Second Motion setting out a list of all witnesses whose statements were tendered in support of the Bosnia Indictment . It is stated that the Prosecution is seeking to redact identifying information from 203 of the 252 statements.[8]

12. The Trial Chamber notes that this amounts to some four-fifths of the witnesses identified in the supporting material. Of the 203 witnesses for whom redactions have been made , 51 of these are witnesses already granted protective measures in other proceedings before the Tribunal.

(iii) The time at which it is proposed that disclosure of the identity of the witnesses would be made to the accused

13. The Prosecution proposes that the provisional protective measures sought should remain in effect until it has had the opportunity to interview each witness and investigate their need for protective measures and to file a motion for protective measures based upon that need. The Prosecution does

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indicate that in the case of some witnesses, it will be seeking that his or her identity not be disclosed to the accused until as few as ten days prior to the witness' testimony.

(iv) The nature of the protective measures granted by other Trial Chambers, in particular, whether any such measures were granted in relation to disclosure pursuant to Rule 66 (A)(i)

14. The Prosecution refers to the practice in a number of other cases before the Tribunal . It refers to a confidential Decision in the *Nikolic* case, in which the Trial Chamber permitted the Prosecution to fulfil its obligation under Rule 66 (A)(i) by providing redacted statements of some witnesses.[9] The Trial Chamber would note with respect to this Decision that the witnesses for whom such practice was accepted by that Chamber were sexual assault victims. Furthermore , the order of the Trial Chamber was that the Prosecutor would be "granted leave not to disclose to the accused the identities of the... witnesses until a time determined by this Trial Chamber *closer to the commencement of trial*". Whether the Trial Chamber was indicating that it would make its decision closer to the commencement of trial or that disclosure would be required closer to the commencement of trial is not clear. However, the same Trial Chamber in the Brdanin Decision stated that the time in which unredacted disclosure is to be made "must be a time before the trial commences rather than before the witness gives evidence".[10]

15. The Prosecution also makes reference to a decision made in these proceedings concerning the Kosovo indictment.[11] The Prosecution asserts that this decision affirms the appropriateness of the redaction of materials discoverable under Rule 66 (A)(i) of the Rules. However, the Kosovo Decision concerned exclusively non-disclosure *by the accused to the public* of material, not the non-disclosure of material by the Prosecution to the accused. The Decision, and indeed the initial Prosecution Motion in that matter, also recognised that an order of non-disclosure to the public was limited and that the accused could disclose the material to members of the public to the direct and specific extent necessary for the preparation and presentation of the accused's case. The Decision is, whilst relevant to the Prosecution's application under Rule 53 (A), not relevant to this aspect of the Trial Chamber's consideration.

16. In fact, the only highly relevant decision referred to by the Prosecution was the Brdanin Decision. In that Decision, the Trial Chamber dealt, *inter alia*, with an application by the Prosecution for a blanket redaction of identifying information for all witnesses whose statements formed part of the supporting material. The Prosecution relies heavily upon this Decision in asserting that:

> (a) once the Prosecution has demonstrated to the Trial Chamber that exceptional circumstances exist to justify the delayed disclosure of the identity of particular victims or witnesses, then its obligations under Rule 66 (A)(i) will have been discharged by providing statements of those victims or witnesses with identifying information redacted;[12]
>
> (b) in assessing the balance between the rights of the accused and the risks faced by witnesses, the Trial Chamber must examine the likelihood that Prosecution witnesses will be interfered with once their identity is known to the accused and his counsel , but not to the public;[13]
>
> (c) the Trial Chamber in that Decision accepted the Prosecution assertion that the greater the length of time between the disclosure of a witness's identity and the time when he or she is called to give evidence at trial, the greater the potential that the witness will be interfered with;[14] and
>
> (d) the relief sought by the Prosecution in this case is consistent with an order made in the

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> Brdanin Decision to the effect that the obligation upon the Prosecution to disclose all witness statements under Rule 66 (A)(i) does not have to be met so long as it files protective measures with respect to particular statements or particular victims and witnesses motions within a "reasonable period".[15]

17. In fact, the Trial Chamber notes that with respect to each of these assertions, the Brdanin Decision has somewhat more to say. The Trial Chamber in that Decision held that what is required under Rule 69 (A) is a showing of "exceptional circumstances " with respect to *each* witness for whom the Prosecution seeks non-disclosure of identifying information, and that this be done *at the time* that service of the supporting material is required.[16] Crucially, that Trial Chamber noted quite correctly that "Rule 69 (A) does *not* provide SaC blanket protection".[17]

18. Concerns regarding interference with witnesses was also expressly dealt with by the Trial Chamber in the Brdanin Decision. Unfortunately, the Prosecution in the Second Motion has misrepresented the conclusions made by that Chamber. Whilst the assertions contained in paragraphs 16 (b) and (c) above are strictly speaking correct , in fact the Trial Chamber went on to state clearly that it did not accept that , absent specific evidence of the risk that persons to whom the Defence speaks in the course of its investigations may reveal the identity of particular witnesses , the likelihood that interference will eventuate is not sufficiently great to justify the extraordinary measures sought by the Prosecution under Rule 69 (A).[18] Furthermore, that Chamber did not accept the proposition that the prevailing circumstances in the former Yugoslavia in general, and Bosnia and Herzegovina in particular, would justify blanket redactions of the sort requested by the Prosecution.[19] That view is shared by this Trial Chamber.

19. Finally, something must be said with respect to the assertion in its Second Motion that relief sought by the Prosecution in this case is consistent with an order made in the Brdanin Decision. The Trial Chamber notes that the Prosecution misquoted an order made in that Decision to an effect that rather profoundly misrepresents the position stated by that Trial Chamber. The Prosecution asserted in the Second Motion that the obligation upon the Prosecution in the Brdanin Decision to disclose all witness statements under Rule 66 (A)(i) did not have to be met so long as it files protective measures with respect to particular statements or particular victims and witnesses motions within a "reasonable period". In fact, what the Trial Chamber ordered was that the Prosecution was to disclose to the defence within 21 days all the witness statements pursuant to Rule 66 (A)(i) in unredacted form, unless within that time (i.e. within 21 days) it filed a motion for protective measures with respect to particular statements or other material or particular victims and witnesses.[20] The Prosecution subsequently filed its Second Corrigendum, in which it apologised for the error. The Trial Chamber accepts the assurances from the Prosecution that the misquotation was unintentional and was not intended to mislead the Trial Chamber .

20. The Prosecution also argues that there are several factors particular to this case justifying the ordering of the protective measures sought. First, the accused has repeatedly stated that he does not recognise the authority of the Tribunal. The Prosecution refers to an allegation that an SPS party member made threatening remarks about persons considering testifying for the Prosecution in these proceedings. The Prosecution therefore argues that until such time as the accused does recognise the Tribunal and agrees to be bound by its orders, the Prosecution should not be compelled to provide information that could be used to intimidate or harm witnesses . Secondly, it is argued that many of the witnesses whose statements were tendered in support of the indictment have already been granted protective measures in other proceedings before the Tribunal. Finally, it is argued that it would be impracticable at this stage of the case for the Prosecution to re-interview all of the witnesses whose statements must be disclosed pursuant to Rule 66 (A)(i) by the time required under that Rule in order to

determine what, if any, protective they request and the basis for such a request. These matters will be dealt with below. 321

(B) Request that the accused be ordered not to make public any material disclosed pursuant to Rule 66 (A)(i)

21. The Prosecution has requested also that the accused be prohibited from making public any of the material received from the Prosecution pursuant to Rule 66 (A)(i). Although the Prosecution does not offer any real argumentation in support of its request, it is noted by the Trial Chamber that such orders are routinely made, subject to the limitation that the accused may disclose the material to members of the public to the direct and specific extent necessary for the preparation and presentation of his case. This Trial Chamber made such an order in the Kosovo Decision.

III. DECISION

22. It should first be noted that, whilst the Prosecution has framed its request in terms of seeking permission to redact identifying information from the 203 of 252 witness statements contained in its supporting material, it has in fact *already* redacted those statements. Therefore, correctly stated the application is one for permission to be relieved of its obligation to provide the witness statements to the accused in unredacted form.

23. The Prosecution asserts that the duty to provide for the protection and privacy of the witnesses is an affirmative one.[21] The measures which are appropriate should be determined after balancing the right of the accused to a fair and public trial and the protection of victims and witnesses .[22] These propositions are uncontroversial . What is clear from the Statute and Rules of the Tribunal is that the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one. Article 20.1 of the Statute states that Trial Chambers shall ensure that trials are conducted "with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses.[23] The case law of the Tribunal bears out this proposition.[24] It is noted, however, that whilst the rights of the accused are elevated above the protection of victims and witnesses, the latter are still given greater protective status than in national systems of criminal law. The reasoning for this may, in part, be explained by the complexities of the Tribunal's jurisdiction, the particular dangers that attach to those who give evidence in proceedings before the Tribunal and lack of a comprehensive witness protection programme at the Tribunal's disposal . The provisions of the Tribunal's Statute and Rules, as well as its jurisprudence , show that the Tribunal takes seriously the striking of an appropriate balance between the sometimes competing interests of the accused and victims and witnesses . It should not be forgotten that the Rules of the Tribunal are created and interpreted in light of its Statute and the Trial Chamber will consider the specific provisions in this light.

24. What the Trial Chamber must specifically address is whether the Prosecution has satisfied the requirements of Rule 69. Paragraph (A) of that Rules requires the Prosecution to make a showing of "exceptional circumstances" before it will be permitted to redact identifying information from witness statements. The Trial Chamber believes that such a showing can only be made on an individual basis. As the Trial Chamber in the Brdanin Decision explained, exceptional circumstances must be established with respect to *every witness* the Prosecution seeks to protect through redaction of identifying information, and that this be done *at the time* service of the supporting material is required.[25] "Rule 69 (A) does *not* provide [a] blanket protection".[26] It must be right that the Prosecution, to be allowed to redact information it is required to disclose within a strict time frame under the Rules, be required to make a showing of exceptional circumstances with respect to *each witness* for whom - or *each document*

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for which – it seeks redaction.[27] It is, after all, something only to be granted in "exceptional circumstances", and the reason for this is that it goes to the heart of an accused's right to a fair trial by enabling him to investigate the case against him.[28] The Prosecution cannot therefore simply redact the identifying information and say that it will apply for particular protective measures for *some* of these witnesses within an unspecified period of time. Its obligation is to disclose the statements in *unredacted* form *at the stage* of its duty to disclose under Rule 66 (A)(i). That duty arose in this case on 7 January 2002. It is at that time that the Prosecution, if it wished to redact identifying information of witnesses from the material, should have shown exceptional circumstances with respect to each such witness.

25. In contemplating the making of such applications for particular witnesses, the Trial Chamber reminds the Prosecution of the jurisprudence dealing with conditions for the granting of witness anonymity. In early considered decisions in the *Tadic*[29] and *Blaskic*[30] cases, the Trial Chambers set out five conditions that would have to be met for witness anonymity to be granted:

> (a) first and foremost, there must be real fear for the safety of the witness or his or her family;
>
> (b) secondly, the testimony of the particular witness must be important to the Prosecution case;
>
> (c) thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
>
> (d) fourthly, the ineffectiveness or non-existence of a witness protection programme is a matter that will have considerable bearing on any decision to grant anonymity ; and
>
> (e) fifthly, any measures taken should be strictly necessary.

26. Furthermore, Trial Chamber II in the Brdanin Decision recently set out three criteria which would need to be considered in respect of applications made under Rule 69 (A) for specific protective measures for witnesses. They are:

> (a) the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public ;
>
> (b) the extent to which the power to make protective orders can be used not only to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; and
>
> (c) the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. (The Prosecution accepted in the Brdanin case that, although the shorter the time between disclosure and testifying the less the opportunity will be for interference with that witness, the time allowed for preparation must be time *before trial commences* rather than before the witness gives evidence. What time frame is reasonable will depend on the category of the witness .)

27. In respect of the third criterion raised in the Brdanin Decision, the Trial Chamber also notes a decision in the *Tadic* case concerning the period for disclosure pursuant to Rule 69 (C), in which it held that whilst there was a basis for non- disclosure of identifying information concerning a particular witness, exceptional circumstances under Rule 69 (A) having been made out, the name of the witness

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was to be "released not less than thirty (30) days *before the firm trial date* ".[31]

28. The Trial Chamber notes with regret that the granting of such protective measures , which started out as an exceptional practice, has become almost the norm in proceedings before the Tribunal. Nonetheless, this practice has followed individual applications for protective measures, not for blanket orders suppressing the identity of witnesses from the accused. Whilst it is extremely important to provide adequately for the protection of victims and witnesses, the requirement that the accused be given a fair trial dictates that Trial Chambers only grant protective measures where it is properly shown in the circumstances of each such witness that the protective measures sought meet the standards set out in the Statute and Rules of the Tribunal , and expanded in its jurisprudence. The Prosecution is under an obligation at this early stage of the proceedings to justify redaction of a witness's identifying information from statements disclosed pursuant to Rule 66 (A)(i) with respect to each such witness .

29. One of the arguments the Prosecution brings to justify its Motion is that the accused has stated that he does not recognise the Tribunal's authority and that in one incident a member of the accused's Socialist Party of Serbia ("SPS") made a threat on Belgrade television with respect to anyone planning to testify for the Prosecution against the accused.[32] It is noted that this threat was not made by the accused and that there is no suggestion the accused prompted this threat. The Prosecution has indicated that it is investigating the threat and if further applications are brought with respect to this or other such matters then the Trial Chamber will consider them. Nonetheless, the Trial Chamber considers that this matter cannot be taken as a factor which would weigh so heavily as to persuade it to grant a blanket protection order of the nature being requested by the Prosecution . As to the accused's attitude towards the Tribunal, this is a matter the Trial Chamber is cognisant of and which it will take into consideration in determining individual motions for protective measures and, in particular, where the accused's attitude is likely to bear in a substantive way upon the particular witness.

30. The Trial Chamber therefore rejects the request of the Prosecution to simply redact all identifying information from the 203 witnesses identified in its Appendix A. What is required of the Prosecution is that it brings motions for protective measures for individual witnesses on the basis of the criteria set out above. It should in fact have done so prior to the time it was required to make disclosure to the accused under Rule 66 (A)(i). For these reasons, the Prosecution is required to comply with its obligation under Rule 66 (A)(i) to supply to the accused statements and documents in unredacted form within 14 days of the filing of this Decision. If, however, within that time, the Prosecution files a motion for protective measures for particular witnesses, it need not provide copies of those statements or documents relevant to that witness in unredacted form until such time as the Trial Chamber has disposed of such motion, and subject to the terms of any order made on that motion.

31. The Trial Chamber, however, accepts that where witnesses have already been granted protective measures in other proceedings before the Tribunal, those protections should continue and the Trial Chamber will have to consider appropriate orders with respect to those witnesses when entertaining other such future motions from the Prosecution.

32. Finally, on the second order sought by the Prosecution for limited non-disclosure by the accused to the public of material received from the Prosecution pursuant to Rule 66 (A)(i), the Trial Chamber notes that this was its practice in the Kosovo Decision and that it has been the practice of other Trial Chambers of the Tribunal . The considerations which attach to such an application are that, whilst an application under Rule 69 (A) goes to the heart of an accused's ability to prepare his defence , applications under Rule 53 (A) do not materially impede the preparation of an accused's defence so long as he is expressly allowed to make public such material for this strict purpose. Furthermore, applications under Rule 53 (A) go directly to concerns regarding the safety of victims and witnesses in proceedings

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before the Tribunal. It has been noted above that the correct balance must be achieved between the interests of the accused and the protection of victims and witnesses . The Trial Chamber is of the view that whilst the balance dictates clearly in favour of an accused's right to the identity of witnesses which the Prosecution intends to rely upon (subject to protective measures granted), it dictates against making public supporting material where such disclosure might lead to witness identification and therefore endanger such victims or witnesses. The reason for this distinction is primarily because the former goes to the ability of the accused to prepare his defence, whilst the latter does not. The Trial Chamber will make the order sought subject to limitations set out below in the disposition.

DISPOSITION

33. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:

(1) Those witnesses granted protective measures in other cases before the Tribunal shall continue to be protected in accordance with those measures. The names of these witnesses are set out in the confidential and *ex parte* Schedule A attached to this Decision;

(2) With respect to the remaining 167 of the 202 witnesses for whom protective measures are sought, the Prosecution shall by 5 March 2002, being 14 days from date of this Order, supply to the accused copies of all statements or documents in unredacted form, provided that, in the event that the Prosecution files a motion within that period for protective measures in relation to particular witness statements or documents , it need not supply unredacted copies of those statements or documents identified in that motion until such time as the Trial Chamber has disposed of the motion, and subject to any orders made upon that motion. The names of these witnesses are set out in the confidential and *ex parte* Schedule B attached to this Decision . The names of the remaining witnesses for whom no provisional protective measures are sought are set out in Schedule C attached to this Decision;

(3) The accused shall not disclose to the public:

> (a) the supporting material disclosed to the accused pursuant to Rule 66 (A)(i) of the Rules, except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the accused's case;
>
> (b) the knowledge of the accused or his counsel or representatives with regard to the identities and whereabouts of the witnesses mentioned in the supporting material ; or
>
> (c) any evidence or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony disclosed to the accused pursuant to Rule 66 (A)(i) of the Rules.

For the purposes of this Order, "the public" means all persons, governments, organisations , entities, clients, associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), and the Prosecutor, and the accused. "The public" specifically includes, without limitation , family, friends and associates of the accused, accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal.

Schedules are attached to this Decision.

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

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Richard May

Presiding

Dated this nineteenth day of February 2002

At The Hague

The Netherlands

[Seal of the Tribunal]

1 - The Prosecution in this filing take the opportunity to make further arguments with respect to the number of witnesses concerned in this case compared with the Brdanin case. Whilst this is not an appropriate manner in which to seek to assert further arguments not contained in the initial filings, the Chamber has considered what the Prosecution had to say.
2 - "1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses[...]"
3 - "In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute."
4 - "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."
5 - "(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused..."
6 - "(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order."
7 - "(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."
8 - The Prosecution notes it is not seeking redaction of any information from any of the documents. Appendix A in the Second Motion is an amended version of the same appendix in the First Motion and is the document upon which the Prosecution relies. Second Motion, paras. 8-9.
9 - *Prosecutor v. Nikolic*, "Confidential Decision on Second Motion by Prosecution for Protective Measures", Case No. IT-94-2-PT, 29 November 2000.
10 - Brdanin Decision, para. 33.
11 - *Prosecutor v. Milosevic*, "Decision on Prosecution's Motion for Order of Non-Disclosure", Case No. IT-99-37-PT, 19 July 2001 ("Kosovo Decision").
12 - First Motion, para. 5.
13 - First Motion, para. 6.
14 - First Motion, para. 6.
15 - Second Motion, para. 15. There is an error in this interpretation and a misquotation of the Brdanin Decision in the Second Motion and the Prosecution have subsequently filed a "Second Corrigendum to Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69", 6 February 2002 ("Second Corrigendum"). This matter is dealt with below.
16 - Brdanin Decision, para. 10.
17 - *Ibid*, para. 19.
18 - Brdanin Decision, para. 28.
19 - *Ibid*., paras. 8 and 11.
20 - Brdanin Decision, para. 65.2.
21 - First Motion, para. 4, referring to *Prosecutor v. Tadic*, "Decision on Motion by Prosecution for Protective Measures for

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Witness R", Case IT-94-1-T, 31 July 1996, p.4.
22 - *Ibid.*
23 - Emphasis added.
24 - See, for example, *Prosecutor v. Tadic*, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", Case No. IT-94-1-T, 10 August 1995 ("Tadic Decision"), para. 215; *Prosecutor v. Brdanin and Talic*, "Decision on Motion by Prosecution for Protective Measures", Case No. IT-99-36-PT ("Brdanin Decision"), 3 July 2000, para. 20.
25 - Brdanin Decision, para. 10.
26 - *Ibid*, para. 19.
27 - *Ibid.*, paras. 11, and 28. In the Brdanin Decision, the Prosecution sought an order that it was permissible for it to redact identifying information with respect to every witness in its Rule 66 (A)(i) material. This case, in which the Prosecution seeks such an order with respect to 203 of 252 witnesses, is analogous in this respect. The Chamber in Brdanin did not accept the proposition that the prevailing circumstances in the former Yugoslavia would justify blanket redactions of the sort requested by the Prosecution. That is also the view of this Trial Chamber.
28 - Article 21.4(b) of the Statute requires as a minimum guarantee that the accused is "to have adequate time and facilities for the preparation of his defence..."
29 - Tadic Decision.
30 - *Prosecutor v. Blaskic*, "Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses", Case No. IT-95-14, 5 November 1996.
31 - *Prosecutor v. Tadic*, "Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L", Case No. IT-94-1-T, 14 November 1995, para. 21. Emphasis added.
32 - Second Motion, para. 17. In a "Corrigendum to Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69: Prosecution Response to Order for Further Submissions", 31 January 2002, the Prosecution correct the meaning of the use of a threatening word. The reference to Brankovic was to a person who was ostracised for his traitor-like conduct, not "executed" as was asserted in the Second Motion.

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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;

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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

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

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

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

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

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

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

Reply by the Defence

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

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

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

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

HAVING DELIBERATED, 331

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.***

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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)

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IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Dorothee de Sampayo Garrido-Nijgh

Decision of: 12 May 1998

PROSECUTOR

v.

MILAN KOVACEVIC

DECISION ON PROSECUTION MOTION TO PROTECT VICTIMS AND WITNESSES

Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Ann Sutherland
Mr. Michael Keegan

Counsel for the Accused:

Mr. Dusan Vucicevic
Mr. Anthony D'Amato

THE TRIAL CHAMBER

NOTING the Motion To Protect Victims And Witnesses filed by the Office of the Prosecutor ("Prosecution") on 20 April 1998 ("the Prosecution Motion") requesting protective measures for all victims and witnesses who might be called to appear during the trial, the Defence Reply to the Prosecution Motion filed on 1 May 1998 ("the Defence Reply") in which the Defence made various requests for relief, including: (a) a request for pre-trial interviews with Prosecution witnesses; (b) an order that the Prosecution reveal whether any Prosecution witness has received psychiatric or psychological treatment or counselling; and (c) disclosure of any interrogation, counselling, financial or other support provided to the Prosecution witnesses by state security and intelligence services or social and religious organizations; and the Reply To The Defence Reply and Response To Motion For Relief Contained In The Defence Reply, both filed by the Prosecution on 7 May 1998 with leave of the Trial Chamber,

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NOITNG that the Prosecution has agreed to approach its witnesses and enquire as to their willingness to give pre-trial interviews to the Defence and to enquire as to whether they have received psychiatric or psychological treatment or counselling and to convey that information to the Defence,

HAVING HEARD the arguments of the parties on 11 May 1998 and having reserved its Decision on both the Prosecution Motion and the requests contained in the Defence Reply to a later date,

CONSIDERING the obligation on the Trial Chamber to provide for the protection of victims and witnesses mandated by Article 22 of the Statute of the International Tribunal ("Statute") and by Rule 75 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

CONSIDERING ALSO that in the case of *Prosecutor v. Delalic et al,* Case No. IT-96-21, in a decision of Trial Chamber II dated 18 March 1997, it was held that the Defence does not have any right to obtain information concerning Prosecution witnesses for the purpose of conducting pre-trial interviews, this Trial Chamber endorses that Decision, as there is no right to conduct such interviews: no such right is reflected in Article 21 of the Statute or in Article 14 of the International Covenant on Civil and Political Rights and, as such, the conduct of interviews in these circumstances does not form part of the practice of the International Tribunal, even when acceded to by the Prosecution,

CONSIDERING FURTHER that there is a danger that pre-trial interviews may add further to the distress of victims and witnesses,

PURSUANT to Article 22 of the Statute and to Rule 75 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY GRANTS THE PROSECUTION MOTION, REFUSES THE RELIEF SOUGHT IN THE DEFENCE REPLY, AND ORDERS as follows:

1. The Prosecutor, the accused, his counsel and their representatives shall not disclose to the public, to the media or to family members and associates the identity, whereabouts or any other identifying information of witnesses, except for reasons related to the preparation of their cases;
2. The Prosecutor, the accused, his counsel and their representatives shall not disclose to the public, to the media or to family members and associates the substance, in part or in whole, of the witness statements which the Prosecutor provides pursuant to discovery, except for reasons related to the preparation of their cases;
3. The Prosecutor and the Defence shall each maintain a log indicating the name, address and position of each person or entity which receives a copy of a witness statement, as well as the date of disclosure. If there is a perceived violation of the orders described herein, either the Prosecutor or the Defence shall notify the Trial Chamber which may either review the alleged violations or may refer the matter to a designee, such as the duty Judge. If the Trial Chamber refers the matter to a duty Judge, the duty Judge shall review the disclosure logs, make factual determinations, and report back to the Trial Chamber with a recommendation as to whatever action seems appropriate;
4. The Prosecutor and the Defence shall instruct those persons who have received a copy of the statements not to reproduce them, under pain of sanction for contempt of the Tribunal, and to return the said documents as soon as they are no longer required;
5. The Prosecutor and the Defence shall verify that those individuals who have received a copy of the statements comply strictly with their obligations not to reproduce them, and to return them as soon as they are no longer required.

For the purposes of this Decision, the term "public" does not include those entities or persons who are

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assisting the accused, his counsel or the Prosecutor in the preparation of their cases.

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

Richard
May

Presiding
Judge

Dated this twelfth day of May 1998

At the Hague

The Netherlands

[Seal
of
the
Tribunal]

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IN THE TRIAL CHAMBER

Before: Judge Adolphus Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 18 March 1997

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC, also known as "Pavo"
HAZIM DELIC
ESAD LANDZO, also known as "Zenga"

DECISION ON THE DEFENCE MOTION TO COMPEL THE DISCOVERY OF IDENTITY AND LOCATION OF WITNESSES

The Office of the Prosecutor:

Mr. Eric Ostberg Mr. Giuliano Turone

Ms. Teresa McHenry Ms. Elles van Dusschoten

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Branislav Tapuskovic, Ms. Mira Tapuskovic, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. Mustafa Brackovic, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION

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On 19 February 1997, a Defence Motion to Compel the Discovery of Identity and Location of Witnesses ("the Motion") was filed by the Defence for the accused Esad Landzo (Official Record at Registry Page ("RP") D2761-D2768) for consideration by this Trial Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. ("International Tribunal"). The Office of the Prosecutor ("the Prosecution") filed a Response to the Defence Motion ("the Response") on 20 February 1997. (RP D2770-D2768)

having considered the written submissions of the Defence and the Prosecution ("the parties"), and after hearing the parties in oral argument on 10 March 1997, the Trial Chamber delivered an oral decision on 11 March 1997 and reserved the written decision for a later date,

THE TRIAL CHAMBER HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

1. The following provisions of the Statute of the International Tribunal are relevant to the issue before the Trial Chamber:

Article 20

Commencement and conduct of trial proceedings

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

. . . .

Article 21

Rights of the accused

. . .

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

. . .

(b) to have adequate time and facilities for the preparation of his defence and to communicate with the counsel of his own choosing;

. . .

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

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. . . .

2. The following Rules of Procedure and Evidence ("the Rules") are also relevant to the issue:

Rule 67

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

. . . .

Rule 69

Protection of Victims and Witnesses

. . .

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

Rule 75

Measures for the Protection of Victims and Witnesses

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

. . . .

B. Pleadings

1. The Defence

3. The Defence requests that the Trial Chamber compel the Prosecution to disclose the names and locations of the witnesses it intends to call at trial, for the purpose of conducting pre-trial interviews with those witnesses. It contends that this information has been withheld contrary to the Statute of the Tribunal and its Rules. The Defence asserts that it must have the opportunity to approach the Prosecution's witnesses outside of the Tribunal and "without the restrictive gaze of the

prosecution." (the Motion at RP 2759).

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4. The Defence notes that the Prosecution has not filed for protective measures for its witnesses. It asserts that without such a request for protective measures and the granting of these by the Trial Chamber, the Prosecution has no right to withhold the addresses of the witnesses, thereby preventing the Defence from having access to them and interviewing them prior to trial.

5. The Defence contends that, after discussion with the Prosecution pursuant to the Trial Chamber's Order Disposing of Motions Filed by the Defence of 27 January 1997 (RP D2678-D2676), the two parties were unable to resolve the matter between themselves. The Defence therefore requests that the Prosecution be ordered to disclose the names and addresses of the witnesses which it intends to call at trial, the location of the witness, the count to which each witness will testify and the estimated length of their testimony.

6. Whilst speaking to the Motion before the Chamber, Defence Counsel further emphasised that the Defence is prejudiced by the fact that it is unable, without further information, to investigate the circumstances surrounding the witnesses, such as their reputation.

2. The Prosecution

7. The Prosecution maintains that the Defence was provided with the names of its witnesses several months prior to the present time.

8. It asserts that it is under no obligation to provide the addresses of the witnesses, under the Statute, the Rules or any Order of the Trial Chamber. It further asserts that the Rules envision that such addresses will **not** be provided. The Prosecution submits that, under Sub-rule 67(A)(ii), it is only the Defence which is under a duty to provide the names and addresses of the witnesses it intends to call to any special defence tendered. Therefore, it argues, the Rules do not contemplate, in the absence of similar specific mention of addresses as is contained in Sub-rule 67(A)(ii), that the Prosecution should provide the addresses of its witnesses.

9. During the oral argument on the Motion, the Prosecution took the position that the use of the word "identity" in Sub-rule 69(C) does not import the current addresses of the witnesses. The Prosecution was of the view that other information, such as birth date or place of origin of the witnesses could be considered part of their identity as required by that Rule.

10. The Prosecution submits that a witness is under no obligation to grant a pre-trial interview to the Defence, although he or she may choose to do so. To disclose the addresses of the witnesses to the Defence would, in the opinion of the Prosecution, violate assurances it has already made to the witnesses, create possible risks for the well-being of the witnesses and jeopardise the witnesses' right to privacy as well as their willingness to co-operate with the Tribunal.

11. The Prosecution nevertheless reports that, in an effort to accommodate the request of the Defence, it has contacted each of its witnesses in order to determine whether they would be willing to have their addresses given to the Defence or grant the Defence a pre-trial interview. However, the witnesses all expressed their unwillingness that such action should be taken.

12. Finally, the Prosecution declares that the absence of a request for protective measures for its

witnesses does not imply that the addresses of those witness should be disclosed to the Defence. -342

III. FINDINGS

13. In any criminal trial the testimony and examination of witnesses constitutes a crucial element of the case for both the Prosecution and the Defence. It cannot be over-emphasised that the final verdict on the guilt of the accused person or persons depends in large part upon this testimony and examination. Recognising the critical nature of witness testimony to the accused person, Article 21(4)(e) provides for witness examination as one of the minimum guarantees necessary for a fair trial.

14. The Judges of the International Tribunal, in drawing up the Rules to govern its operation, sought to ensure that the right of the accused to a fair trial always be respected. It is of fundamental importance to the fairness of a trial that the parties know the extent of and limitations to their rights and obligations pertaining to the disclosure of the identities of witnesses appearing before the Tribunal.

15. While the protection of victims and witnesses is the subject of several of the Rules, the provisions of Article 20(1) of the Statute strike the appropriate balance by stating that "full respect" must be given to the rights of the accused and "due regard" for the protection of victims and witnesses.

16. The arguments of the Prosecution fall into two categories. Firstly, that the Rules do not require disclosure of the addresses of witnesses and, secondly, that such disclosure would endanger the witnesses.

17. It is clear from Sub-rule 69(C) that the Defence has a right to know the identity of the witnesses which are to be called by the Prosecution in the presentation of its case. The use of the term "identity" has a significance which goes beyond the mere provision of the names of these witnesses. A name by itself is not sufficient to identify the person by whose testimony the charges against the accused are sought to be proven. To identify the witnesses, therefore, it is necessary for the Defence to know further particulars about them, this in turn to satisfy the right of the accused to an adequate preparation of his defence.

18. The provisions of Rule 75 are such that the privacy and protection of the witnesses may be taken into account by the Trial Chamber and weighed against the rights of the accused. Whilst the Prosecution may, under Rule 39(ii), take special measures to provide for the safety of potential witnesses, these measures relate to the investigative stage of a case. It is not for the Prosecution to provide assurances to witnesses once it has decided that these witnesses will be called to give testimony before the Tribunal. The granting of any necessary protective measures is solely a matter for determination by the Trial Chamber.

19. Furthermore, there is no opportunity for the Defence to examine the witnesses for the Prosecution in any real sense without a proper appreciation of those witnesses. The basic right of the accused to examine witnesses, read in conjunction with the right to have adequate time for the preparation of his defence, therefore envisages more than a blind confrontation in the courtroom. A proper in-court examination depends upon a prior out of court investigation. Sub-rule 69(C) reflects this by referring to a "sufficient time prior to the trial".

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20. The term "identity" does not necessarily include the present addresses of the witnesses. The Trial Chamber rejects the submission of the Defence that it has a right to these addresses for the purposes of conducting pre-trial interviews as unsupported by any Rule or provision of the Statute. Substantial identifying information would appear to be the sex of each witness, his or her date of birth, the names of his or her parents, his or her place of origin and the town or village where he or she resided at the time relevant to the charges. Such information provides the Defence with adequate notice of who exactly it is that the Prosecution deems essential to the proof of its case against the accused so that the Defence can adequately conduct its own investigations.

IV. DISPOSITION

THE TRIAL CHAMBER,

FOR THE FOREGOING REASONS,

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES,

PURSUANT TO RULE 54,

HEREBY ORDERS that the Prosecution shall immediately provide to the Defence for each accused, should they not already have done so, the name, sex, date of birth, place of origin, names of parents and place of residence at the time relevant to the charges to which the witness will testify, of each of the witnesses it intends to call at trial,

HEREBY DENIES the Defence request that the current addresses of the witnesses referred to above be made available to the Defence.

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

_____

Adolphus
G.
Karibi
-
Whyte

Presiding
Judge

Dated this eighteenth day of March 1997

At the Hague

The Netherlands

[Seal
of