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SCSL-2003-05-PT-1P-022

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(536-617)

SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson
Designated Judge

Registrar: Robin Vincent

Date filed: 23 April 2003

THE PROSECUTOR

v.

ISSA HASSAN SESAY

Case No. SCSL-2003-05-PT

RESPONSE OF DEFENCE OFFICE
TO "*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

Eustace Thompson
23-4-03 2:45pm

Defence Office

John R.W.D. Jones, Acting Chief of Defence Office and Legal Advisor
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern

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I. INTRODUCTION

1. On 9 April 2003, the *Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure* dated 7 April 2003 (the "**Prosecution Motion**") was filed by the Court Records Office and subsequently served on the Defence. The Prosecution Motion requested a Judge or Chamber to issue eleven (11) protective measures.

2. In a communication dated 17 April 2003 from the Chambers, copied to the Defence Office, the Defence was notified that, due to the different dates on which the Prosecution Motion was served on the Parties, "*the time limit for the filing of the Defence Response to the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure is 23 April 2003*".

3. Accordingly, the Defence Office herewith files, on behalf of Issa Hassan Sesay (the "**Accused**"), its response to the Prosecution Motion, without prejudice to the position that might be taken by the Accused's assigned counsel once such counsel is assigned.

4. While the Defence Office does not oppose measures genuinely designed for "the protection of witnesses and victims" within the meaning of Articles 16 and 17 of the Statute of the Special Court for Sierra Leone and Rules 69 and 75 of the Special Court's Rules of Procedure and Evidence (the "**Rules**"), the OTP in its motion is requesting measures far in excess of what is necessary to achieve this legitimate purpose. In particular, the Defence Office objects to the orders requested in paragraph 20 (a), (g) and (k) of the Prosecution Motion.

II. FACTUAL BASIS FOR THE MOTION

5. The Office of the Prosecutor (the "**OTP**") bases its request for the orders outlined above on the 5 March 2003 statement of Morie Lengor, an investigator with the OTP, and on the 7 April 2003 declaration of Alan W. White, Chief of Investigations for the OTP. These statements assert that potential witnesses in Sierra Leone – the wording of the Prosecution Motion leaves it unclear whether it is *all* or only *some* potential witnesses - have expressed a general fear of violence from ex-combatants living in their communities should those potential witnesses be identified as such. Mr. White's declaration also indicates that some potential witnesses have received specific threats as a result of their involvement with investigators from the OTP. The materials submitted do not, however, provide any indication as to the extent or degree of such specific incidents of intimidation except in relation to alleged CDF supporters, which is a distinct group from the RUF/AFRC faction to which the OTP allege Mr. Sesay belonged, and therefore has no bearing on his case.

6. It is further asserted in the material submitted by the OTP that some members of the forces involved in the Sierra Leonean conflict may now be members of either the Sierra Leone Police (the "**SLP**") or the Republic of Sierra Leone Armed Forces (the "**RSLAF**").

7. Finally, Mr. White's declaration indicates that the security situation in the region is "*volatile*" and that members of the armed factions involved in the Sierra Leonean conflict are present throughout West Africa.

8. The material submitted by the OTP in support of its motion gives no indication of the importance of the testimony to the OTP's case at trial of the witnesses for whom protective measures are sought. In addition, the material gives no indication as to the general location of the witnesses nor whether any have criminal records or are suspected of crimes themselves (an important point in relation to the *Tadic Protective Measures Decision*, as discussed below).

9. The submitted material also gives no indication as to the position of the Special Court's Victims and Witness Unit (the "**VWU**") with respect to the orders sought by the Prosecution nor the potential effectiveness of witness protection measures arranged through the VWU.

10. In order to give a fuller picture of the context in which the Prosecution Motion is made, the Defence Office submits a brief recent security review from UNAMSIL and the 2002 report of the U.S. Department of State outlining the human rights situation in Sierra Leone for that year (the report was released March 31, 2002) as annexes 1 and 2 to this Response. The UNAMSIL report indicates the security situation in Sierra Leone remains "*calm and stable*" and that there are no particular security concerns for any "*up-country sector*" in the country save the Eastern – Koidu sector, which reports an influx of refugees. The Department of State report indicates that the human rights situation in Sierra Leone is improving. Of particular importance in the Defence Office's submission, the report notes the stabilizing influence of the 17,500 UNAMSIL soldiers in the country and improved performance by the SLP and RSLAF.

III. WITNESS ANONYMITY

11. In general, the orders requested in the Prosecution Motion are unduly prejudicial to the Accused's right to a fair trial guaranteed under international law and by Article 17 of the Statute of the Special Court for Sierra Leone. In particular, the OTP's concerns over witness protection must be appropriately balanced against the Accused's right to be informed of the nature and cause of the charge against him, to have adequate time and facilities to prepare his defence and to examine the witnesses against him – rights guaranteed under by Article 17, sub-sections 4(a), (b) and (e) of the Statute and Article 14 of the *International Covenant on Civil and Political Rights* to which Sierra Leone is a party.

12. When witness protection and the rights of an accused are balanced, close attention must be paid to the principle of proportionality. Any order deemed necessary by this Court must affect

the Accused's fair trial rights as little as possible. This proportionality requirement derives from international human rights law which itself forms part of the basis for the Statute of the Special Court for Sierra Leone. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (the "**ICTY**") in its decision granting provisional release to the three accused in *Prosecutor v. Hadzihasanovic et al.* dated 19 December 2001, held:

> "*A measure in public international law is proportional only when (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied.*" (emphasis added)

1) **ICTY Jurisprudence**

13. The purpose of protective measures is primarily to protect victims and witnesses from threats to the safety and security of their persons. Protective measures may be broadly classified into two classes – *confidentiality*, i.e. measures protecting the witness's identity *from the public*, on the one hand, and *anonymity* – that is, withholding the identity of the witness not only from the public *but from the Accused as well*, on the other. Clearly, anonymity is a much more restrictive measure, and one which is rarely ordered by international courts and tribunals, and then only with extremely good cause based on a request particularised with respect to each specific witness in respect of whom protective measures are sought.

14. The Prosecution Motion requests measures both of confidentiality and of *partial* anonymity in that the OTP proposes to disclose the witness's identity to the Accused only shortly (21 days) before the witness testifies.

15. Where anonymity is requested, strict threshold requirements must be met. These were clearly set out by the ICTY Trial Chamber in its *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* rendered in *Tadic* on 10 August 1995 (the "***Tadic* Decision**").[1] In *Tadic* the Trial Chamber stipulated that for an application for anonymity to be granted, the following five conditions would have to be met:

1) First and foremost, there must be real fear for the safety of the witness or her or his family (para. 62, *Tadic* Decision);
2) Secondly, the testimony of the particular witness must be important to the Prosecutor's case (para. 63, *ibid.*);
3) Thirdly, the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy (para. 64, *ibid.*);
4) Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has considerable bearing on any decision to grant anonymity (para. 65, *ibid.*); and
5) Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied (para. 66, *ibid.*).

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[1] The Decision was attached to the Prosecution Motion and is therefore not re-attached here.

16. The ICTY Trial Chamber in *Milosevic, Decision on Prosecution Motion for Provisional Protective Measures pursuant to Rule 69* dated 19 February 2002 identified 3 further criteria that should be considered in granting orders for protective measures for witnesses and victims:

> (a) the likelihood that prosecution witnesses will be identified or intimidated once their identity is made known to the accused and his legal counsel;
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> (b) the extent to which the power to make protective orders can be used not only to protect individual victims and 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
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> (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 [another] case that, although the shorter the time between the 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.)

17. The Prosecution Motion does not fulfil the *Tadic* criteria for anonymity since the threshold requirements set out above have not been addressed by the OTP. The Prosecution Motion also, wrongly in the Defence Office's submission, requests that the time for disclosing the identity of the witness be counted from 21 days before the witness testifies rather than from the firm trial date. This inadequately provides for the right of the Accused to prepare for trial, since it would mean that when the trial starts the Accused would still be unaware of the identity of a great number, indeed the majority, of the witnesses that would be brought against him.

18. It is worth noting that ICTY jurisprudence in no way supports the OTP's argument for a "*21 day rule*" – a rule which is, indeed, only found in two ICTR decisions. On the contrary, in most cases at the ICTY, e.g. *Hadzihasanovic et al.*, the Defence were not only provided with all of the witnesses's identities from the outset – many months before the trial started – but the Defence was permitted to interview Prosecution witnesses without any need to apply to the Chamber and without a requirement that the Prosecution be present for such interviews. In the *Tadic Decision* cited by the OTP, several of the requests for anonymity were rejected, applying the criteria set out above. Where partial anonymity was granted – in respect of witness F – his identifying details were ordered to be disclosed to the Defence "*not less than thirty days in advance of the firm trial date*", not 21 days from before the date of *testifying*. It is also worth noting that anonymity in the *Tadic* trial was in the end only employed for one witness, whose credibility was thoroughly impeached at trial (see the Trial Chamber's *Order for the Prosecution to investigate the false testimony of Dragan Opacic* rendered in *Tadic* on 10 December 1996 and *Decision Withdrawing Protective Measures for Witness "L,"* rendered by the Trial Chamber in the same case on 5 December 1996). It is submitted that the ICTY's experience in this area is a salutary reminder of the dangers of anonymity, or partial anonymity, and the temptation it presents to witnesses to testify falsely.

2) <u>ICTR Jurisprudence</u>

19. The Prosecution places great reliance on a selection of cases from the ICTR. Although it is evident from the decisions that have been granted on motions for protective measures that the ICTR has, on occasion, granted the same wide-ranging anonymity orders the OTP seeks in the current case, the Defence Office submits it has done so only where the ICTY's approach, first set out in *Tadic*, justified such orders. See, for example, in the *Prosecutor v. Rutaganda*, the *Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses*, rendered on 26 September 1996, in which the Chamber based itself in part on the *Tadic Decision* and granted a range of measures which stopped short of full anonymity.

20. The Defence submits that the main factor that weighed in the minds of the Judges of the Trial Chamber of the ICTR in issuing broad orders for anonymity was the specific security situation in Rwanda and neighbouring countries where witnesses were located. At the time, civil unrest raged in Rwanda and the Great Lakes region as a whole and such measures were deemed necessary in that particular context to protect witnesses and victims from that region. Thus the particular circumstances of the genocide in Rwanda and its aftermath required, having regard to the test set out in *Tadic*, broad orders for witness anonymity.[2] The ICTR jurisprudence thus revolved around the particular facts of the security situation in the Great Lakes region of East Africa at the time, while the ICTR applied the same legal test applied by the ICTY. Measures necessary to ensure that potential witnesses are free to testify which may have been necessary in East Africa provide no guidance where the issue before a court is the protection of potential witnesses in Sierra Leone or any other country. The question as to which protective measures are appropriate in Sierra Leone has to be looked at on its own merits, taking into consideration the present security situation in this country and whether witnesses have objectively grounded fears about testifying. Protective measures should only be ordered in respect of those specific witnesses.

3) Application of *Tadic*'s Principles to the Present Case

(a) Real fear

21. This paramount factor from *Tadic* sets out an objective test for the grant of witness anonymity. Only where the potential witness's fear is "real" – i.e. objectively verifiable and reasonable – will it require the Chamber to consider protective measures. As the Trial Chamber of the ICTY in *Prosecutor v. Brdjanin and Talic, Decision on Motion for Protective Measures*, 3 July 2000, stated (at paragraph 26):

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[2] Reference may be made to *Prosecutor v. Bagosora, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses* rendered by the Trial Chamber on 31 October 1997; *Prosecutor v. Nahimana and others, Decision on the Prosecutor's Application to Add Witness X to the list of witnesses for protective measures*, 14 September 2001; and *Prosecutor v. Carcisse Muvunyi & others, Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment.* In the latter case, the Chamber ruled in respect of witnesses who resided outside Africa, that the test established by the Trial Chamber is that "*the present security situation would affect any potential witness even if residing outside the region*".

> *"Any fears expressed by potential witnesses themselves that they may be in danger or at risk are not in themselves sufficient to establish any real likelihood that they may be in danger or at risk . . . Something more than that must be demonstrated"*.

22. In the present case the Prosecution evidence outlined in Section II above does no more than set out the fact that *some witnesses* – it is unclear precisely how many potential witnesses – have expressed subjective fears. Indeed the Prosecution Motion refers to witnesses "*who have not affirmatively waived their rights to protective measures*" for two categories of witnesses, rather than referring to witnesses who have *positively requested* protective measures. The correct approach would be for the OTP to have asked each witness whether they wished to have protective measures, and then to determine - in respect of witnesses expressing such fears – whether those fears are objectively justified, and then to request such protective measures only in respect of those witnesses and only such measures as did not disproportionately infringe on the rights of the accused. This has not been the OTP's approach. The requests for partial anonymity must be rejected on the basis that the evidence in support of those requests does not establish objectively that such measures are required.

23. Moreover, the Prosecution Motion does not effectively distinguish between witnesses who are living in Sierra Leone, West Africa or elsewhere, when the location of the witness is directly relevant to their security situation and thus relevant to the necessity or otherwise of ordering protective measures. These separate categories of witness must be evaluated differently with respect to the reasonableness of their fears of intimidation and the degree of danger they face even where such fears are established as reasonable. A witness in Sierra Leone who lives in close quarters with ex-combatants allied to an accused may be expressing a reasonable fear of reprisal whereas similar fears expressed by a witness living in London would have to be deemed unreasonable on the basis of the material submitted by the OTP.

24. To the extent, if any, that the material filed by the OTP establishes a real fear the Defence Office submits the evidence offered by the Prosecution fails to satisfy the other criteria set out in *Tadic* which would justify the grant of witness anonymity.

(b) Importance of the Witness's Testimony

25. The OTP has not provided the Court with any information on which it can base a finding as to the importance of any of the witnesses for whom the Prosecution seeks anonymity. Without such information, this Court cannot properly entertain the application for anonymity.

(c) *Prima Facie* Evidence of Untrustworthiness

26. While anonymity may provide effective protection for the truthful witness in exceptional cases, it can also protect witnesses from effective investigation of their true antecedents while hampering effective preparation for cross-examination at trial. This point is addressed in the *Tadic Decision* and in the ICTY's experience of witness "L", as outlined above.

27. The OTP has not provided any evidence, nor made any assertions to the effect that all of the witnesses in respect of whom partial anonymity is sought are *prima facie* trustworthy. The OTP has thus not met the evidentiary burden imposed upon it as the party bringing the motion and accordingly the motion cannot be entertained.

(d) Effectiveness of Other Witness Protection Measures

28. The material submitted by the Prosecution primarily speaks to dangers that potential witnesses perceive in their communities in Sierra Leone as a result of the presence of ex-combatants. None of these communities are identified, even generally[3]. Bearing in mind the proportionality requirement outlined above, the Defence Office submits that the availability of moving witnesses to safer locations or other measures overseen by the VWU may obviate the need for anonymity. It is not clear from the Prosecution Motion whether any enquiries have been made about the effectiveness of other witness protection measures.

(e) Proportionality

29. Full or partial anonymity severely hampers the effective investigation of an adverse witness's antecedents, which needs to be carried out well in advance of the start of trial, in the pre-trial investigative phase, and not in the midst of the trial as would be the case if the OTP's "21 day rule" were applied. Anonymity also hampers effective preparation for cross-examination of such a witness which may, in turn, protect the witness who is not telling the truth from proper scrutiny at trial. It is a sad but inescapable fact that some witnesses do lie. Thus, the effect of anonymity on an accused's rights to a fair trial is significant in any case. The proportionality requirement discussed in *Tadic*, and required by public international and human rights law, strongly argues against the imposition of such a drastic measure.

30. In the circumstances of the present motion measures short of anonymity may be available to protect witnesses with legitimate fears. For example, the OTP and VWU can move potential witnesses to safe areas and the Defence Office has no objection to reasonable restrictions on Defence Counsel's publication of information received from the Prosecution. The Defence Office submits such measures are sufficient to address the security concerns outlined by the OTP in its motion and that any further restriction of the accused's fair trial rights would be disproportionate to its effect on any potential witness found to have a real fear of intimidation.

4) <u>The 21-Day "Rule"</u>

31. In the alternative, should this Court be inclined to grant the anonymity order sought, the Defence Office submits the proposed identity disclosure 21 days before the witness testifies at the trial is arbitrary, oppressive and violates the rights of the accused.

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[3] The Defence Office is not suggesting the OTP is required to identify specifically where a potential witness lives. Obviously, such identification would frustrate any legitimate witness protection efforts. However, the Defence Office submits that the Region or even District where a potential witness lives could and should, in many cases, be provided so that the request may be properly considered.

32. The "*21 day rule*" referred to by the OTP in the cases attached to the motion is not informed by any legal reasoning but is rather dictated by the factual circumstances obtaining in Rwanda at the time. Moreover this "rule" is in fact found only in two ICTR cases – *Muvunyi* and *Karemera* – and was *not* ordered in the vast majority of cases at the ICTR and at the ICTY.

33. The security situation in Sierra Leone differs from that of Rwanda and its environs, and differs again from the situation in the former Yugoslavia at the time the *Tadic Decision* was rendered (the *Tadic Decision* was issued when the conflict in that region was still on-going, when witnesses from the region had no effective local protection and indeed were at risk from the local police forces themselves). Given the myriad situations that could be faced in different prosecutions, the Defence Office submits that it makes no sense to lay down a strict rule for the disclosure of the identity of the witness based on two ICTR decisions; the matter must be looked at in the context of the security situation in Sierra Leone and examined case-by-case.

34. The situation in Sierra Leone calls for the use of less restrictive measures as the security situation differs considerably from that of Rwanda. In support of this, the Defence submits as attachments reports compiled by reputable international human rights organisations giving an account of the present human rights and to some extent the security update on Sierra Leone. The Defence therefore invites the Trial Chamber to consider the situation in Sierra Leone in its own context, in arriving at a conclusion on whether or not a "21 day rule" may be justified.

35. It should be noted that a "21 day rule" is, in itself, intrinsically arbitrary; the OTP has not stated why the dangers allegedly faced by witnesses would disappear 21 days before they were to testify, nor why the period of 21 days should run from before the date when the witness will testify rather than from before the firm trial date, nor why 21 days is, in the Prosecution's view, a reasonable period rather than 30 days or 60 days or 90 days or some other period which provides the Defence with adequate time to prepare for trial.

36. Article 14.2 of the Statute of the Special Court for Sierra Leone states that the Trial Chamber shall be guided by the *Criminal Procedure Act, 1965* of Sierra Leone and, by necessary implication, by the jurisprudence of the Supreme Court of Sierra Leone. The criminal procedure of Sierra Leone, like the national laws of most common law nations, grants an accused the opportunity to hear the evidence against him before trial by way of a preliminary investigation hearing for serious cases. Any deviation from this basic principle is considered highly exceptional.

IV. USE OF PSEUDONYMS

37. The Defence Office does not, as a general matter, oppose the imposition of necessary measures of *confidentiality* – i.e. protection of the witness's identity from the public, as opposed to from the Accused – including the use of synonyms, but would again insist that such measures

should only be ordered with respect to witnesses who have well-founded fears of testifying should their identities be made known to the public.

V. DEFENCE COUNSEL LOG AND "DESIGNATION" OF PERSONS

38. The Defence Office does not oppose the Prosecution's request for an order designating certain material as non-public. With respect to the detailed measures proposed to ensure such material is not publicized the Defence Office respectfully submits an undertaking by counsel is sufficient to address the concerns implicit in the Prosecution's request. Defence Counsel will be bound by their home state's rules of professional conduct and any rules of professional conduct adopted by this Court. Those rules will inevitably include an obligation to abide by any undertaking respecting the confidentiality of material handed over to counsel. Any breach of such undertaking can be addressed through Rules 46 and 77 of the Rules of Procedure and Evidence of the Special Court. There is therefore no need for any further procedures.

VI. REQUIRING DEFENCE TO APPLY FOR ACCESS TO PROTECTED WITNESSES

39. The Defence Office submits that this issue is appropriately dealt with by the Prosecution addressing a communication to each potential witness asking whether they have any objections to being contacted by the Defence. If the witnesses express no objections, then there can be no objection to the Defence contacting the Prosecution witnesses and speaking to them about the case. This procedure was indeed adopted by the ICTY Trial Chamber in *Hadzihasanovic et al.*.

VII. REDACTION WITHOUT A COURT ORDER

40. The Defence Office notes that the Prosecution has already "*redacted the names and any other identifying data of the witnesses*" from the material to be disclosed to the Defence (paragraph 4, Prosecution Motion). This raises two key issues. First, the question arises why the Prosecution is seeking protective measures, and in an "*Extremely Urgent Motion*" sought to delay disclosure to the Defence until an order on protective measures is issued, when in fact disclosure would not have revealed the witness's identities in any event.

41. Second, ICTR jurisprudence lays down that there should not be redaction without an order from the Chamber. See the *Decision on the Motion filed by the Prosecutor on the Protection of Victims and for Witnesses* rendered by the Trial Chamber in *Ruzindana* on 31 January 1997:

> "*WHEREAS, pursuant to Rule 69(A) of the Rules, non-disclosure by the Prosecutor of the identity of a victim or witness can only be administered if she has first obtained a court order for such measures from the Trial Chamber, and in any case, only when exceptional circumstances are shown;*
>
> *WHEREAS, in this case, the Tribunal notes* ex officio *that the Prosecutor independently decided not to disclose the identity of victims and witnesses to the Defence, without first requesting an order from a Trial Chamber as required under Rule 69(A) of the Rules;*
>
> *WHEREAS the Prosecutor thereby wrongfully submitted to the Defence versions in which identifying information on victims and witnesses were redacted, even if, had the Prosecutor first obtained an order to that effect, she would have been legally entitled to do so . . .*"

42. This does not mean that redaction can only take place after the Chamber has ordered protective measures for victims and witnesses under Rule 69. The Chamber can authorise temporary redaction, pending a protective measures order. See *Decision to withdraw assigned counsel and to allow the Prosecutor temporarily to redact identifying information of her witnesses*, rendered by the Trial Chamber in *Musema* on 18 November 1997:

> *"HAVING RECEIVED, during the initial appearance of the accused, the Prosecutor's oral request pursuant to Rule 69 of the Rules for permission to temporarily redact the names and identifying information of the Prosecutor's witnesses in the supporting material until such time as the Chamber has ordered measures for the protection of her witnesses;* [...]
>
> *9. The Tribunal finds that there are good reasons to grant the Prosecutor's request to redact the identifying information relating to her witnesses."*

43. It is clear from this that *an* order of some description is required from the Chamber before the OTP may be permitted to redact identifying information. Accordingly, the OTP should be ordered, in the absence of an Order authorising redaction, to provide disclosure to the Defence in unredacted form.

VII. CONCLUSION

44. The Prosecution Motion is ill-founded in that (a) it does not make clear whether all witnesses were asked whether they had fears for their safety, (b) it does not attempt to determine which fears are objectively grounded and which are not, (c) it does not draw distinctions between the different situations of witnesses in different parts of Sierra Leone, or in West Africa, (d) it does not distinguish between the cases of the different Accused, (e) it bases itself on measures ordered by the ICTR which were based on the particular security situation prevailing in Rwanda and its surroundings, which are not applicable to the situation in Sierra Leone, and (f) it does not attempt to minimise the intrusiveness of the measures on the rights of the accused to a fair trial but seeks, in respect of virtually all witnesses, the most restrictive measures, which would make it all but impossible for the Accused adequately to investigate the witnesses's backgrounds to determine whether they are trustworthy or whether they have motives for lying, or might otherwise be mistaken in their testimony, and if granted, would render a fair trial difficult, if not impossible.

Dated this 23rd day of April, 2003.

DEFENCE OFFICE

John R.W.D. Jones, Acting Chief of Defence Office and Legal Advisor
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern

DEFENCE INDEX OF AUTHORITIES

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2. United States Department of State Report on Human Rights Situation in Sierra Leone
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4. Prosecutor v. Tadic, IT—4-10, 10 August 1995
5. Prosecutor v. Milesovic, IT-02-54, 19 February 2002
6. Prosecutor v. Rutaganda, ICTR -96-3-T, 26 September 1996
7. Prosecutor v. Bagosora, ICTR -96-7-1, 31 October 1997
8. Prosecutor v. Muvunyi, ICTR-2000-55-1, 25 April 2001
9. Prosecutor v. BRDANIN & Momir TALIC, IT-99-36, 3 July 2000
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12. Prosecutor v. Ruzindana, ICTR-96-10-T, 31 January 1997
13. Prosecutor v. Musema, ICTR 96-13-I, 18 November 1997

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To: Haddijatou Kah-Jallow/SCSL@SCSL
cc:
Subject: Security

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2 GENERAL SECURITY:

The general security situation remained calm and stable during the period under review. The Security and the Force Personnel continue to monitor the situation closely throughout the country. It is advised that travel outside ones sector must be preceded either by a security briefing given by UNAMSIL Security or its Military counterparts.

3 TRAVEL ADVISORIES:

a. Liberia. The situation along the Liberian/Sierra Leonean border remained unstable, as refugees fleeing from the Liberian war continue to arrive at the border in their numbers amidst reports of heavy fighting in Liberia. It is reported that during the period there was some firing in the refugee camp at Kailahun, which has raised fears among the refugees some of whom have left the camp. There are reports of fighting close to Monrovia. UN Representative and ECOWAS Leaders have expressed concern about the Liberian situation especially on how to get assistance to UN Staff and other workers trapped outside Monrovia.

b. Ivory Coast. The Government Forces captured one of the western towns near Man in the rebel held area. The Rebels have accused the Government using Helicopter Gunship in the attack contrary to the ceasefire agreement. This new development has threatened the fragile peace. The Rebels are reported to have met in Man to discuss how to retake the town. There are also reports of new outbreak of fighting in the Eastern town of Boundoukou near the border with Ghana. The 11,000 ECOWAS peacekeeping troops are spread thinly across the country from East to West stretching over 600 km. There is a request for more troops to be added to enable them effectively maintain the ceasefire line.

Staff must receive security clearance before undertaking any official travel to countries classified Phase 1 and above. A comprehensive list is available at the Travel Unit.

4. THE SECTORS (Up-Country):

a. Sector West Area – (Port Loko)
The situation remained calm and stable during the period under review.

b. Sector Centre – (Magburaka)
The situation was assessed to be calm and stable throughout the period under review.

c. **Sector East – (Koidu)**

Reports from UNHCR office at Kailahun update indicates that 10 refugees reported at the Kailahun Way Station. A total of 4754 refugees have so far been transported to the Kenema Way Station.

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Sierra Leone

Country Reports on Human Rights Practices - 2002
Released by the Bureau of Democracy, Human Rights, and Labor
March 31, 2003

Sierra Leone is a constitutional republic with a directly elected President and a unicameral legislature. On January 18, the devastating 11-year civil conflict officially ended when all parties to the conflict issued a Declaration of the End of the War. The Government since asserted control over the whole country, backed by a large U.N. peacekeeping force. Revolutionary United Front (RUF) insurgents, who fought successive governments since 1991, completed disarmament and demobilization. The Civil Defense Force (CDF), a government-allied militia, also disarmed and demobilized, but many CDF members retained informal links to act in concert as a veterans' lobbying group and in their centuries-old role as members of traditional hunting societies. In May peaceful presidential and parliamentary elections were held; Ahmed Tejan Kabbah was re-elected President and his Sierra Leone People's Party (SLPP) won a large majority in Parliament. Many international monitors declared the elections free and fair; however, there were numerous reports of election irregularities and abuses. Since the resumption of the disarmament, demobilization, and reintegration (DDR) process in May 2001, an estimated 72,500 former combatants disarmed; on January 31, the disarmament and demobilization sections of the program were completed. The process of reintegration continued at year's end. The U.N. maintained a force of approximately 17,500 peacekeepers during most of the year. In September the U.N. Security Council decided to begin a gradual withdrawal of U.N. Mission to Sierra Leone (UNAMSIL) troops, to be completed by 2005. The official independent judiciary began functioning in areas abandoned during the war, but there still were sections of the country where the judiciary had not yet returned. The judiciary demonstrated substantial independence in practice but at times was subject to corruption.

Among the Government's security forces, the police officially had primary responsibility for internal order; however, on occasion, the Republic of Sierra Leone Armed Forces (RSLAF) and UNAMSIL shared responsibility with the police in security matters. The RSLAF were deployed to all vital locations and secured the country's borders with guidance and leadership from the British-led International Military Advisory and Training Team (IMATT). The Sierra Leone Police (SLP) were present in all provincial and district capitals. The Government maintained control of security forces throughout the year. During the year, more than 55,000 ex-combatants were registered with the National Commission for Disarmament, Demobilization, and Reintegration (NCDDR). Approximately 31,000 of these ex-combatants were engaged in reintegration program activities, ranging from formal education and vocational skills training to small-scale trade, agriculture, and community development. NCDDR projected that 7,000 more ex-combatants would enter reintegrations programs every 6 months, until all registered combatants had entered the programs. Some members of the security forces committed human rights abuses.

The country had a market-based economy and remained extremely poor; per capita earnings for the population of under 5 million have declined approximately by two-thirds since 1970. The country was rich in natural resources and minerals (particularly diamonds, gold, rutile, and bauxite) and had large areas of fertile land suitable for farming. Mineral extraction and agricultural production began after a virtual standstill during the war; however, the illegal diamond industry continued to operate. There was little manufacturing, and there were few exports; approximately 60 percent of the Government's budget came from foreign assistance.

Years of fighting and decades of corruption and mismanagement resulted in a devastated infrastructure.

The Government generally respected the rights of its citizens; however, there were serious problems in several areas. With the end of war and demobilization of the RUF and CDF, many systematic and serious human rights abuses ended. During the year, there were no reports of unlawful killings or other abuses by the CDF in support of the Government. RSLAF soldiers at times beat former RUF rebels. Prison conditions improved significantly during the year. The number of deaths in custody declined considerably. On March 1, civil liberties suspended under the Constitution were reinstated when the Government lifted the state of emergency. Members of the SLP continued to arrest and detain persons arbitrarily. There were reports of extortion by police. Prolonged pretrial detention, due to a severe lack of resources in the judicial system, remained a problem. The Government at times limited freedom of speech and the press during the year. Violence in Liberia, which produced an influx of more than 50,000 Liberian refugees, contributed to border areas becoming more unstable. Violence, discrimination against women, and prostitution remained problems. Female genital mutilation (FGM) remained widespread. Abuse of children was a problem; however, numerous children who fought as child soldiers continued to be released and participated in reintegration programs during the year. Residents of non-African descent faced institutionalized political restrictions. Forced labor continued to be a problem in rural areas. Child labor remained a problem. There were reports of trafficking in persons. Sierra Leone was invited by the Community of Democracies' (CD) Convening Group to attend the November 2002 second CD Ministerial Meeting in Seoul, Republic of Korea, as an observer.

There were some reports of abuses committed by former RUF rebels. International aid groups believed that many girls who were abducted by the RUF remained sex slaves during the year. Some young ex-combatants still were dependent on their former RUF commanders for support.

There was no cross-border conflict between rebel forces and the Guinean military. During the year, there were incursions into the country by Liberian combatants. At times the combatants looted villages and abducted inhabitants, reportedly to use them as porters.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom From:

a. Arbitrary or Unlawful Deprivation of Life

There were no reports of the arbitrary or unlawful deprivation of life committed by the Government or its agents.

Unlike in the previous year, there were no reports that forces operating in support of the Government committed unlawful killings.

No action was taken against the CDF members responsible for the June 2001 killing of three civilians during an attack in Kono district or the June and July 2001 retaliatory attack by the RUF that resulted in three deaths.

No action was taken against the members of the security forces responsible for the following incidents in 2000: The May and June killings of 27 persons in the towns of Makeni, Magburaka, and Kambia; the July killing of civilians in Bunumbu during a helicopter gunship attack; and the July execution of an RUF fighter who allegedly was trying to surrender.

Two persons were killed during a demonstration, and alleged eyewitnesses claimed UNAMSIL troops were responsible for the killings (see Section 2.b.).

There were a number of deaths in custody during the year (see Section 1.c.). In September one RUF member who was indicted for murder died in custody.

No action was taken against the members of the Economic Organization of West African States (ECOWAS) Monitoring Group (ECOMOG) responsible for the January 2000 stabbing death of a civilian in a market and the April 2000 killing of an ex-Sierra Leone Army (SLA) soldier.

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Unlike in the previous year, there were no reports that RUF members were responsible for killings during the year or killed ex-combatants who had fled the group. There also were no reports of mutilations that led to deaths by rebel groups.

In March RUF leader Foday Sankoh and 49 RUF co-defendants were indicted with 16 counts of murder and 54 counts of shooting with intent to commit murder in connection with the 2000 incident outside Sankoh's residence in Freetown in which 20 persons were killed and 80 persons were injured. Thirty-one members of an ex-SLA splinter group called the West Side Boys were charged with 11 counts of murder and 11 counts of robbery with aggravation in connection with incidents that took place in Port Loko District in 1999 and 2000. Sankoh, the 49 former RUF rebels, and the indicted West Side Boys remained in detention awaiting trial at Pademba Road Prison at year's end.

No action was taken against the RUF for the following incidents in 2001: The July killing of 22 persons in an attack on the village of Henekuma; the August killing of 2 persons in an attack on the village of Seria, in Koinadugu district; and the death of four former RUF members, allegedly under orders from RUF chairman Issa Sesay.

No action was taken against the RUF rebels responsible for the following killings in 2000: The April and May killings of U.N. peacekeepers; the May killings of journalists Kurt Schork and Miguel Gil Moreno; the June killings in the attack on Port Loko; and the August killing of nine civilians in the village of Folloh. Although the Special Court for Sierra Leone was expected to examine these incidents, no further action was taken by year's end.

An international forensic investigation team visited alleged mass gravesites throughout the country, including several sites in the Port Loko district. Local residents claimed that the victims were civilians executed by ex-Armed Forces Revolutionary Council (AFRC)/RUF members in 1999. Human Rights Officers from UNAMSIL and representatives from the Special Court for Sierra Leone also visited several suspected mass gravesites. In February a former RUF member reported that he had witnessed 75 CDF members killed in an "execution house" in Kailahun in 1998.

Unlike in the previous year, the Guinean army did not attack any part of the country. The Guinean army continued to occupy disputed territory in Yenga, Kailahun District. There was no further verification of reports that Guinean soldiers bombed and shelled villages in the Kambia District in 2001, killing or injuring many civilians, and no action was taken against Guinean soldiers who allegedly carried out these attacks. One Guinean commanding officer was relieved from command after leading an attack against a just-demobilized column of RUF soldiers at a disarmament site at Rokupr, Kambia District in May 2001.

There was no action taken against Guinean armed forces that reportedly participated in the following killings in 2001: The January helicopter gunship attack on the town of Kamakwie that reportedly killed 12 civilians; the February incident of Guinean artillery fire that allegedly killed 4 civilians in Sabuya; the February killing of a 3-year-old girl in the village of Rokel; and the May killing of a small child in Rokupr.

b. Disappearance

With the demobilization and disarmament of the RUF, there were no reports that RUF rebels abducted children, women, or men as slaves or soldiers; however, some women and children remained in captivity during the year. The RUF did not exert significant control over the civilian population in any area of the country. The U.N. estimated that rebel forces abducted approximately 20,000 persons throughout the country during the 1991-1999 period. More than 10,000 victims were released and went through a formal reintegration process; most of those released were children. Many others escaped; however, former RUF rebels continued to hold some persons, including women and children as laborers or sex slaves at year's end. Some human rights monitors said that some of the women remained with their captors during the year due to a lack of viable options and intimidation by their captors (see Section 5). According to child protection officers from nongovernmental organizations (NGOs), the Government was hindered severely by a lack of resources and has taken little action to secure their release. The Ministry of Social Welfare, Children, and Gender maintained a database, with the help from UNICEF, which attempted to track children separated from their families during the war.

There were no developments in the following disappearances in 2000: The February abduction of 11 passengers by the RUF from a bus near Masiaka; the July disappearance of a foreign worker following an attack by the West Side Boys; the July abduction of 18 persons by the West Side Boys during an attack on a bus; and the August kidnaping of 15 persons by the RUF during an attack on the village of Folloh.

During the year, Liberian combatants abducted persons in the country. For example, on July 16, armed Liberian combatants abducted 28 persons from the villages of Mandavalahun, Sange, and Kolu in Kailahun District. The combatants captured 31 villagers in the raid, but 3 escaped. On July 25, an armed group from Liberia abducted 18 persons during a raid of the village of Kokobu, Kailahun District. The Liberian combatants were thought to be using the villagers primarily as porters for looted goods. RSLAF performed frequent border patrols to deter such attacks, and UNAMSIL maintained a heavy presence in Kailahun District; however, the border with Liberia was very porous, and cross-border raids were difficult to stop completely.

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Constitution prohibits such practices; however, there was one unconfirmed report of soldiers beating a person. There also were reports that police accepted bribes and extorted money from motorists. Unlike in the previous year, there were no reports that the CDF beat or otherwise abused persons on behalf of the Government. The conduct of the RSLAF continued to improve following reorganization and increased training.

On February 12, two uniformed RSLAF soldiers allegedly beat two former RUF combatants in the presence of two police officers. The police officers allegedly did not intervene and accepted bribes from the soldiers. RSLAF officials said that the two soldiers were former SLA members and no longer were in military service. An SLP official in the Criminal Investigations Division said that the men were RSLAF members and made a formal request to the RSLAF to identify the perpetrators.

During the year, there were frequent reports that SLP officers took bribes at checkpoints, stopped and falsely charged motorists with violations, and impounded vehicles in order to extort money. Unlike in the previous year, there were no reports that drivers were beaten if they refused to pay.

Unlike in the previous year, there were no reports that the military or the CDF manned roadblocks and bridges to extort money. There was no further information on the disciplinary action taken against an SLA soldier who in 2001 reportedly beat a driver who refused to pay at a roadblock on the road from Kabala to the Guinean border.

There was no action taken against the CDF members responsible for beating, raping, or otherwise abusing the persons in the following cases from 2000: The May and June injuring of 50 persons during gunship attacks on the towns of Makeni, Magburaka, and Kambia; the July raping of 3 women who were accused of transporting goods to rebel-held areas; the August beating of 2 truck drivers because they could not produce the requested bribe; and the October beating of a journalist.

There was no action taken against the relatives of the Minister of Transport and Communication who allegedly beat a journalist, Mustapha Bai Attila, in 2000.

No one was injured by landmines during the year; very few landmines were used in the 11-year conflict.

A policeman allegedly raped a minor girl at the Jembe refugee camp. SLP personnel were removed from the camp during the investigation; however, the alleged perpetrator died and the case was closed.

During the year, there were reports that UNAMSIL soldiers raped persons. For example, on June 26, a UNAMSIL soldier allegedly raped a 14-year-old boy in Jui, Western Area. Although there was strong circumstantial and physical evidence that the rape occurred, 10 days after the alleged rape a UNAMSIL investigation did not find convincing physical evidence to validate the boy's allegation. The UNAMSIL soldier later was sent home, and UNAMSIL sent details of the

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allegations and findings to the soldier's government.

In April two UNAMSIL soldiers allegedly raped a woman in Joru, Kenema District. International human rights monitors talked to eyewitnesses who supported the victim's claim. UNAMSIL representatives said they carried out an investigation, although international human rights monitors claimed that the investigation was insufficient. UNAMSIL instituted a Personnel Conduct Committee to receive complaints on conduct impropriety. The UNAMSIL Human Rights Section held training sessions for peacekeepers on sexual abuse.

No action was taken against the ECOMOG employee who injured a person during an argument over a stolen vehicle in 2000.

Unlike in the previous year, there were no beatings, rapes, or abductions of women or refugees committed by organized groups of former combatants; however, it was likely that such crimes were committed by individual ex-combatants including former RUF rebels. In previous years, the RUF committed numerous abuses, including abductions, torture, beatings, and rapes, including gang rapes. There also were no reports of deliberate mutilations during the year. UNAMSIL began systematic investigations of amputees, tracking and monitoring individual amputation cases and compiling statistics. U.N. officials and humanitarian organizations estimated that hundreds if not thousands of persons, including children, had one or both limbs amputated over the decade-long conflict. There were no more reports of RUF rebels carving the initials "RUF" into the skin of civilians. During the year, a U.S.-based plastic surgeon removed the "RUF" scars from many victims.

In September Foday Sankoh and 49 other RUF members appeared in High Court. The trial was postponed throughout the year, and the cases of Sankoh and his co-defendants had not been heard (see Section 1.a.).

No action was taken against RUF rebels who committed human rights abuses in 2001, including extortion, beatings, and rapes. No action was taken against RUF members who in April 2001 beat and killed a woman and beat her stepson in Seidu, Kono District.

There was no reported action taken against the RUF rebels who beat, raped, or otherwise abused the persons in the following cases from 2000: The February beating of 15 RUF combatants who tried to join the disarmament process; the March abduction and injuring of Aaron Kargbo and Aruna Sherrif, both Adventist Development and Relief Agency staff members; the April and May abduction of U.N. peacekeepers; and the May injuring of at least 1 civilian during a confrontation between British paratroopers and RUF rebels at Lungi Lo.

There were no developments on the unconfirmed reports that Guinean troops operating in the country amputated the limbs of suspected RUF members in 2001.

Prison conditions improved significantly during the year. International human rights monitors who visited Pademba Road maximum-security prison reported that conditions there were good, with adequate access to food, medical care, recreation, and vocational skills training. In July human rights monitors reported that prisons in Bo and Moyamba were generally good; however, a prison in Kenema suffered from overcrowding, and access to medical facilities was limited. In October a rebuilt detention facility opened in Kono District. Many of the problems that remained in prisons were a result of the poor state of the judicial system. A large backlog of cases led to problems with overcrowding. The Pademba Road prison, which was designed for 325 prisoners, routinely housed hundreds more. There were no reports that prisoners were held incommunicado, although it was government policy to forbid family visits to prisoners at Pademba Prison except in exceptional circumstances and on a case-by-case basis. According to international monitors, the mortality rate in Pademba Prison was within acceptable actuarial norms. Male and female prisoners were housed separately. Adults and juveniles were incarcerated together. Conditions in the holding cells in police offices were extremely poor. Pretrial detainees were held with convicted prisoners. There were no reports that prison guards tortured or beat former RUF members in prison. There was no further investigation into the March 2001 killings at Pademba Prison.

International monitors, including UNAMSIL and the International Committee for the Red Cross (ICRC), had unrestricted access to visit Pademba Prison and other detention facilities. The ICRC and UNAMSIL doctors visited and monitored the health of former RUF leader Foday

Sankoh, who was said to be in poor health. At least one local human rights group claimed that it could not get unrestricted access to the prisons.

d. Arbitrary Arrest, Detention, or Exile

The Constitution prohibits arbitrary arrest and detention; however, government forces occasionally arrested and detained persons arbitrarily. The law requires warrants for searches and arrests in most cases. There were adequate judicial protections against false charges, and detainees had the right of access to family or counsel, although family visits were restricted at maximum-security Pademba Prison (see Section 1.c.). On March 1, the Government lifted the state of emergency, under which many of these protections were suspended. Some detainees had not been informed of their legal status, and had no access to legal advice. There were provisions for bail and there was a functioning bail system. Many criminal suspects were held for months before their cases were examined or formal charges were filed. A number of prisoners in custody had not seen a judge since 1999 and 2000 (see Section 1.e.).

Following the demobilization of the CDF, there were no reports that CDF members arrested or detained persons during the year.

In July and August, four Liberian children were detained without charge at Pademba Road Prison and then released.

Following the lifting of the state of emergency, a large number of persons detained without charge were released or charged accordingly. At year's end, there were 18 persons who were detained for more than 2 years without charge; 17 were former SLA members and 1 was a former SLP officer.

On September 25, the Government expelled David Bropley, a Liberian ex-combatant, to Denmark for conducting "activities incompatible with his refugee status." Bropley had been in detention for 1 month prior to his expulsion.

The Government did not use forced exile.

e. Denial of Fair Public Trial

The Constitution provides for an independent judiciary, and the Government generally respected this provision in practice; however, the judiciary continued to function only in part of the country. The judiciary began to reestablish operations in areas that were abandoned during the war, although there still were large parts of the country without judicial institutions. The judiciary demonstrated substantial independence in practice but at times was subject to corruption.

The judicial system consisted of the Supreme Court, appeals courts, and a high court whose justices were chosen by the President. Local courts administered traditional law with lay judges; appeals from these lower courts moved to the superior courts.

Although the Constitution and the law provide for a speedy trial, in practice the lack of judicial officers and facilities often produced long delays in the judicial process. Trials were usually fair; however, there was evidence that corruption influenced some cases. A majority of cases on the magistrate level were prosecuted by police officers, many of whom had little or no formal legal training. In 2000 the Armed Forces of the Republic of Sierra Leone (Amendment) Act reinstated the right of members of the armed forces to appeal a sentence handed down by a court-martial to the Court of Appeal.

Traditional justice systems continued to supplement extensively the central government judiciary in cases involving family law, inheritance, and land tenure, especially in rural areas. In Kono District there were reports that former CDF and Movement of Concerned Kono Youth (MOCKY), held informal courts to settle disputes among area residents, typically those who were not satisfied with the results of the legal judicial system. MOCKY representatives denied these reports and said that they catalogued disputes and brought them for referral to the proper authorities.

There were no reports of political prisoners.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

The Constitution and law prohibit such practices, and government authorities generally respected these prohibitions in practice.

In March the government lifted the state of emergency, under which the Government permitted searches without warrants and established a nightly curfew.

In February former RUF commanders in Tongo Fields, Kenema District reported that youths from the Lower Bambara chiefdom tried to drive them out of the area. The ex-RUF commanders alleged that the youths were former CDF members under the influence of the Acting Paramount Chief. The youths allegedly harassed persons in Tongo Fields and imposed fines and taxes.

On July 6, approximately 100 persons destroyed dozens of homes in Kokwima, Kono District. Local chiefs and MOCKY allegedly carried out the attacks in an effort to rid the Kono area of non-Kono persons. MOCKY representatives claimed that individuals from Tankoro, Kono District destroyed the homes because police had failed to respond to reports that the dwellings were being used to traffick drugs. An individual who owned land on which many of the homes were built said that the only homes spared belonged to Konos.

Unlike in the previous year, there were no instances of rebel forces invading, looting, or destroying private property.

Unlike in the previous year, there were no reports that rebel forces kidnaped and forcibly conscripted children (see Section 5).

There was no action taken on unconfirmed reports that in March 2001 RUF fighters forcibly conscripted civilians in Makeni into the Poro Society, one of several secret societies in the country tied to indigenous beliefs and rituals, and forced them to join the RUF.

On July 21, five armed Liberians reportedly looted the villages of Kokobu and Gbandoma.

Unlike in the previous year, there were no reports that Guinean troops destroyed private property or burned homes.

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Constitution provides for freedom of speech and of the press; however, the Government at times limited these rights in practice. During the year, there were no bans on any newspapers, and no radio station was shut down for failure to pay fees. Unlike in the previous year, security forces did not harass journalists. The written press and radio generally reported on security matters, corruption, and political affairs without interference.

More than 50 newspapers were published in Freetown during the year, covering a wide spectrum of interests and editorial opinion. Most of the newspapers were independent of the Government, and several were associated with opposition political parties. The number of newspapers fluctuated weekly. Many contained sensational, undocumented stories and repeated items carried by other newspapers. Newspapers openly and routinely criticized the Government and its officials, as well as the rebel forces.

The Independent Media Commission (IMC) regulated independent media outlets. Although it was an independent body, some media observers alleged that the Government influenced it. In March the IMC ordered the editor of the African Champion newspaper to stop publication and cease editorial functions for 2 months in response to two articles printed on February 6 and 11 that accused President Kabbah's son of using a Consul's diplomatic status to escape import duties. The IMC said the editor, Mohammed Koroma, had to cease publication until an investigation was complete. Koroma ignored the demand on the grounds that the IMC did not

have the legal right to demand his suspension. The IMC charged Mohamed Koroma to the High Court, but the case had not been heard by year's end.

In November Paul Kamara, editor of the For Di People newspaper, was sentenced to 6 months in prison for defaming a local judge. The court sent a letter to the President recommending the banning of the paper for 6 months, however, the ban was not implemented by year's end. International press rights groups called for the repeal of the criminal libel law under which Kamara was charged.

There was no action taken against police forces that detained and interrogated the editor of the Democrat newspaper in February 2001.

There was no further development on the rumors of "killing squads" that allegedly targeted a list of seven journalists in September 2001.

Due to low levels of literacy and the relatively high cost of newspapers and television, radio remained the most important medium of public information. Several government and private radio and television stations broadcast; both featured domestic news coverage and political commentary.

In February the IMC instituted a $2,000 (4 million Leones) annual license fee for single channel radio stations. Radio journalists and media monitors claimed that this fee was prohibitively expensive, and if enforced would limit severely the number of independent radio stations. The IMC threatened to close any radio station that did not pay the fee. At year's end, no stations had been closed.

The parastatal Sierratel communications company exercised a monopoly over Internet access in the country. The lack of competition and the poor condition of telephone lines often made Internet connectivity problematic.

The Government did not restrict academic freedom. All institutions of higher learning were open during most of the year; however, university infrastructure destroyed during the conflict was not yet restored fully by year's end.

b. Freedom of Peaceful Assembly and Association

The Constitution provides for freedom of assembly, and the Government generally respected this right in practice.

Several large demonstrations took place during the year, including demonstrations involving thousands of persons before the May elections. Although some demonstrations were marred by violence, most were relatively peaceful. At times UNAMSIL forces backed up government security forces in dealing with demonstrations.

The Government did not ban any demonstrations during the year.

On July 18, two persons were killed in demonstrations relating to the death of a well-known Fullah moneychanger in Freetown. A large crowd took the body of the moneychanger from the morgue and paraded it in the streets. UNAMSIL troops were deployed to key areas in central Freetown for security reasons. According to UNAMSIL, when the crowd became aggressive, UNAMSIL troops employed a combination of persuasion, crowd dispersal tactics, and firing of warning shots in the air. A consortium of domestic human rights NGOs investigated the incident and determined through alleged eyewitness accounts that UNAMSIL troops directly fired into the crowd, killing two civilians. A UNAMSIL investigation into the incident found no conclusive evidence as to how the individuals were killed.

RUF members who opened fire on demonstrators in 2000, killing at least 20 persons and injured 80 others, remained in detention at year's end (see Section 1.a.).

The Constitution provides for freedom of association, and the Government generally respected this right in practice. There were numerous civic, philanthropic, and social organizations, and

the registration system was routine and nonpolitical. No known restrictions were applied to the formation or organization of the 16 opposition political parties and the more than 60 registered civic action NGOs. In 2001 21 political parties were registered; during the year, 16 political parties were registered. Some parties were integrated into other parties, such as the Grand Alliance Party. In 2001 the RUF alleged that the Government prevented the establishment of an RUF political party as called for in the Lome Accord. However, during the year the RUF registered as a political party, changed their name to the Revolutionary United Front Party (RUFP), and fielded presidential and parliamentary candidates.

c. Freedom of Religion

The Constitution provides for freedom of religion, and the Government generally respected this right in practice.

For a more detailed discussion see the 2002 International Religious Freedom Report.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

The Constitution provides for these rights, and the Government generally respected them in practice; however, there were frequent reports that SLP officers manned roadblocks and stopped motorists to extort money from travelers (see Section 1.c.). Unlike in the previous year, there were no reports of RUF rebels or CDF members manning roadblocks.

Approximately 247,000 internally displaced persons (IDPs) remained at year's end. Some IDPs were housed in camps, but many lived in Freetown. Residents who feared that their homes would not be safe strongly resisted government attempts to close IDP camps. The large influx of IDPs and the lack of resources caused tension between local residents and IDPs; however, there were no reported incidents of violence. There were numerous reports that refugees and IDPs returned to find their homes occupied.

Approximately 135,000 refugees repatriated during the year. An estimated 70,000 persons remained in refugee camps in Guinea and Liberia; smaller numbers remained in Cote d'Ivoire, the Gambia, Ghana, and other countries and were likely to integrate locally in those countries.

Unlike in the previous year, there were no cross-border actions by the RUF in Guinea that contributed to the return of refugees from Guinea. Unlike in the previous year, there were no reports that the RUF raped, abducted, and killed refugees returning to the country from camps in Guinea.

The law does not provide for granting of asylum or refugee status in accordance with the 1951 U.N. Convention Relating to the Status of Refugees and its 1967 Protocol. However, in practice the Government cooperated with the U.N. High Commissioner for Refugees (UNHCR) and other organizations on repatriation matters and continued to provide first asylum to an increasing number of Liberians who had fled the conflict in their home country. UNHCR reported that more than 50,000 Liberian refugees entered the country by year's end. Some camps such as Jendema Camp at times were not able to provide adequate food or shelter for the influx of refugees, which caused border areas to become unstable. However, at year's end, conditions in all camps were described as adequate.

The U.N. conducted an investigation into reports in 2001 of widespread sexual abuse of refugees in the Mano River Union, including Sierra Leone. The U.N. investigation found no evidence to support earlier claims of widespread abuse, but did confirm the report of the rape of a 14-year old returnee in Jui (see Section 1.c.). Other international aid workers reported that several cases of abuse and exploitation of refugees by aid workers took place throughout the year.

The Liberian border officially closed at times during the year due to the civil conflict in Liberia; however, authorities permitted refugees, returnees, and other persons to move between the two countries regularly. There were some unconfirmed reports of bribery or coercion at border crossing points, although UNHCR reported that the Government did not hinder or refoule those seeking asylum. At year's end, the border was open for all travel.

There were no reports of the forced return of persons to a country where they feared persecution.

Section 3 Respect for Political Rights: The Right of Citizens to Change their Government

The Constitution provides for the right of citizens to change their Government; however, the May elections were marred by some irregularities.

In 2001 the Government extended the term of Parliament and the President by 6 months in response to the "state of war" in the country. In December 2001, Parliament voted to amend the Constitution in order to modify the electoral system. The amendments also extended President Kabbah's term of office until July. On March 29, Parliament was dissolved until the May elections.

During the year, the Government facilitated the RUF's re-registration as a political party, the RUFP. The Government did not allow Foday Sankoh to run as the RUFP Presidential candidate, citing a law that required candidates to be registered to vote and to file personally their candidacy with the National Electoral Commission (NEC). RUFP leadership said that Sankoh's registration was not possible because he was in government custody. The RUF alleged that the Government unfairly was trying to ward off a potential threat in the elections, because Sankoh had considerable name recognition and support in the country.

On January 24, the Government began voter registration for the May elections; however, there were reports that the Government's voter registration efforts were unbalanced, with more support going to areas that were dominated by the SLPP. There were widespread reports of underage voter registration.

On May 14, presidential and parliamentary elections were held. Eleven political parties were represented in the elections. President Kabbah of the SLPP was reelected with 70 percent of the popular vote. The RUFP fielded presidential and parliamentary candidates but performed poorly, winning only 1.7 percent of the vote. In Parliament the SLPP won 83 seats; only 2 other parties won seats. Only the SLPP was represented in the Cabinet after two cabinet members, who were earlier considered to be independent, joined the SLPP following the elections. Many international monitors declared the elections free and fair; however, there were credible reports of significant abuse of incumbency, manipulation of vote counting, and partisan action by the NEC. There also were reports of voter coercion by party bosses and traditional leaders. These abuses reportedly did not affect substantially the overall outcome of the election.

There were reports of significant problems on election day. Voter eligibility rules were changed during the course of election day. Early in the day, voters whose names did not appear on registration lists but who held voter cards were allowed to vote. Later in the day, the NEC changed the rule, which led to confusion in some polling stations. One district, Pujehun, reported a 104 percent voter turnout. In the southern and eastern districts, results showed that opposition parties received zero votes in some areas, which was not credible given the observed participation in the election of opposition supporters in those districts.

Locally elected councils and a traditional chieftain system controlled local government. Local elections, which were to have taken place in 1999, again were postponed.

It was estimated that approximately 40 percent of women in the country voted and represented 13 percent of the candidates in the May elections. Sixteen women won seats in the 112-seat Parliament. There were three women in the Cabinet and one in the Supreme Court. A significant number of women were employed as civil servants.

No statistics were available concerning the distribution of votes among minorities. Only citizens could vote. The Constitution restricts the acquisition of citizenship at birth to persons of "patrilineal Negro-African descent." Since legal requirements for naturalization effectively denied citizenship to many long-term residents, a large number of persons of Lebanese origin, who were born and resided in the country, could not vote (see Section 5). There was a small percentage of the Lebanese population who had been naturalized and did vote, although the exact figure was unknown. There were no ethnic Lebanese members of Parliament.

Section 4 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

A number of domestic and international human rights groups generally operated with few government restrictions, investigating and publishing their findings on human rights cases. Government officials generally were cooperative and responsive to their views. National Forum for Human Rights (NFHR) served as an umbrella organization for human rights groups in the country. More than 30 human rights NGOs were registered with NFHR, although only approximately 20 of these were said to be active. The majority of domestic human rights NGOs focused on human rights education, while only a few NGOs actively monitored and reported human rights abuses. The Campaign for Good Governance (CGG) oversaw widespread monitoring activities and has monitored human rights abuses in every province since 2000. CGG also undertook a conflict-mapping exercise that recorded more than 1,000 testimonies of victims and perpetrators of abuses during the war. The final report of this exercise was given to the Truth and Reconciliation Commission (TRC) and Special Court for use in carrying out these two institutions' respective mandates.

For the first time in years, human rights monitors were able to travel freely in previously rebel-held areas. Intensive reporting, data collection, and investigations started in these formerly inaccessible areas. Representatives of various international NGOs, foreign diplomats, the ICRC, and U.N. human rights officers were able to monitor trials and to visit prisons and custodial facilities during most of the year; however, the Government on occasion attempted to restrict such visits (see Section 1.c.).

UNAMSIL continued to operate regional human rights offices in the provincial capitals of Bo and Makeni in addition to the UNAMSIL Human Rights section in Freetown.

In July the U.N. Special Court for Sierra Leone, whose role is to try those who "bear the greatest responsibility for the commission of crimes against humanity, war crimes, and serious violations of international humanitarian law," began operations and was given 3 years to complete its mandate. By year's end, investigations had begun and construction had begun on court facilities in Freetown. It was not known when the first indictments would be made.

The TRC provided a forum for publicly airing the grievances of victims and the confessions of perpetrators from the civil war. The TRC began with three interim secretariats who initiated preparations for eventual public hearings. The TRC was delayed, partly by a lack of funding, but was expected to begin public hearings in March 2003. In the interim, commissioners and staff began an education campaign throughout the country. The TRC suffered from management problems that delayed the Commission's start date and resulted in the dismissal of nearly the entire interim secretariat staff. OHCHR provided an interim administer in December to oversee a renewed hiring process. On December 4, 70 statement takers began collecting narratives throughout the country.

The U.N. and numerous NGOs, both domestic and international, continued to educate and sensitize the population about the TRC and the Special Court for Sierra Leone, and the Government supported these efforts.

Section 5 Discrimination Based on Race, Sex, Disability, Language, or Social Status

The Constitution prohibits discrimination against women and provides for protection against discrimination on the basis of race and ethnicity; however, residents of non-African descent, particularly the Lebanese community, faced institutionalized political restrictions on the acquisition of citizenship.

Women

Domestic violence against women, especially wife beating, was common. The police were unlikely to intervene in domestic disputes except in cases involving severe injury or death. In rural areas, polygyny was common. Women suspected of marital infidelity often were subjected to physical abuse. Frequently women were beaten until they divulged the names of their partners. Because husbands could claim monetary indemnities from their wives' partners, the beatings often continued until the woman named several men even if there were no such

relationships. There also were reports that women suspected of infidelity were required to undergo animistic rituals to prove their innocence.

Rape was recognized as a societal problem and was punishable by up to 14 years imprisonment. Cases of rape were underreported and indictments were rare, especially in rural areas. There were reports that former rebel forces continued to force women and girls to act as sex slaves. Medical or psychological services for rape victims were very limited. There were reports of the sexual abuse of refugees in refugee camps (see Section 2.d.).

FGM was practiced widely at all levels of society, although with varying frequency. The less severe form of excision was practiced. UNICEF and other groups estimated that 80 to 90 percent of women and girls had undergone the practice; however, local groups believed that this figure was overstated. FGM was practiced on girls as young as 5 years old. No law prohibits FGM. A number of NGOs worked to eradicate FGM and to inform the public about its harmful health effects. However, active resistance by women's secret societies, in which FGM commonly occurred as part of initiation rites, countered the well-publicized international efforts against FGM.

On July 31, SLP officers arrested 10 women in Freetown in connection with the death of a 14-year-old girl following an FGM rite. The girl reportedly was found lying on the ground, bleeding from her genital area. All 10 women were suspected to be members of the Bundu secret society.

Prostitution was widespread. Many women and girls, particularly those displaced from their homes and with few resources, resorted to prostitution as a means to support themselves and their children.

The Constitution provides for equal rights for women; however, in practice women faced both legal and societal discrimination.

In particular their rights and status under traditional law varied significantly depending upon the ethnic group to which they belonged. The northern Temne and Limba tribes gave greater rights to women to inherit property than did the southern Mende tribe, which gave preference to male heirs and unmarried daughters. In the Temne tribe, women could not become paramount chiefs; however, in the Mende tribe, there were several female paramount chiefs. Women did not have equal access to education, economic opportunities, health facilities, or social freedoms. In rural areas, women performed much of the subsistence farming and had little opportunity for formal education.

Women were active in civic and philanthropic organizations. Domestic NGOs such as 50/50 and Women's Forum raised awareness of gender equality and women's issues and encouraged women to enter politics as candidates for Parliament.

Children

The Government was committed to improving children's education and welfare; however, it lacked the means to provide them with basic education and health services. The Ministry of Social Welfare, Gender, and Children's Affairs had primary responsibility for children's issues.

The law requires school attendance through primary school. Schools, clinics, and hospitals throughout the country were looted and destroyed during the 11-year insurgency; most were not rebuilt by year's end. A large number of children received little or no formal education. Schools were financed largely by formal and informal fees, but many families could not afford to pay them. The average educational level for girls was markedly below that of boys, and only 6 percent of women were literate. At the university level, male students predominated.

FGM was performed commonly on girls (see Section 5, Women).

More than 6,000 child soldiers served alongside adults on both sides during the civil conflict, but in greater numbers on the rebel side. Some observers estimated that there were almost twice that many child soldiers. In 2001 the recruitment of children for military service by the CDF and the kidnaping and forced conscription of children into rebel forces ceased.

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The National Commission for Disarmament, Demobilization, and Reintegration listed 6,845 demobilized child combatants. Girls represented 8 percent of demobilized child soldiers, and 30 percent of reunified noncombatant separated children. Because U.N. and human rights monitors estimated that girls represented 50 percent of those abducted during the war and there were reports that the rebels released disproportionate numbers of boys, these groups fear that many girls continued to be held as sex slaves. UNICEF reported in August that almost 7,000 children, including nearly 5,000 ex-combatants and nearly 2,000 noncombatant separated children, had been reunified with their families. More than 3,500 children of both groups were engaged in formal and informal education programs. Others were in special transitional centers, which were designed to help provide for their unique mental and emotional needs prior to reunification with their families. There continued to be reports that some families and communities rejected the returnees because of their perceived involvement in rebel atrocities. Child protection agencies reported that hundreds of boys and girls did not participate in the formal demobilization process. Locating the families of released child combatants often was difficult, and some did not want to assume responsibility for their children, some of whom were mentally and emotionally incapable of rejoining their families.

Persons with Disabilities

There was no outright discrimination against persons with disabilities in housing or education; however, given the high rate of general unemployment, work opportunities for persons with disabilities were few. Public facility access and discrimination against persons with disabilities were not considered public policy priorities. Although a few private agencies and organizations attempted to train persons with disabilities in useful work, there was no government policy or program directed particularly at persons with disabilities. No law mandates accessibility to buildings or provides assistance to persons with disabilities. In May the Government made some effort to facilitate access to voting for persons with disabilities, particularly for the blind.

Some of the numerous individuals maimed in the fighting, or had their limbs amputated by rebel forces, received special assistance from various local and international humanitarian organizations. Such programs involved reconstructive surgery, prostheses, and vocational training to help them acquire new work skills; however, amputees complained that they did not receive sufficient assistance compared to ex-combatants, who received assistance through the demobilization process. Although the Lome Accord also called for the creation of a special fund to implement a program for rehabilitation of war victims, the fund had not yet been established by year's end. Attention to amputees increased the access of other persons with disabilities to health care and treatment.

National/Racial/Ethnic Minorities

The ethnically diverse population consisted of at least 13 ethnic groups. These groups all spoke distinct primary languages and were concentrated outside urban areas; however, all ethnic groups used Krio as a second language. Little ethnic segregation was apparent in urban areas. Interethnic marriage was common. The two largest ethnic groups were the Temne in the north and the Mende in the south. Each of these groups was estimated to make up approximately 30 percent of the population. There were reports of interethnic tension (see Section 1.f.).

Ethnic loyalty remained an important factor in the government, the armed forces, and business. Complaints of ethnic discrimination in government appointments, contracts, military commissions, and promotions were common.

Residents of non-African descent faced institutionalized political restrictions (see Section 3). Legal requirements for naturalization, such as continuous residence in the country for 15 years or the past 12 months and 15 of the previous 20 years, effectively denied citizenship to many long-term residents, notably members of the Lebanese community.

Section 6 Worker Rights

a. The Right of Association

The Constitution provides for the right of association, and in practice, workers had the right to join independent trade unions of their choice. Approximately 60 percent of the workers in urban

areas, including government workers, were unionized, but attempts to organize agricultural workers and mineworkers have met with little success. All labor unions generally joined the Sierra Leone Labor Congress (SLLC), but membership was voluntary. There were no reliable statistics on union membership, but membership numbers declined as a percentage of all workers because of the virtual collapse of the small manufacturing sector. Police and members of the armed services were prohibited from joining unions.

The Trade Union Act provides that any five persons may form a trade union by applying to the registrar of trade unions, who has statutory powers under the act to approve the creation of trade unions. The registrar could reject applications for several reasons, including an insufficient number of members, proposed representation in an industry already served by an existing union, or incomplete documentation. If the registrar rejected an application, the decision could be appealed in the ordinary courts, but applicants seldom took such action.

The law does not prohibit antiunion discrimination against workers or employer interference in the establishment of unions; however, there were no reports of such cases during the year. An employee fired for union activities could file a complaint with a labor tribunal and seek reinstatement. Complaints of discrimination against trade unions were made to a tribunal.

Unions were free to form federations and to affiliate internationally. The SLLC was a member of the International Confederation of Free Trade Unions (ICFTU).

b. The Right to Organize and Bargain Collectively

The Regulation of Wages and Industrial Relations Act provides the legal framework for collective bargaining. Collective bargaining must take place in trade group negotiating councils, each of which had an equal number of employer and worker representatives. Most enterprises were covered by collective bargaining agreements on wages and working conditions. The SLLC provided assistance to unions in preparations for negotiations; in the case of a deadlock, the government could intervene. The Industrial Court for Settlement of Industrial Disputes began hearing cases in 2000; although most cases involving industrial issues continued to go through the normal court system, the Industrial Court heard more than 50 cases during the year.

Workers had the right to strike, although the Government could require 21 days' notice. There were several significant strikes in the public sector during the year. Most notably teachers and doctors went on strike over wages and unpaid salaries in the form of work stoppages and sick-outs. Teachers, doctors, and nurses went on strike during the year. Teachers struck in January, and nurses and doctors struck in February and March. According to the president of Sierra Leone Nurses' association, the Government eventually accepted 80 percent of the nurses' demands. Workers from Sierratel, a telecommunications parastatal, went on strike over refunds of pension benefits.

No law prohibits retaliation against strikers, even for a lawful strike; however, the Government did not take adverse action against the employees and paid some of them back wages.

There were no export processing zones (EPZs).

c. Prohibition of Forced or Bonded Labor

The Constitution prohibits forced and bonded labor, including by children; however, forced labor remained a problem. Under the Chiefdom's Council Act, individual chiefs could impose forced labor as punishment, and have done so in the past. They also could require members of their villages to contribute to the improvement of common areas. This practice occurred only in rural areas. There was no penalty for noncompliance. There were reports of some bonded labor, possibly including labor by children, in rural areas.

Some women and girls, although in significantly less numbers than before, allegedly remained as sex slaves with former RUF rebels (see Section 5). There were reports that former RUF commanders continued to force children to mine diamonds (see Section 6.f.).

Liberian forces abducted persons for forced labor (see Section 1.b.).

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d. Status of Child Labor Practices and Minimum Age for Employment

The official minimum age for employment was 18 years; however, children between the ages of 12 and 18 years could work in certain non-hazardous occupations, provided that they had parental consent. Due to a severe lack of resources, the Government was unable to implement these laws.

Children routinely assisted in family businesses and worked as petty vendors. Adults employed a large number of street kids to sell, steal, and beg. In rural areas, children worked seasonally on family subsistence farms. Hundreds of children, including those 10 years old and younger, mined in alluvial diamond fields. A majority of these children worked for relatives; however, some reportedly worked for former RUF commanders.

Because the adult unemployment rate remained high, few children were involved in the industrial sector. Foreign employers hired children to work as domestic laborers overseas at extremely low wages and in poor conditions. The Department of Foreign Affairs and International Cooperation was responsible for reviewing overseas work applications to see that no one under the age of 14 was employed for this purpose; however, the reviews were not effective.

The Constitution prohibits forced and bonded labor by children; however, such practices continued to exist (see Section 6.c.).

e. Acceptable Conditions of Work

The minimum wage was approximately $10.50 (21,000 Leones) per month; it had not been adjusted since 1997. The minimum wage was not sufficient to provide a decent standard of living for a worker and family. Most workers supported an extended family, often including relatives who were displaced by the insurgency in the countryside. It was common to pool incomes and to supplement wages with subsistence farming and child labor (see Section 6.d.).

The Government's suggested workweek was 38 hours, but most workweeks exceeded that figure.

Although the Government set health and safety standards, it lacked the funding to enforce them properly. Trade unions provided the only protection for workers who filed complaints about working conditions. Initially a union could make a formal complaint about a hazardous working condition; if this complaint were rejected, the union could issue a 21-day strike notice. If workers were to remove themselves from dangerous work situations without making a formal complaint, they risked being fired.

The law protects both foreign and domestic workers; however, there were fewer protections for illegal foreign workers.

f. Trafficking in Persons

The law does not prohibit trafficking in persons, and there were reports that persons were trafficked from and within the country. Child prostitution was a problem (see Section 5). With the end of the war and the demobilization of child soldiers, trafficking in persons lessened significantly. The Government acknowledged unconfirmed reports of limited trafficking withing and from the country; however, it lacked resources to address the problem adequately. There were no figures available on the extent of the trafficking problem.

During the year, the Government compelled the RUF to disarm, demobilize, and release its child soldiers; however, there were concerns that a significant number of children remained with their captors. It was likely that small groups of previously captured women and girls continued to be forced to act as sex slaves (see Section 5).

Unlike in the previous year, there were no reports that rebels abducted persons to work as servants or laborers in the diamond fields; however, there were reports that former RUF commanders continued to use children to mine diamonds. The Government had not yet asserted complete control over the diamond fields by year's end.

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In July Liberian soldiers abducted men, women, and children and used them as porters and other unknown purposes (see Section 1.b.).

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IN THE TRIAL CHAMBER

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

Registrar:
Mr. Hans Holthuis

Decision of:
19 February 2002

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION GRANTING PROTECTIVE MEASURES FOR INDIVIDUAL WITNESSES

The Office of the Prosecutor

Mr. Geoffrey Nice
Mr. Dirk Ryneveld
Ms. Hildegaard Uertz-Retzlaff
Mr. Dermot Groome

The Accused

Slobodan Milosevic

Amicus Curiae

Mr. Steven Kay
Mr. Branislav Tapuskovic
Mr. Michaïl Wladimiroff

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

BEING SEISED of a confidential "Prosecution's Motion for Specific Protective Measures for Individual Witnesses Testifying during the Kosovo Phase of Trial" filed by the Office of the Prosecutor ("Prosecution") on 12 February 2002 ("the Motion") in respect of five witness identified by the Prosecution in the Motion ("the Protected Witnesses"),

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

PURSUANT TO Rule 75 of the Rules,

HEREBY GRANTS THE MOTION AND ORDERS as follows:

1. pseudonyms shall be used whenever referring to the Protected Witnesses in proceedings before the International Tribunal and in discussions among parties to the trial;

2. the testimony of the Protected Witnesses shall be given in closed session; edited records and transcripts of the sessions may be released to the public and to the media by Order of the Trial Chamber after review by the Prosecution in consultation with the Victims and Witnesses Unit;

3. the name, address, whereabouts and other identifying information concerning the Protected Witnesses shall be sealed and not included in any of the public records of the International Tribunal;

4. to the extent the name of, or other identifying data concerning, the Protected Witnesses is contained in existing public documents of the International Tribunal, that name and other identifying data shall be expunged from those documents;

5. documents of the International Tribunal identifying the Protected Witnesses shall not be disclosed to the public or the media; and

6. the public and the media shall not photograph, video-record or sketch any of the Protected Witnesses while the Protected Witness is in the precincts of the International Tribunal.

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

_____

Richard May
Presiding

Dated this nineteenth day of February 2002
At The Hague,
The Netherlands

[Seal of the Tribunal]

ICTR-96-7-I
3.12.1997
(200 - 196)

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Case No. ICTR-96-7-1

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER 2

OR:ENG.

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

Registry: Ms Prisca Nyambe

Decision of: 31 October 1997

THE PROSECUTOR
VERSUS
THEONESTE BAGOSORA

Case No. ICTR-96-7-1

DECISION ON THE PROSECUTOR'S MOTION FOR THE PROTECTION OF VICTIMS AND WITNESSES

The Office of the Prosecutor:
Mr James Stewart
Ms Luc Cote
The Counsel for the Accused:
Mr.Raphael Constant

Case No. ICTR-96-7-1

THE TRIBUNAL,

SITTING AS Trial Chamber 2, composed of Judge William H. Sekule, Presiding , Judge Yakov Ostrovsky and Judge Tafazzal Hossain Khan

CONSIDERING the indictment submitted by the prosecutor dated 5th August 1996 against Theoneste Bagosora and confirmed on 10 th August 1996 by Judge Lenart Aspegren pursuant to rule 47 of the Rules of Procedure and Evidence (the 'Rules') on the basis that there was sufficient evidence to provide reasonable grounds for believing that he had committed genocide, conspiracy to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II thereto;

CONSIDERING the initial appearance of the accused Theoneste Bagosora which took place on 20th February, 1997 and the decision confirming this indictment, signed by Judge Lennart Aspegren on 10th August 1996;

CONSIDERING ALSO that, on 10 April, 1997 the Prosecutor filled a motion before this trial Chamber requesting the chamber to issue an order for protective measures in respect of victims of and witnesses to the crimes allegedly commited by the accused as appearing in the indictment.

BEING NOW SEIZED by a supplementally motion filled under the provisions of article 19, 20, and 21 of the statute and rule 69 and 75 of the rules dated 21st October ,1997 which replace the preliminary motion filed by the Prosecutor on 10th April, 1997, seeking protective measures for victims and witnesses to crimes allegedly committed by the accused as appearing in the indictment.

CONSIDERING the provisions of Articles 19 and 21 of the Statute of the Tribunal and rules 69 and 75 of the Rules regarding the protection of victims and witnesses;

CONSIDERING the defence oral and Written response to the prosecutors motion dated 27th June, 1997.

TAKING NOTE of the supplementally brief in support of the motion of the prosecutor dated 21st October 1996 which highlights on the latest security situation in Rwanda.

HAVING HEARD the parties on 31 October 1997;

THE ARGUMENTS

(I) the Prosecutor, invoking the provisions of Article 19, 20, and 21 of the Statute and rules 69 and 75 of the Rules for the protection of victims and witnesses, requested this Chamber to order for the protection and non disclosure of the identities of the prosecution witnesses and victims as well as for other related reliefs for witnesses in category A and B ie;

Category (a) Any person residing in Rwanda who may be called as a prosecution witness during the trial of the accused unless he waives the application of the protective measures available, after having been notified about them.

(b) Any person residing outside Rwanda who may be called as a prosecution witness during the trial of the accused ,who express fear for his or her safety and indicates to the office of the prosecutor his or her desire to have the protective measures extended to him or her.

(ii) in support of both her oral and written submissions Prosecutor relied on a number of UN reports and an affidavit of Mr. Oyvind Olsen, the commander of investigations in the office of the prosecutor in Kigali dated 20th March, 1997 which is supported by a supplementary affidavit dated 21 October, 1997 which suggests that the security situation in Rwanda is volatile and that, by January through December 1996, 227 genocide survivors and their associates were killed and 56 were injured and that Gisenyi prefecture, the birth place of the accused is also insecure.

(iii) the defence counsel on his part in paragraph 52 of the objection to the motion filled by the prosecutor ,invited this Chamber to reject all except prayers made in paragraph 3 and 5 of the prosecutors motion which deals with prohibition of disclosure to the public and the media.

DELIBERATIONS

On the matter of the request for the protection and non-disclosure of the identity of victims and witnesses to the public and the media AND on the matter of the request for the temporary non- disclosure of the identity of prosecution witnesses to the defence until such time as they are under the protection of the Tribunal.

(i) In the light of reports and submissions made with regard to the security situation in Rwanda and the neighbouring countries, the Chamber is of the opinion that the security situation is precarious, unstable and volatile posing a risk to victims and potential witnesses. This trial Chamber observes that, such a situation would substantially prejudice the rights of the parties to the case.

(ii) rule 75 provides, *inter alia*, that a Judge or a Chamber may *proprio motu* or at the request of either party, or of the victims or witnesses concerned, or the victims and witnesses unit (the "VWU"), order appropriate measures for the protection of victims and witnesses, provided that, these measures are consistent with the rights of the accused. In that vein of argument, the trial chamber is of the considered opinion that the prosecutor should disclose the identity of its witnesses in sufficient time prior to the trial to allow the defence to rebut any evidence that prosecution witnesses may raise;

(iii) by virtue of Article 21 of the statute and rule 75 of the Rules and in order to ensure a fair trial to the accused, the trial chamber is obliged to take steps to provide for all appropriate and possible measures to protect the victims and witnesses provided always that ,the measures sought will not hinder the due process of the law.

(iv)the defence emphasised on the need for the prosecution to lay a basis for the measures sought. The trial Chamber is of the opinion that the prosecution in its oral submissions has provided the relevant basis in support of her request;

(v)The defence has not generally opposed the prosecutors requests for protective measures of her witnesses and that, the measures sought by the prosecutor are pertinent for justice to be achieved.

(vi)MINDFUL of this very Chamber's previous decisions on similar issues ,the trial chamber is of the view that, as much as possible, similar protective measures in this motion should be granted to the victims and prosecution witnesses unless the witness or victim waives the right to avail themselves to such measures.

NOW THEREFORE

FOR THESE REASONS

THE TRIAL CHAMBER DECIDES:-

(i) that the prosecutor should furnish particulars of the victims and witnesses in category A and B above, to the victims and witnesses support unit (VWU) thereby enabling the unit to initiate appropriate steps to implement the protective measures. Names and addresses of persons for whom pseudonyms were used in the indictment and supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public or to the media.

(ii) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under the seal of the Tribunal and shall not be disclosed to the defence until further orders .

(iii) The names ,addresses , whereabouts of the prosecution witnesses and any other information identifying them shall be kept under the seal of the Tribunal and not included in any of the public records of the Tribunal.

(iv) The names, addresses, whereabouts of the prosecution witnesses and any other information identifying them shall not be disclosed to the public or the media.

(v) The defence shall not reveal to anyone except to their immediate team, the names addresses, whereabouts of the prosecution witnesses and any other information identifying them once such information has been revealed to it by the prosecution.

(vi) The public and the media shall not take photographs ,make audio and video recording or sketches of the prosecution witnesses who are under the protection of the tribunal, without authorisation.

(vii) the prosecutor shall be permitted to designate pseudonyms for each of its witnesses for use during any communication inter partes and to the public as well as in the official proceedings of the Tribunal.

(viii) the defence and or its representatives who are acting pursuant to their instructions shall notify the prosecutor of any request for contacting the prosecution witnesses, and the prosecutor shall make arrangement for such contacts.

(ix) pursuant to rule 75 of the Rules, the prosecutor is at liberty to request a judge or the trial chamber, in cases where the names, addresses and other identifying information of victims and witnesses, as well as their locations appear in any existing files at the Tribunal, to have such information expunged from the said files.

Delivered orally on 31st October 1997
Done,
at Arusha, this 26th November 1997

William H. Sekule	Yakov Ostrovsky	Tafazzal Hossain Khan
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
3 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. On 10 January 2000, the Prosecutor filed a motion seeking orders directed to the two accused (Radoslav Brdanin and Momir Talic) and their legal teams – collectively described as the "Brdanin and Talic Defence" – in the following terms:

> (1) The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.
>
> (2) Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:
>
> > (a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor;

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(b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony;

(3) If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case;

(4) With regard to (3) above, the Brdanin and Talic Defence shall maintain a log indicating the name, address and position of each person or entity receiving such information and the date of disclosure. If there is a perceived violation of the orders described herein, the Prosecutor shall notify the Trial Chamber which may either review the alleged violations or may refer the matter to a designee, such as a duty Judge. If the Trial Chamber refers the matter to a duty Judge, the duty Judge shall review the disclosure log, make factual determinations, and report back to the Trial Chamber with a recommendation as to whatever action seems appropriate .

(5) If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel. The Brdanin and Talic Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record.

(6) The Prosecutor may make limited redactions to witness statements or prior testimony concerning the identity and whereabouts of vulnerable victims or witnesses. The identities of such persons shall be disclosed to the Brdanin and Talic Defence within a reasonable period before commencement of trial, unless otherwise ordered.(1)

Paragraph 2 of the Motion defines, in wide terms, the expressions "the Prosecutor ", "Brdanin and Talic Defence", "the public" and "the media".(2) The Motion was filed on a confidential basis.

2. The orders sought numbered (1), (2) and (3) were not opposed. The others were opposed.

2 The Statute and the Rules

3. There are three provisions of the Tribunal's Statute which are relevant to this application. Article 20 ("Commencement and conduct of trial proceedings") provides , so far as is here relevant:

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

[...]

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21.2 ("Rights of the accused") provides:

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> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

Article 22 ("Protection of victims and witnesses") provides:

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

4. There are also a number of the Rules of Procedure and Evidence ("Rules") which are relevant to the application. Rule 66(A)(i) ("Disclosure by the Prosecutor") is in the following terms:

> Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
>
> (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; [...]

Rule 53(A) ("Non-disclosure") provides:

> In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

Rule 69 ("Protection of Victims and Witnesses") provides:

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

Rule 75(A) ("Measures for the Protection of Victims and Witnesses") provides:

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

3 The redactions made by the prosecution

5. On 11 January, the prosecution purported to comply with its obligation under Rule 66(A)(i) by serving on counsel for the two accused copies of the supporting material which had accompanied the indictment when confirmation was sought. *Every* statement served had been redacted to remove the name and any other material which would identify either the persons who had made the statements or their whereabouts , notwithstanding the references in par (6) of the orders presently sought to

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"limited redactions" and "vulnerable victims or witnesses". The documents were accompanied by a letter which requested counsel to respect the protective measures sought in the Motion until such time as the Trial Chamber had ruled upon it. (3)

6. It was conceded by the prosecution that this redaction had been effected without having first obtained an order pursuant to Rule 69, but it was said that the redaction had been carried out in advance of such an order "for safety's sake".(4) The first issue to be determined in the Motion is, therefore, whether pursuant to Rule 69(A) the prosecution is entitled to the redaction of the name and identifying features of *every* person who has made a statement until "a reasonable period before [the] commencement of [the] trial", as sought by the Motion.(5)

7. In relation to the power to provide appropriate protection for victims and witnesses in the Statute and Rules, it was held by the Trial Chamber in the *Prosecutor v Tadic*(6) that:

> [...] in the fulfilling of its affirmative obligation to provide such protection, [the Tribunal] has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access of information and the protection of victims and witnesses. How the balance is struck *will depend on the facts of each case.* (7)

The balance between the right of the accused to a fair and public trial and the protection of victims and witnesses within its unique legal framework had also been referred to in earlier decisions in the same case.(8)

8. The prosecution, however, relies not only upon the facts of this particular case but also upon "the facts and circumstances concerning Tribunal cases generally" to justify the redaction of all identification of *every* person who had made the relevant statements and their whereabouts. It says that Bosnia and Herzegovina continues to be a dangerous place, where each ethnic or political group is viewed as the enemy of another, and where –

> [...] much of the war is still being fought, with indictees [sic] or suspects and their supporters (as well as supporters of those detained in The Hague) still at large and where witnesses against them are considered "the enemy".(9)

The Motion proceeds:

> 10. In the past two years, there have been increasing instances involving interference with and intimidation of Tribunal witnesses, including breaches and violations of witness protection orders (including non-disclosure orders) and other security measures . The situations range from witnesses having their lives threatened, to repeated instances of witness statements that have been disclosed to accused and their counsel being published in the media or otherwise made public (despite the existence of non-disclosure orders), to numerous threatening telephone calls, to loss of jobs or job opportunities, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Tribunal.
>
> 11. In light of these past breaches of confidentiality and other serious problems , and their effect on victims and witnesses, the Prosecutor has grave concerns that the safety of witnesses, their willingness to testify and the integrity of these proceedings will be substantially jeopardised if witnesses' identities, whereabouts and statements are prematurely disclosed in circumstances where they cannot be protected . The Prosecutor submits that the requested protective measures greatly assist in minimising these concerns.

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9. The prosecution submits that the future of this and all other Tribunal cases depends upon the ability and willingness of witnesses to give evidence. Absent evidence, there will be no trials, or no trials which accomplish justice. It says :(10)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

10. It was frankly conceded by the prosecution that the basic argument underlying its submissions was that the requirements of Rule 69(A) – that "exceptional circumstances " must be shown before protective measures will be ordered by the Trial Chamber – are satisfied in relation to *every* witness in *every* case "at this stage" (that is, at the time for service on the accused of the supporting material which accompanied the indictment when confirmation was sought).(11) It was also frankly conceded by the prosecution that it is difficult to argue that *every* witness must be vulnerable.(12)

11. In the opinion of the Trial Chamber, the prevailing circumstances within the former Yugoslavia *cannot by themselves* amount to exceptional circumstances . This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives.(13) Accordingly, the use by those judges of the adjective "exceptional" in Rule 69(A) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing (or normal) circumstances – in the former Yugoslavia. As was made clear by the Second *Tadic* Protective Measures Decision, the circumstances of each case must be examined.

12. The prosecution submits that the Second *Tadic* Protective Measures Decision should no longer be followed, as it was the Tribunal's first case, and that there had been numerous documented instances of interference since that time.(14) Even if the situation *has* changed since the Second *Tadic* Protective Measures Decision – and the Trial Chamber is not satisfied that there has been any *significant* change – the wording of Rule 69(A) has nevertheless remained the same, and the phrase "exceptional circumstances" in its ordinary usage does not permit any interpretation which equates it with what is now said to be the rule in the former Yugoslavia.

13. The action of the prosecution in redacting the name and identifying features in *every* statement, although no doubt administratively convenient, was both unauthorised and unjustified on the basis which the prosecution has now put forward .

4 An alternative procedure?

14. During the course of the oral hearing of the Motion, on 24 March 2000, there was discussion as to whether a procedure could be devised which would avoid the need for a witness-by-witness application by the prosecution to the Trial Chamber for protective measures before complying with its obligation under Rule 66(A)(i) to serve copies of its supporting material upon the accused.

15. The prosecution proposed a procedure whereby –

> (i) it would take it upon itself to redact the identity of every witness who has asked for his or her identity not to be revealed and who, in its judgment, is a vulnerable witness,

(ii) the accused could make a "reasonable" request to it for the identity of particular victims and witnesses to be revealed, giving reasons why their identity was required at an earlier stage than (say) thirty days before the commencement of the trial, and

(iii) if that request were refused, the accused could then seek relief from the Trial Chamber.(15)

Should the accused require the name of a witness because there are, for example, features directly implicating the accused, the name would be supplied unless there is a very good reason why the prosecution wished to withhold it.(16)

16. Such a proposal, however, has two basic defects. First, it continues to assume that *every* witness (or at least those who ask for their identity not to be disclosed) is in fact "in danger or at risk" (as Rule 69(A) describes them), or "vulnerable" (as the Motion describes them). As already decided, that is not so . Secondly, the proposal completely reverses the appropriate onus. Rule 69(A) places the onus upon the prosecution to demonstrate the exceptional circumstances justifying an order for non-disclosure, whereas this proposal places the onus upon the accused to justify disclosure.

17. There is another problem. The prosecution asserted that, as it has a responsibility to ensure that the accused is given a fair trial, it should be trusted in effect to perform the role which the Rules give to the Trial Chamber in determining which victims and witnesses are vulnerable.(17) It asks the accused "to accept that there are very good reasons why the identity is not being provided".(18) This does not even begin to discharge the onus which the prosecution bears under Rule 69(A). One of the supporting documents served on the accused in the present case consists of the transcript of evidence which a proposed witness gave in open session in another case before the Tribunal, with all material identifying the witness redacted. As it would be a simple thing for the accused to find the relevant transcript and thus to identify the witness in question, there could be no exceptional circumstances warranting a redaction of that witness's name. This example suggests a perhaps less than dispassionate approach by the prosecution to its task.(19)

18. The proposal was opposed by both accused, and the Trial Chamber accepts that its implementation would be contrary to both the Statute and the Rules.

5 A conflict between the Rules?

19. The prosecution claims that there is a conflict which needs to be resolved between the obligation placed upon it by Rule 66(A)(i) to disclose the supporting material to the accused within thirty days of his initial appearance and the protection afforded to victims and witnesses provided by Rule 69 (A).(20)

20. The Trial Chamber does not accept that there is any such conflict. As already decided, Rule 69 (A) does *not* provide the blanket protection asserted by the prosecution. Before protective measures will be granted, Rule 69(A) requires the prosecution first to establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1: that "proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". As the prosecution correctly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one.(21) The reference to "proceedings" in Article 20 is not limited to the actual trial; it includes every phase of the litigation which affects the determination of the matter in issue.(22)

21. If the prosecution is able to demonstrate exceptional circumstances justifying the non-disclosure of the identity of any particular victims or witnesses at this early stage of the proceedings, then its obligations of disclosure under Rule 66 (A)(i) will be complied with if it produces copies of the statements with the names and other identifying features of only *those* witnesses redacted.

6 Rule 69(A)

22. It is necessary initially to say one thing about Rule 69(A) if only for the purpose of putting it on one side. The Rule expresses the power to make a non-disclosure order in relation to a victim or witness who may be in danger or at risk "until such person is brought under the protection of the Tribunal". This rather curious wording appears to assume that the Tribunal has a witness protection program or scheme which will render the non-disclosure order no longer necessary once it comes into operation. In fact, the Tribunal does not have any such program or scheme.(23) The Rule has always been interpreted as including the power to make non-disclosure orders which continue throughout the proceedings and thereafter. If necessary, such a power is justified by Rule 53(A), which permits a non-disclosure order (so far as the public is concerned) to be made in relation to any document or information until further order – but, again, only "[i]n exceptional circumstances". So far as the accused is concerned, Rule 69(C) requires the identity of the victim or witness to be disclosed to him "in sufficient time prior to the trial to allow adequate time for preparation of the defence".(24)

23. There is therefore clear power to make what may be described as the usual non -disclosure orders in relation to particular victims and witnesses once exceptional circumstances have been shown. That, however, is not what is sought by the prosecution in the present motion. In substance, the present motion seeks only to justify the prosecution's right to make the blanket redactions already made. In that endeavour , the prosecution has been unsuccessful, and it will be necessary to file a fresh motion in which it seeks to justify a non-disclosure order in relation to particular victims and witnesses.(25) As some of the issues which will arise in relation to such a fresh motion have been debated in relation to the present motion, it is appropriate to express the views of the Trial Chamber in relation to those issues at this stage.

24. The first issue concerns the likelihood that prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel , but not to the public. The prosecution says, and the Trial Chamber accepts, that the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.(26) Paragraph 10 of the Motion makes the general allegation that there has been an increasing number of instances in which there have been breaches and violations of witness protection orders, thus justifying grave concerns that such instances will increase further if the identity of the witnesses is disclosed earlier than is necessary.

25. The prosecution subsequently gave four examples of these instances.(27) In the first, counsel for an accused was charged (with his client) with contempt arising from alleged interference with a prospective witness for that client. The charge of contempt has been dismissed upon the basis that the Trial Chamber was not satisfied beyond reasonable doubt that the interference had occurred.(28) In the second example, counsel in one case named in open session a person as having been a witness in an associated case who had been granted protective measures in that other case. When charged with contempt, Counsel claimed that he had drawn the inference that that person had given evidence in the associated case from the fact that it was known that he had been in The Hague at the time. The prosecution did not assert that this knowledge had been gained as a result of a breach by anyone bound by the protective measures order in the associated case.(29) In the third example, a witness list was published in a newspaper in Sarajevo. In the fourth example, a witness statement was published in a newspaper in Croatia . The prosecution asserted that:(30)

> As a result of these actions, Prosecution witnesses who had previously agreed to appear before the Tribunal refused to testify.

The reference to "these actions" appears to be limited to the third and fourth examples .

26. It is, however, important to recall the terms of the rule under which the prosecution seeks a non-

disclosure order. Rule 69(A) applies only to "the non-disclosure of the identity of a victim or witness who may be in danger or at risk". Any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent. Most judges can identify cases in which it is obvious that witnesses have been interfered with, but it is by no means so obvious that this has resulted from breaches by defence team members of witness protection orders. The examples of violations in the four cases following (in a temporal sense only) the disclosure of the identity of the witnesses to the defence are accompanied by the prosecution's assertion that they show "a history of violations in virtually every case that has been brought before this Tribunal".(31) This piece of hyperbole does not assist.

27. Counsel for the accused have, with some justification, complained that their integrity has been impugned by these assertions. Such an intention has been denied by the prosecution, which has attempted to explain the relevance of its assertions in this way:(32)

> It is submitted that if, before an order is to be made, the Prosecutor is required to demonstrate that there are grounds for believing that a particular defence counsel would behave improperly and/or until interference with witnesses or improper disclosure of confidential material has taken place, then the purpose of the order (which does no more than comply with the statutory obligation to protect victims and witnesses), has been negated.

This was expanded at the oral hearing:(33)

> We're suggesting that the interference may and has in the past come from persons who have a vested interest in, whether actively sought by the accused or no, helping them. And one of the foolish ways which they see help being given is by interference with witnesses.

These explanations do not entirely eradicate the suggestion by the prosecution that there is a presumption that impropriety will occur, particularly when the terms of Order (4) are considered.(34)

28. The Trial Chamber accepts that, once the defence commences (quite properly) to investigate the background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the defence has spoken may reveal to others the identity of those witnesses, with the consequential risk that the witnesses will be interfered with. But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.

29. A second issue which arose relates to the extent to which the power to make protective orders can be used not only to protect individual victims and witnesses in the particular case but also to assist the task of the prosecution to bring other cases against other persons in the future. This issue arises from the prosecution's assertion quoted earlier:(35)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

That is a statement which could easily be misunderstood. In the view of the Trial Chamber, when the required balancing exercise is undertaken before protective measures are ordered, a clear distinction must be drawn between measures to protect individual victims and witnesses in the particular trial

and measures which simply make it easier for the prosecution to present its other cases against other persons.

30. Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia* , interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration . It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases.

31. The Trial Chamber accepts that the need to carry out *any* balancing exercise which limits the rights of the accused necessarily results in a less than perfect trial. On the other hand, it also accepts that such a result does not necessarily mean that the trial will not be a fair one. Those propositions were stated by the majority of the Trial Chamber in the First *Tadic* Protective Measures Decision , (36) and they have never been disputed . The question here is whether the extent to which it is necessary to deny the rights of the accused in order to assist the prosecution to have indeterminate victims and witnesses testify on its behalf in future cases tilts the balance too far. The right to a fair trial holds so prominent a place in a democratic society that it cannot be sacrificed to expediency. (37)

32. That said, however, the Trial Chamber accepts that, where the likelihood that a particular victim or witness may be in danger or at risk has *in fact* been established, it would be reasonable, for the reasons already given, to order non -disclosure of the identity of *that* victim or witness until such time that there is still left, in the words of Rule 69(C), "adequate time for preparation of the defence" before the trial. Counsel for Brdanin in the end realistically accepted that the real issue was "when". (38) Counsel for Talic did not accept the right of the prosecution to have *any* documents redacted, (39) although his co-counsel emphasised the requirement of Rule 69(A) that redaction be allowed only in exceptional circumstances.(40)

33. A third issue which arose relates to the *length* of that time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. The prosecution accepts that, although the greater the length of time between the disclosure and the time when the witness is to give evidence, the greater the potential for interference with that witness, the time to be allowed for preparation must be time before the trial commences rather than before the witness gives evidence . (41)

34. The prosecution has also very realistically conceded that what is a reasonable time will depend upon the particular category in which the witness in question falls .(42) For example, where (as in the present matter) the case against the accused does not suggest that either of the accused personally did the acts in question, the witnesses who are to prove the basic facts for which the accused is said to be responsible (either as a superior or by way of aiding and abetting) do not themselves directly implicate the accused , and knowledge of their identity would do little to assist the defence in its preparation for the trial.(43) The witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who directly implicate the accused as having superior authority or as aiding and abetting.(44) The distinction is a valid one, but the problem is that it is in relation to the witnesses who fall into the second category that the prosecution has the greater concerns and whom it seeks to keep anonymous until the last moment.

35. All three of these issues will be relevant to the determination of the fresh motion which the prosecution must now file in which it seeks to justify a non-disclosure order in relation to particular witnesses.

36. The prosecution has suggested that a disclosure of its witnesses' identity thirty days before the trial would be sufficient to allow the accused to be ready for trial . The prosecution asserts that the

name of the witness is – 582

> [...] normally only relevant to issues of credit and is, therefore, generally only a small part of any case preparation that the Defence may undertake.(45)

The prosecution asked rhetorically:(46)

> [E]ven if [the defence] have the name of a witness, how would this assist them preparing the defence of either of the two accused?

These statements are quite unrealistic when applied to those witnesses who fall within the category of giving evidence which directly implicates the accused. There can be no assumption by counsel for the accused that these witnesses will be telling the truth.(47) There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were,(48) or have subsequently retracted their evidence.(49) The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence.(50) Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

37. One difficulty which is said by both accused to have arisen in the present case results from the fact that the indictment was sealed, and has remained sealed except in relation to these two accused. Persons whom the defence teams wish to interview have declined to co-operate for fear that they are also named in that indictment , or perhaps in another sealed indictment. This difficulty was said to arise in relation to prospective witnesses for the *defence* whom the defence teams wish to interview, which is hardly relevant to the present issue, which concerns *prosecution* witnesses.(51) However , the Trial Chamber recognises that such a difficulty may well arise also in relation to those from whom the defence teams seek information in relation to the prosecution witnesses.

38. The Trial Chamber does not believe that it is possible to lay down in advance any particular period which would be applicable to all cases. Everything will depend upon the number of witnesses to be investigated, and the circumstances under which that investigation will have to take place. Some accused may have better resources of their own than others, depending upon their position prior to their arrest. That period can only be determined after the protective measures are in place. However, from evidence given in other cases,(52) the Trial Chamber accepts that the pre-trial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial.

7 Return of documents

39. Order (5), if made, would oblige counsel for the accused to return all statements of witnesses to the Registry "at the conclusion of the proceedings". It is said that, as the statements were provided to the accused only to enable him to prepare for the trial, they should be returned to the Registry – thus ensuring that what may be described as the non-public information which the statements contain can never be disclosed to the public.(53) The prosecution would not have access to the documents when they are returned.(54)

40. It was argued on behalf of Talic that the documents became the property of the accused as soon as they are provided to him, and that he should be entitled to keep them "so that he could use them

properly in the future".(55) The prosecution replied that property in the documents does not pass to the accused .(56) The Trial Chamber does not find it necessary to determine this issue, as it accepts the alternative submission made on behalf of Brdanin, that the "work product" of counsel (being the notations inevitably made by counsel on those documents during the preparation and the course of the trial) does become the property of the accused and that it is of a confidential nature.(57) It is unnecessary to determine whether that confidentiality stems from the legal professional privilege which arises (at least in the common law systems) between attorney and client; it is sufficient to say that the "work product" is confidential, and that the accused should not ordinarily be required to divulge it. The issue therefore becomes whether the risk of disclosure is of such a nature that the documents ought nevertheless be returned .

41. When pressed as to how realistic the risk was that the non-public material in these statements would be disseminated if the documents were kept by counsel after the case has been concluded (when the protective measures still operate), the prosecution first referred to the refusal by one defence counsel in another case to return his papers at the conclusion of the trial, and then suggested that:(58)

> One keeps papers in one's office, people wander in and out of the office, or one leaves papers somewhere, and unless they're returned and accounted for, [...] there's always that risk. That's the difficulty.

If there is a deliberate refusal by counsel to return the documents when ordered to do so, he or she would be subject to punishment for contempt. Such a refusal does not lead inevitably to a deliberate disclosure of the documents; however, even punishment for contempt would not cure the damage should there be a deliberate disclosure. But what realistically is the likelihood of a repeat of an event such as this? And what realistically is the likelihood that counsel who has kept the statements *after the conclusion of the case* would leave them in a situation where there would be an unintentional disclosure to somebody who has wandered into his or her office? All but one of the documented disclosures to which the prosecution has referred in the Motion occurred either during the pre-trial phase or during the trial itself. The exception occurred when counsel in one completed case provided an unredacted statement of a witness to counsel in an associated case who had at that time received from the prosecution only a redacted statement of that witness .(59)

42. The Trial Chamber does not accept that the risk is of such significance as to warrant the concern which the prosecution has expressed. There is in any event some difficulty in determining the exact time when the proceedings have concluded , which the prosecution has proposed as the time for the statements to be returned . It was agreed at the oral hearing that, if such documents were to be returned to the Registry at the conclusion of the trial, they would for practical reasons be destroyed, rather then stored.(60) Whether an appeal is to be lodged would be known fairly quickly, and counsel could perhaps be permitted to keep the statements until the time for filing an appeal has expired and, if an appeal is filed, until the appeal is disposed of. But what if, at some later stage, an application is made for a review pursuant to Rule 119 ? Counsel retained for the accused in that procedure would have lost a very valuable resource if the work product on the statements has been destroyed. This would be unfair to the accused. It was suggested by the prosecution that the answer would be for defence counsel to keep his or her work product separately from the statements supplied. The Trial Chamber regards that submission as quite impractical.

43. The Trial Chamber does not accept that the likely risk of either deliberate or unintentional disclosure after the conclusion of the case is of such significance as to justify the unwieldy and possibly unfair consequences of an order that the documents be returned in every case. The fact that orders for the return of statements have been made in similarly general terms in other cases does not impress the Trial Chamber,(61) as the present case appears to be the first in which objection has been taken to orders of the nature sought in this case, and the first in which there has been any examination of what is involved in those orders.

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44. The Trial Chamber is prepared to make an order in the terms of the first part of Order (5) – that, if a member of the Brdanin and Talic Defence team withdraws from the case, all the material in his or her possession shall be returned to the lead defence counsel. Such an order is justified as that member of the team no longer has any need for the documents. But the Trial Chamber is not prepared at this stage to make any further order in relation to the return of documents. It accepts that such orders may be warranted in a particular case. Counsel for Brdanin suggested that an order may be warranted where a document was "akin to a national security document",(62) but the Trial Chamber would not limit the occasions when an order may be appropriate to that class of case. Such orders are better considered at the end of the trial, when the risk involved may more easily be identified. The risk has not been identified in the present case at this stage. The order is therefore otherwise refused, without prejudice to any further application at a later stage.

8 Maintaining a log

45. The accused have not objected to Order (3), which obliges their Defence team (as defined) to inform each person among the public to whom they find it directly and specifically necessary to disclose confidential or non-public materials that such person is not to copy, reproduce or publicise the information disclosed, is not to show or disclose that information to any other person, and is to return the original or any copy of such material provided to that person. Order (4), if made , would oblige counsel to maintain a log indicating the names, addresses and position of each person or entity receiving any of the non-public information in the materials provided by the prosecution. The prosecution points out that similar statutory requirements exist in relation to statements, photographs and medical reports in sexual cases in the United Kingdom.(63) Such a regime was said to be necessary in Tribunal cases as the "only way of tracing these things".(64) An expanded explanation was given in these terms:(65)

> [...] if there is a leak of confidential material, and the Trial Chamber has to conduct an investigation, the only way they can properly do so is by a log being kept. And that's the reason that we are asking for that [...]

The procedure laid down by Order (4) is that, if a "perceived violation" of the non-disclosure order occurs, the Trial Chamber, or a designee [sic] such as a duty judge, may review the disclosure log so that "appropriate" action may be taken. The prosecution asserts that the log will not be disclosed to it..(66)

46. The accused Talic objects to such an order upon the basis that it infringes the confidentiality of his defence team's investigations,(67) in that (a) it will permit both the prosecution and the Tribunal to know those whom his defence team is meeting in order to organise his defence,(68) and (b) it will permit the prosecution to prosecute those persons "secretly".(69) The prosecution denies that legal professional privilege applies to that information . Again, it is unnecessary for the Trial Chamber to determine whether the confidentiality as to the identity of persons to whom the defence team have spoken in the preparation of the case for the accused stems from legal professional privilege, as it is sufficient to say that such information *is* confidential, and the accused should not ordinarily be requested to divulge it.

47. It is significant, in the view of the Trial Chamber, that the review of this log is contemplated only in the event of a "perceived violation" of the non-disclosure order. As that order is binding only upon the Brdanin and Talic Defence (which term is limited by its definition to the accused themselves, their counsel and all staff assigned to them by the Tribunal), Order (4) appears to be intended specifically to provide the basis for "appropriate" action against only those persons responsible for maintaining the log. The "appropriate" action could well include prosecution for contempt of the Tribunal.

48. If, however, any member of the defence team is to be prosecuted for contempt , it is perhaps

disingenuous of the prosecution to assert that the log will not be disclosed to it, as it would be the prosecution to which the Trial Chamber would necessarily have to turn for assistance in proceedings for contempt pursuant to Rule 77. Again, if any member of the defence team is to be prosecuted for contempt , he or she is entitled to the same presumption of innocence and right to silence which any other accused person has. The obligation to keep the log upon which such a prosecution is to be based would require that accused person to provide evidence against him or herself, contrary to Article 21 of the Tribunal's Statute. Such a procedure could be justified only where the situation were so grave that substantial damage was being caused by improper disclosures.(70) The Trial Chamber is not satisfied that such a situation exists here.

49. A requirement that such a log be kept so that any improper disclosure could be traced to a person to whom the defence team has quite properly disclosed the identity of the witness (in its investigation into the background of that witness) would not give rise to these problems, but the non-disclosure order is not binding upon those other persons, and the Tribunal is powerless to take any action against them if such a disclosure by them does occur. The Trial Chamber does not accept that it is appropriate to require such a log to be maintained by the defence team for the purpose contemplated by Order (4). The order is refused.

9 Confidential filings

50. An issue was also raised by the Trial Chamber itself as to the action of the prosecution in filing its Motion on a confidential basis. At the time when the Motion was filed, a Scheduling Order was made which, *inter alia*, lifted its confidentiality.(71) An informal request was made by the prosecution to rescind that order,(72) but the order was merely stayed until further order, so that both the confidentiality of this document and the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential" could be argued at the oral hearing.(73) The Registrar was also invited to make representations pursuant to Rule 33(B) upon the second of those issues, as well as upon the issue as to whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis .(74) A submission of the Registrar was filed.(75)

51. The purported basis for filing the Motion as a confidential document was the fear that, if the material contained in par 10 of the Motion – which is quoted in par 8 of this Decision – could be read by anyone, including those who are potential witnesses and those who have an interest in preventing such witnesses from giving evidence, it could well lead to those witnesses refusing to co-operate,(76) and to the possibility of interference with witnesses being planted in the minds of those who have a vested interest in ensuring that evidence which implicates these two accused is not given. (77)

52. The Trial Chamber repeats what it said earlier,(78) that the issue is the likelihood that prosecution witnesses may be interfered with or intimidated, and that any fears expressed (or held) by potential witnesses themselves that they may be approached are not in themselves sufficient to establish the likelihood that they may be interfered with or intimidated. The Trial Chamber regards the suggestion that those already minded to prevent evidence being given against these two accused would, by reading a publicly filed document such as this Motion, be incited to interfere with or intimidate witnesses as merely fanciful.(79) The reality is that there have already been serious allegations made publicly that witnesses in other cases have been interfered with. In one case, the allegations were upheld in proceedings for contempt against the counsel concerned.(80) In another case, the allegations against other counsel and the accused for whom he appeared were dismissed. (81) Both judgments are public documents, and may be read by anyone. The second was given only recently, but no-one has suggested that there has been an upsurge of interference with witnesses in the period since the first of those judgments was given. Nor could they.

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53. There was no justification for filing the Motion on a confidential basis. Article 20.4 of the Tribunal's Statute provides:

> The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Pursuant to that Article, Rule 79 provides that a Trial Chamber may exclude the press and the public from the proceedings only for one of three specified reasons (one being the safety, security or non-disclosure of the identity of a victim or witness as provided by Rule 75). Both these provisions make it clear that the proceedings must be in public unless good cause is shown to the contrary.(82)

54. The prosecution has submitted that these provisions relate only to hearings, and not to the filing of motions. That is strictly true, but they indicate a intention that *everything* to do with proceedings before the Tribunal should be done in public unless good cause is shown to the contrary. As a matter of general policy , this must be so. A necessary consequence of the filing of this Motion on a confidential basis has been that the oral argument upon the Motion – which dealt with matters of great importance – took place in closed session, although it was subsequently conceded by the prosecution that nothing said during that oral hearing other than the references to par 10 of the Motion was confidential in nature.(83) If par 10 of the Motion did not justify it being filed on a confidential basis, then the public has been denied its right of access to a hearing, a right which both the prosecution and the Tribunal should have been anxious to enforce.

55. The prosecution also asked rhetorically:(84)

> [W]hat interest can the public have in [...] unnecessarily knowing that there's an application for protection of witnesses and/or that there have been successful attempts in the past?

The answer is that there is a public interest in the workings of courts generally (including this Tribunal) – not just in the hearings, but in everything to do with their working – which should only be excluded if good cause is shown to the contrary . The attitude displayed by the prosecution in the present case appears to be part of an unfortunately increasing trend in proceedings before the Tribunal for matters to be dealt with behind closed doors. When the prosecution seeks to have anything dealt with confidentially, the accused does not usually object because it is in his interest that the less that is made public concerning his case the better.(85) This trend is a dangerous one for the public perception of the Tribunal, and it should be stopped.

56. The stay on the order lifting the confidentiality of the Motion is removed, and the filings by the parties in relation to the Motion, and the transcript and video-recording of the oral hearing on the Motion, will also be made public.

57. The remaining issues concerning confidentiality were the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential ", and whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis.

58. The parties made no specific submissions in relation to these issues, although the prosecution did identify some convenient categories into which its "confidential " filings fall, to which reference will be made later.

59. The Registrar has identified as being relevant to this issue Article 12.1 of the Directive for the Registry–Judicial Department–Court Management and Support Services ("Directive"),(86) which provides :

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> Documents which are confidential in whole or in part, or which include words or phrases which should not be disclosed to the public, are filed and classified in accordance with the procedure described in Article 11 herein. These documents remain a part of the relevant case file, but they are placed in a distinct folder which is not accessible to the public.

The classification of documents described in Article 11 of the Directive makes no reference to the classification of documents as confidential. The Registrar has submitted that, as it is her view that "her Office is not in a position to make decisions that affect the judicial rights of the parties",(87) and "in accordance with the current practice of the Registry", the parties *do* have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".(88) Such a practice, she says(89) –

> [...] is the most appropriate mechanism for satisfying the dual objectives of maintaining the security of each party's documents, and maintaining a transparent and impartial filing system.

60. The Trial Chamber respectfully takes issues with a number of these assertions . First, Article 12 makes it clear that the documents to which it relates are those which are *in fact* confidential, not those which are merely claimed to be so, and to documents which "should" not be disclosed to the public. On the face of it, the Article *does* require the Registry staff to make a determination . Secondly, it is by no means the universal practice of the Registry to leave it to the parties to nominate whether they wish to have the documents filed on a confidential basis, and decisions *are* made by Registry staff on occasions as to whether a document should be filed on a confidential basis.(90) Thirdly, the Directive cannot be interpreted according to the ability of the Registrar to provide staff who are able to apply it. And, lastly, the argument that, by making a determination as to whether a document should be filed on a confidential basis , the Registry staff will no longer be seen as impartial is illogical. The Trial Chamber does not accept the Registrar's conclusion that the parties have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".

61. In relation to the suggested requirement that a party seeking to file a document on a confidential basis must first obtain leave to do so, the Registrar asserts that it would be contrary to the Directive, which can only be amended by the Registrar after consultation with the judges and the Prosecutor.(91) As the parties require documents to be filed on a continuous basis throughout the day, and in some cases after hours, she also asserts that any requirement of leave could potentially result in delays because of the unavailability of the Pre-Trial Judge or the Trial Chamber.(92)

62. Once again, the Trial Chamber respectfully takes issue with these assertions . The contents of the Directive are irrelevant to the suggested requirement of leave. The Directive does not impinge upon the power of a Trial Chamber to control the particular proceedings before it. The Trial Chamber may direct the parties to file certain documents, without infringing the Directive. It may equally direct the parties not to file certain documents without first obtaining leave, again without infringing the Directive. The suggested requirement of leave does not *require* the Registry staff to act in any particular way. If a party seeks to file a document merely labelled "Confidential" on such a basis without leave to do so, and if the Registry staff does not draw the party's attention to that requirement , then the Trial Chamber will exercise its power to order that its confidentiality be lifted, a power which the Registrar recognises.(93) The requirement that leave be obtained in advance will merely ensure that usually this power will not have to be exercised after the filing has been accepted.

63. In relation to the argument of inconvenience, the prosecution informed the Trial Chamber that its confidential filings fell into the following categories:(94)

(i) witness protection measures,

(ii) ongoing investigations, pending indictments and sealed indictments, and

(iii) responses to confidential motions filed by the defence and to Trial Chamber decisions which relate to confidential hearings or motions.

Filings in the second category are almost inevitably *ex parte* in nature and so are almost inevitably also confidential in nature. Filings in the third category would also appear to be necessarily confidential in nature. It is therefore with filings in the first category that the issue of inconvenience principally arises , although the Trial Chamber recognises that there may well be other categories in which it would be appropriate to file a document on a confidential basis.

64. If the requirement that leave be sought prior to filing were couched in terms which excluded –

(a) all *ex parte* applications, whatever their nature,

(b) all *inter partes* applications for witness protection which relate to specific persons, and

(c) all applications which fall within the second and third of the prosecution's categories,

there are few documents which would require leave. The prosecution was unable to supply figures, (95) but it was not suggested that there were many such documents. There would be no significant inconvenience ; rather, there will be an opening up of the proceedings to public scrutiny in every case except where confidentiality is really warranted. The Trial Chamber proposes to give such a system a trial in particular cases.

10 Disposition

65. For the foregoing reasons, Trial Chamber II makes the following orders:

1. For the purposes of these orders:

(a) "the Prosecutor" means the Prosecutor of the Tribunal and her staff;

(b) "Brdanin and Talic Defence" means only the accused Radoslav Brdanin and Momir Talic and such defence counsel and their immediate legal assistants and staff, and others specifically assigned by the Tribunal to Radoslav Brdanin and Momir Talic's trial defence teams and specifically identified in a list to be maintained by each lead counsel and filed with the Trial Chamber *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily and properly involved in the preparation of the defence shall be notified to the Trial Chamber in similar fashion within seven days of such additions or deletions ;

(c) "the public" means all persons, governments, organisations, entities, clients , associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), and the Prosecutor, and the Brdanin and Talic Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the accused, the co-accused, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal; and

(d) "the media" means all video, audio and print media personnel, including journalists ,

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authors, television and radio personnel, their agents and representatives.

2. The Prosecutor is to comply, on or before 24 July 2000 at 4.00 pm, with her obligation under Rule 66(A)(i) of the Rules of Procedure and Evidence to supply to each of the accused copies in unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by her from that accused;

provided that, in the event that the Prosecutor files a motion within that period for protective measures in relation to particular statements or other material or particular victims or witnesses (which shall be identified in such motion by a number or pseudonym), she need not supply unredacted copies of those statements or that other material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the terms of any order made upon that motion .

3. The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.

4. Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:

(a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor; or

(b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony.

5. If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case.

6. If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel.

7. The stay imposed by the Variation of Scheduling Order of 27 January 2000 dated 2 February 2000, which lifted the "confidentiality" of the Motion for Protective Measures dated 10 January 2000, is removed.

8. The "confidentiality" of the filings in response to the Motion for Protective Measures dated 10 January 2000, of the filings in reply to those responses and of the oral hearing of the Motion on 24 March 2000 is lifted.

9. The remaining orders sought by the Motion for Protective Measures dated 10 January 2000 are refused.

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

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

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Dated this 3rd day of July 2000,
At The Hague,
The Netherlands.

Judge David Hunt
|Presiding Judge

[Seal of the Tribunal]

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1. Motion for Protective Measures, 10 Jan 2000 ("Motion"), par 14.

2. Those definitions formed the general basis for the definitions given in par 65.1 of this Decision. The prosecution also seeks to preserve the right of the parties and any other person to seek such other or additional protective orders or measures as may be appropriate concerning a particular witness or other evidence.

3. Transcript, 11 Jan 2000, p 40.

4. Transcript, 24 Mar 2000, p 77.

5. Motion, par 14(6).

6. Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996 ("Second Tadic Protective Measures Decision"), at 4.

7. The emphasis has been added.

8. Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (1995) I JR ICTY 123 ("First Tadic Protective Measures Decision"), at 151 (par 30). See also Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, (1995) I JR ICTY 307 at 318-319 (par 11).

9. Motion, par 9.

10. Ibid, par 4.

11. Transcript, p 78.

12. Ibid, p 88.

13. First Tadic Protective Measures Decision, at 145-147 (par 23).

14. Transcript, p 135.

15. Ibid, p 84, 87-88, 92.

16. Ibid, p 86.

17. Ibid, p 86-87, 93-94.

18. Ibid, p 140.

19. Whatever fears that witness may have in being identified as one who is going to give evidence in this trial, it difficult to see how the prosecution, having used the transcript as supporting material when the indictment was confirmed, could argue that there were exceptional circumstances justifying a non-disclosure in relation to that witness. 541

20. Transcript, p 140.

21. Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000 ("Further Particulars"), par 4; Transcript, p 83. See also First Tadic Protective Measures Decision, at 215.

22. First Tadic Protective Measures Decision, at 157 (par 38), citing Axen v Federal Republic of Germany, ECHR decision of 8 Dec 1983, Series A, no 72 (see at par 27).

23. First Tadic Protective Measures Decision, at 175 (par 65), 201.

24. This is subject to Rule 75, which permits appropriate measures to be ordered for the privacy and protection of witnesses unlimited in time, but only if the measures are "consistent with the rights of the accused". No issue arises in the present motion in relation to that power, which is discussed in the First Tadic Protective Measures Decision, by the majority at 169-175,179 (pars 53-66, 71) and by Judge Stephen, dissenting, at 221, 225-235.

25. It was submitted by the prosecution that such a motions should proceed ex parte (Transcript, p 86). That would be appropriate only if the identity of the particular witnesses would otherwise be identified: Prosecutor v Simic, Case IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000, pars 40-41. Whether ex parte or inter partes, it would nevertheless be appropriate for the application to be made on a confidential basis.

26. Further Particulars, par 12; Transcript, pp 78-79.

27. Further Particulars, par 8.

28. Prosecutor v Simic, Case IT-95-9-R77, Oral Judgment, 29 Mar 2000, Transcript, pp 904-905.

29. Prosecutor v Zlatko Aleksovski, Case IT-95-14/1-T, Finding of Contempt of the Tribunal, 11 Dec 1998.

30. Further Particulars, par 8

31. Ibid, par 9.

32. Ibid, par 10.

33. Transcript, p 90.

34. This provides for a log to be maintained by counsel of those to whom they have disclosed the non-public information in the material provided by the prosecution, and which may be reviewed by the Trial Chamber in the event of a "perceived violation" by counsel or others within the defence team. See Section 8 of this Decision.

35. Paragraph 9 of this Decision.

36. At 179 (par 72). It is perhaps instructive that the authority upon which the majority relied – a decision of the Appellate Division of the Supreme Court of Victoria (Australia), in Jarvie v Magistrates Court of Victoria [1994] VR 84 at 90, delivered by Mr Justice Brooking on behalf of the Court – involved a witness who had been well known to the accused, although only by a pseudonym and not his real name (he was an undercover police officer): First Tadic Protective Measures Decision, per Judge Stephen, at 233.

37. Kostovski v Netherlands, ECHR decision of 20 Nov 1989, Series A, no 166, at 21 (par 44).

38. Transcript, p 115.

39. Transcript, p 123.

40. Transcript, pp 126-128. This is more consistent with the written response filed on behalf of Talic: Response of General Talic to the Further Particulars Provided by the Prosecutor Relating to the Motion for Protective Measures, 10 Feb 2000, par 5.

41. Transcript, p 81.

42. Ibid, p 80.

43. Ibid, pp 83-84. In other words, it is unlikely that there will be any real dispute about their evidence: Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18 (A).

44. Transcript, p 89.

45. Further Particulars, par 13.

46. Transcript, p 84.

47. Counsel for Brdanin quoted Lord Owen: "Never before in over thirty years of public life have I had to operate in such a climate of dishonour, propaganda and dissembling. Many of the people with whom I have had to deal in the former Yugoslavia were literally strangers to the truth." (Balkan Odyssey, David Owen, 1996, Indigo Edition, p 1.)

48. See, for example, Prosecutor v Tadic, Case IT-94-1-T, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 Dec 1996, par 4; Prosecutor v Tadic, Case IT-94-1-A, Judgment, 15 July 1999, pp 26-28 (pars 57-65).

49. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, pars 46, 136.

50. Prosecutor v Aleksovski, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 18.

51. So far as defence witnesses are concerned, the attention of defence counsel is directed to the provisions of Article 29 of the Tribunal's Statute.

52. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000.

53. Motion, par 13.

54. Transcript, p 134.

55. Ibid, p 120.

56. Ibid, p 142.

57. Ibid, pp 131, 133-134.

58. Ibid, p 97.

59. Further Particulars, par 15

60. Transcript, p 94-95.

61. Further Particulars, par 16.

62. Ibid, p 133. See also a reference by the prosecution to such documents, at Transcript, pp 99-100.

63. Sexual Offences (Protected Materials) Act 1997, which contains elaborate provisions to prevent disclosure of such

material to any person (including the accused person, even if unrepresented) in such a way which permits that person to retain possession of it at any time or to make a copy of it: Further Particulars, par 18.

64. Transcript, p 97.

65. Ibid, p 134.

66. Ibid, p 134.

67. Response [by Talic] to Prosecutor's Motion, 31 Jan 2000, par 3.

68. Transcript, p 130.

69. Ibid, p 130-132.

70. Such a situation has been justified in some domestic jurisdictions – for example, where lorry drivers are required to keep log books as to their working hours and rest periods.

71. Scheduling Order, 27 Jan 2000, p 3.

72. Letter from James Stewart, Chief of Prosecutions, to the Pre-Trial Judge, 31 Jan 2000 ("Stewart letter"). The prosecution was subsequently required to file the letter: Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

73. Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

74. Scheduling Order, 29 Feb 2000, p 4.

75. Submission of the Registrar on the Confidential Filing Issue in Accordance with Rule 33(B), 7 Mar 2000 ("Registrar's Submission").

76. Stewart letter, par (a).

77. Ibid, par (b); Transcript, p 102.

78. Paragraph 26 of this Decision.

79. The Trial Chamber has not overlooked that publicity may be given to such documents when publicly filed, although none was in fact given to this Motion notwithstanding its public release when its confidentiality was lifted. In any event, so far as the point made by the Trial Chamber is concerned, it does not matter how the allegations in the filed document might become known to those persons already minded to prevent evidence being given against these two accused.

80. Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, a judgment of the Appeals Chamber.

81. Prosecutor v Simic, Case IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000.

82. See also Article 21.2 of the Tribunal's Statute.

83. Transcript, p 148.

84. Ibid, p 104.

85. One example of the approach of the parties to hearing matters in closed session may be seen in Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, at par 11. In Prosecutor v Kunarac, Case IT-96-23-T, Order on Defence Motion Pursuant to Rule 79, 22 March 2000, the defence has sought a closed hearing for the evidence of all the prosecution witnesses who had accused the defendant of rape. The application was refused.

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86. IT/121, 1 March 1997, as approved by the Judges sitting in Plenary Session on 25 June 1996.

87. Registrar's Submission, par 3.

88. Ibid, par 4.

89. Ibid, par 4.

90. A recent example was the wise decision within the Registry to file a document on a confidential basis, notwithstanding the absence of any label of confidentiality, because it included references to the transcript of evidence given in closed session: Prosecutor v Delalic, Case IT-96-21-A, Order Relating to Appeal Brief Filed on Behalf of Zegnil Delalic, 26 May 2000. There have been many other such occasions.

91. Registrar's Submission, par 5.

92. Ibid, par 6.

93. Ibid, par 4.

94. Ibid, p 100.

95. Transcript, p 99.

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Original : French

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

Registry: John Kiyeyeu

Decision of: 6 July 2000

THE PROSECUTOR

V.

Édouard Karemera

ICTR-98-44-I

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

Counsel for the Prosecutor:

Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence :

Mr Didier Skornicki

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

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

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

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

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

WHEREAS Defence Counsel for Édouard Karemera has not responded to the Prosecution's Motion;

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

ARGUMENTS OF THE PROSECUTION

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

2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue the following orders articulated at point 3 of its Motion:

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

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

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

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

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

f) Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in Paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;

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

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

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

j) Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the witnesses in question decide otherwise.

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

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

HAVING DELIBERATED,

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

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

5. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in *Prosecutor v. Tadić*, IT-94-I-T. In its decision of 10 August 1995, the Chamber held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decision, the ICTY determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

6. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation situation prevalent in Rwanda and neighboring countries could be be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. Consequently, the Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

On point 3(f) of the Motion

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

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

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

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

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

10. According to the Chamber, the seven (7) day period proposed by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial is not reasonable to allow the accused requisite time to prepare for his defence, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

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

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

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

FOR THESE REASONS, THE TRIBUNAL:

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

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

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

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

Arusha, 6 July 2000

Laïty Kama
Presiding Judge

William H. Sekule
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

OR: ENG

Before:
Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Asoka de Z. Gunawardana

Registry: Mr. Adama Dieng

Decision of: 14 September 2001

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA

(Case No. ICTR-99-52-I)

DECISION ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

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

Counsel for the Accused:
Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis
Mr. John Floyd III
Mr. René Martel
Mr. Giacomo Barletta Caldarera
Mr. Alfred Pognon

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse

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and Judge Asoka de Z. Gunawardana;

BEING SEIZED OF an *ex parte* application, dated 11 June 2001, and filed with the Trial Chamber pursuant to Rule 66 (C) of the Rules of Procedure and Evidence ("the Rules") for the addition of a new Witness X, to the Prosecution's witness list, and for special protective measures for him;

CONSIDERING additional written submissions from the Prosecution and written submissions from the Defence teams;

CONSIDERING the *inter partes* hearings of the motion on 5 and 6 September 2001;

HEREBY DECIDES the said Prosecution motion.

INTRODUCTION

1. On 26 June 2001, the Trial Chamber decided the Prosecutor's oral motion of 4 June 2001 pursuant to Rule 73 bis (E) for the variation of the Prosecution witness list. In its decision, the Chamber granted the Prosecution leave to add several witnesses to its list of witnesses. The motion was heard by the Chamber in closed sessions on 11-13 June 2001. During the hearing, it became known to the Defence that the Prosecution had filed the present motion concerning Witness X.[1] Following the judicial recess the Trial Chamber decided that the motion should be served on the Defence and that it should be heard in *inter partes* hearings.

SUBMISSIONS OF THE PARTIES

The Prosecution

2. The Prosecution submitted, *inter alia*, that Witness X had been assisting the Prosecutor in its investigation and tracking of suspects for sometime. He has protective status in a host country and recently reconsidered his previous unwillingness to testify, provided that appropriate security precautions are employed for him. Although the Prosecutor was aware of X, she formed the intention to use him as a witness in this case, in June-August 2001.

3. According to the Prosecution, Witness X's testimony is highly material as illustrated by the documents submitted to the Chamber and also disclosed to the Defence. For instance, the Prosecutor submits that Witness X's testimony, relating to the 22 non exhaustive areas presented in a memorandum of 28 August 2001 will rebut points raised in the Defence's pre-trial brief such as Nahimana's involvement with the CDR, the relationship between Radio Rwanda and RTLM, the accused's involvement in false "communiqué", his being head of RTLM, his participation with the Interhamwe and his attitude towards Tutsis and the CDR relations with MRND.[2] The case at hand is complex in that most of the things happened behind closed doors. For the Prosecution to prove its case, it will be necessary to adduce evidence from an insider. Counsel for the Prosecution stated that they had recently contacted Witness X and the Prosecution is now convinced of the inescapable necessity of this witness to the Prosecution's case.

4. Witness X is a key witness whose testimony will be the equivalent of six witnesses and thereby result in the Prosecution dispensing with six witnesses.

5. It is in the interests of justice to call Witness X based on criteria set out in the Trial Chamber's decision of 26 June 2001 for the assessment of "interests of justice" and "good cause", namely, materiality of the testimony, complexity of the case, minimization of prejudice to the Defence, ongoing investigations, replacements and corroborative evidence.

6. With regard to the disclosure of material to the Defence in terms of Rule 66 (A) (ii), nine

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transcripts of the interviews with Witness X in a redacted form, have now been served upon the Defence. Furthermore, the Defence have had notice of Witness X's testimony by the identification of the 22 non exhaustive paragraphs in the Indictment against Ferdinand Nahimana and also by the fact that Witness X is anticipated to cover the testimony of six witnesses whose statements had been disclosed to the Defence some time ago. The Defence, therefore cannot claim to be caught by surprise or to be prejudiced in the preparation of the case it has to meet.

The Defence

7. Defence Counsel submitted that the Prosecution's attempt to bring in a new witness at this stage of the trial, and after a final list of witnesses had been determined by the Chamber in its decision of 26 June 2001, is a willful violation of the Accused's rights to a fair and expeditious trial and their right to a timely disclosure as prescribed by Rule 66 (A) (ii). The conditions for new evidence under Rule 73 *bis* are not met.

8. The Prosecutor was aware of the existence of this witness long before this trial date was fixed, and was also in possession of exculpatory material obtained from the witness. Her failure to give notice of the witness and comply with her disclosure obligations was without good cause and by reason therefore, she is not entitled to the relief claimed.

9. The Prosecution should not be allowed to call Witness X, whose existence has been disclosed to the Defence nine months after the commencement of the trial.

10. The element of surprise resulting from the late disclosure will cause serious prejudice to the Defence in the preparation of their case. The Prosecution should not be allowed to call a new witness in spite of previous statements that its list was final.

DELIBERATIONS OF THE CHAMBER

Whether Witness X shall be added to the Prosecution's witness list

11. The Chamber is guided by its reasoning set out in its decision of 26 June 2001, where it stated:

> "17. It follows from case law that the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Chamber. ...
>
> 19. The Rules do not define the term "interests of justice", but the Chamber is of the opinion that it refers to a discretionary standard applicable in determining a matter given the particularity of the case. When a Trial Chamber has granted leave to call new prosecution witnesses under Rule 73*bis*, statements of such witnesses will form part of the case against the Accused. It follows that the Chamber in its determination will bear in mind also the question of "good cause".
>
> 20. In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay."

12. Regarding the materiality of the evidence, the Chamber notes that Witness X has been identified as an important or key witness for the Prosecution. It is also argued that he is uniquely placed as an insider in the higher echelons of authority to give direct evidence pertaining to the activities of the Accused, as alleged in the Indictment. His past assistance to the investigation work of the Prosecution has rendered him particularly vulnerable to threats and fears of assassination attempts. According to the Prosecution, he has recently overcome his reluctance to testify for reasons of security, by agreeing to do so under special protective measures.

13. The Chamber has been informed by the Parties that the witness is capable of giving both direct and indirect testimony of events in question. It sees no purpose in assessing whether the anticipated indirect testimony outweighs the direct testimony or vice-versa and adopts the view that as long as a witness of the stature of X is available and capable of giving relevant direct testimony on crucial allegations, the Chamber should not exclude such direct testimony. Furthermore, the Chamber has no basis for concluding that the Prosecution has violated its obligations under Rule 68 to provide the Defence with exculpatory evidence.

14. The Chamber observes that the media case is a particularly complex case. It is further noted that Witness X will replace some of the Prosecution witnesses who are now unavailable. It is recalled that all testimonies before the Tribunal are voluntary.

15. The Chamber notes that the Defence has had notice of the nature of the testimony that will be led from Witness X, by reference to the 22 specific areas indicated by the Prosecutor and has also had the benefit of the statements of other witnesses already disclosed to the Defence.

16. The Defence in fact acknowledges an absence of the element of surprise: Counsel for Nahimana stated that "Witness X is not a witness who we can argue, is talking about matters that take us by surprise".[3]

17. The purpose of the disclosure requirements set out in Rule 66 A (ii) is to enable the Defence to have sufficient notice of the case for which it has to prepare. This aim is not frustrated by late disclosure, in this instance, for the reason that the Defence is not caught by surprise as to the nature of the evidence to be given by Witness X and is not unduly prejudiced. Under these circumstances, the fact that the witness is added several months into the trial is not decisive. The lapse of time from June, when the Prosecution lodged the present motion, and now, cannot be held against the Prosecution.

18. The Chamber notes, moreover that if Witness X were to testify, he would be replacing six listed Prosecution witnesses, who would then be abandoned by the Prosecutor. The implication of this fact is that the calling of Witness X will not cause undue delay in the trial proceedings.

19. The Trial Chamber considers that these considerations, namely, the materiality of the anticipated testimony, the lack of the element of surprise to the Defence, and no resultant delays to the trial proceedings, contribute to a finding of "good cause" in terms of Rule 66 A (ii).

20. In assessing the imperatives of "interests of justice" and "good cause" the Chamber has applied the criteria set out in its order of 26 June 2001 cited above as well as contextual considerations such as the seriousness of the charges, non-compellability of witness testimony and the need for protection of witnesses which it has balanced with the dictates of due process and fundamental fairness.

21. As stated above, the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its witness list rests with the Chamber. Furthermore, the Trial Chamber is additionally empowered *proprio motu* to order either party to produce additional evidence or itself summon witnesses and order their attendance, pursuant to Rule 98. The disclosure provisions of Rule 66 A (ii) provides for subsequent disclosure.

22. Consequently, the Trial Chamber grants the Prosecution leave to add Witness X to the list of its witnesses.

Measures of Protection Requested by the Prosecutor

23. In its application of 11 June 2001, the Prosecution requested a wide range of protective measures

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for Witness X. Subsequently, in connection with the hearing on 5 September 2001, the Prosecution submitted a revised outline of the prayers for relief (listed as *litrae* a to k). Some of the requests contained in the application of 11 June 2001 were not included in the revised list, for instance that Witness X shall testify through image- or voice-altering devices, or that all sessions dealing with Witness X be closed.

24. The Chamber notes that some of the requested measures for protection in relation to Witness X are in conformity with the usual practice of witness protection within the Tribunal. It is requested that the witness shall testify under a pseudonym as a protected witness and that his image not be recorded on video (*litra* b); that portions of the testimony that are intrinsically related to his identity and that of those related to him shall be heard in closed session (*litra* c); and that there be no disclosure of his whereabouts or those of his family (*litra* g). The Chamber grants these requests and also orders other measures usually adopted in relation to all Prosecution and Defence witnesses under Rule 75 of the Rules.

25. The Prosecution has also requested that it shall be given the opportunity to propose redactions to the transcripts of Witness X's statements in closed session, before they are released to the public (*litra* e). The Chamber recalls that transcripts from closed sessions are not public, but grants the request in case the question should arise to make them available to persons other than the parties. Furthermore, the Prosecution has requested that portions of Witness X's testimony that are intrinsically related to the integrity of ongoing investigations be conducted in closed session (*litra* d). The Chamber considers this in conformity with the interest of justice, see Rule 73 (A) (iii).

26. The Prosecution has requested that the name, age, former employment, place of birth of Witness X shall be disclosed to the Defence only 30 days before the appearance of the witness (*litra* f). The Chamber notes that the Defence has received the nine redacted transcripts of previous interviews of the witness that the Prosecution intends to rely on and therefore is in a position to commence their preparations now even if the Prosecution has not provided the Defence teams with the identity of the witness. In view of the security considerations that apply in the present case, it is not unreasonable that the identity of the witness is disclosed 30 days before he gives his testimony. For the same reasons, the Chamber also accepts that the said nine transcripts be disclosed in unredacted form to the Defence 30 days before the appearance of Witness X (*litra* i).

27. The Chamber has noted statements from one Defence Counsel to the effect that all Defence teams already know Witness X's identity. If this is correct, the two 30 day periods will only have a limited effect on the preparations of Defence. However, the Chamber does not have sufficient information to verify whether Counsel's assertion is correct.

28. The Chamber does not accept the Prosecution's request that only certain members of the Defence may have access to the information concerning the identity of Witness X and the nine transcripts from the interviews with him unless special permission is given by the Prosecution or the Chamber (*litrae* f and i, see also j). It is understood that the Defence operates as a team. The Chamber considers that Defence Counsel, as officers of the Court, are responsible for ensuring that documents are not made available to persons who do not form part of the Defence teams and that their clients do not disclose documents or information to other detainees or any other person. In view of revelations made by Ngeze to the Chamber, the Chamber makes an explicit order to this effect.

29. In addition to the said nine transcripts on which the Prosecution relies in the present case, there are 17 transcripts which pertain to other accused and which are being used for ongoing investigations in other cases. The Prosecution has requested that there be no disclosure of these transcripts, but that if the Defence so requests the Judges be given the opportunity to review those 17 transcripts out of the presence of the Defence (*litra* h).

30. According to Rule 66 (A) (ii) the Prosecution is under an obligation to disclose previous

statements of witnesses that will be called at trial. Rule 66 (C) provides, however, that when disclosure may prejudice on-going investigations or for any other reasons be contrary to the public interest the Prosecution may apply to the Trial Chamber to be relieved from the obligation to disclose such information. When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential. This Chamber has not yet received such documentation and requests the Prosecutor to submit forthwith the 17 transcripts to the Chamber. Consequently, the Chamber reserves this issue for decision at a later date when it has had the opportunity to review the material.

31. The Prosecution has also requested that Witness X be permitted to testify at a location other than Arusha (*litra a*). The Prosecution argued that Witness X has escaped death and has been under direct threats of execution. The security risk is extremely high because of his role as an informant and his unique insider position in 1994. He has been moved from the African continent and is now under stringent security measures in a Western country. It is submitted that it is not possible to provide for the necessary security measures in Arusha, but that Witness X should testify in The Hague.

32. Counsel for Ngeze and Barayagwiza did not oppose the change of venue. However, all Counsel insisted on the Accused's right to participate in the proceedings. Moreover, Counsel for Nahimana argued that the Prosecution had not demonstrated the crucial need for it. It would be wrong to create the impression that Arusha is good enough for "ordinary", but not for "important" witnesses. It would also be impracticable to split the Defence team and not to provide for ready access to voluminous documents available only in Arusha.

33. On the basis of the available material the Chamber accepts that Witness X is in a particularly vulnerable position and that special security measures are required in connection with his testimony. It is undisputed by the parties that the Tribunal's Rules allow for the change of venue. Reference is made to Resolution 955 (1994) para. 6, according to which the Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions. Rule 4 provides that a Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice. Moreover, Rule 71 (D) provides that a deposition may be given by means of a video conference. It also follows from case law from the ICTY that a witness may be heard by way of a video link, provided that certain conditions are met. Reference is made in particular to *The Prosecutor v. Tadic*, the *Kodic and Cerkez* case and the *Zejnil Delali et al.* case.

34. The Chamber does not see any reason to decide a change of venue in the sense that the entire Chamber, Counsel for the Prosecution and the Defence, the Accused as well as the legal and administrative staff shall sit away from the seat of the Tribunal. The choice is between adopting stringent security measures in Arusha and have X testify here, or arranging for the testimony of Witness X to be given by way of a two way closed circuit video link-up between Arusha and the selected venue. During the hearing of this motion, the Prosecution focused on The Hague as an appropriate place.

35. It follows from case law, with which the Chamber agrees, that certain conditions must be fulfilled for the video solution to be utilised in the present case. The Chamber is of the opinion that the testimony is sufficiently important, that it will be in the interests of justice to grant the application for a video link solution, and that the Accused will not be prejudiced in the exercise of his right to confront the witness. The crucial question is whether the witness is unable or unwilling to come to the Tribunal.

36. The Chamber's preference is that witnesses should be heard at the Tribunal's seat in Arusha. This has been the practice in relation to all witnesses who have so far given testimony at the ICTR. No incidents relating to their safety have been reported. As already mentioned, the Chamber acknowledges that the present witness is in a very special situation which requires particularly stringent security measures. The documentation provided by the Prosecution concerning the risk in

case the witness gives testimony in Arusha relates to the security measures which are adopted in relation to all witnesses. The Chamber considers that it may be possible to adopt sufficient measures to ensure that Witness X can testify here in Arusha.

37. Even if this were so, the information provided to the Chamber suggests that Witness X may be unwilling to testify in Africa out of concern for his security. However, it does not follow clearly from the documentation that his position will be maintained if he is given thorough explanations about the extraordinary measures that will be taken during his stay here (such as moving around from place to place, special locations etc). The Chamber is anxious to avoid testimonies outside Arusha unless such a solution is absolutely necessary.

38. Consequently, the Chamber directs the Witness and Victims Support Section to provide Witness X with the necessary information regarding security measures in order to ascertain whether he is willing to testify in Arusha, and to report back to the Chamber forthwith. In the event that he maintains his position the Chamber authorises the alternative procedure of a video link solution in The Hague. The Registry is directed to make the necessary arrangements for this alternative.

FOR THE ABOVE REASONS THE CHAMBER, BY A MAJORITY

1. **GRANTS** leave to the Prosecution to call a new witness, who shall be referred to by the pseudonym of Witness X;

2. **DECIDES** that Witness X shall be subject to all the measures of protection granted to other Defence and Prosecution Witnesses in the present case;

3. **DECIDES** that the Prosecution shall be given the opportunity to propose redactions to the transcripts of Witness X's statements in a closed session before they are released to the public;

4. **DECIDES** that portions of Witness X's testimony that are intrinsically related to ongoing investigations be conducted in a closed session;

5. **DECIDES** that the name, age, former employment and place of birth of Witness X shall be disclosed to the Defence 30 days before the witness testifies;

6. **DECIDES** that nine transcripts from interviews with Witness X shall be disclosed in unredacted form to the Defence 30 days before the witness testifies;

7. **ORDERS** the Prosecution to submit forthwith to the Chamber the seventeen transcripts from interviews with Witness X and reserves its decision on disclosure until the Chamber has had an opportunity to review the said transcripts;

8. **ORDERS** Defence Counsel to take the necessary measures to prevent the disclosure by the Accused of documents relating to Witness X and information therefrom to other detainees or any other persons;

9. **DIRECTS** the Registry to clarify whether Witness X is willing to testify in Arusha under stringent security measures, and to report to the Chamber forthwith;

10. In the event of an affirmative response, **DIRECTS** the Registry to make necessary arrangements to ensure the protection of Witness X during his stay in Arusha;

11. In the event of a negative response, **DIRECTS** the Registry to make the necessary arrangements for Witness X to give his testimony by means of video-link conference in The Hague.

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Arusha, 14 September 2001

Navanethem Pillay	Erik Møse
Presiding Judge	Judge

Judge Asoka de Z. Gunawardana attaches a dissenting opinion.

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[1] See transcripts of 11 June 2001 pp. 23-24.

[2] See paras. 4.1, 4.4, 5.1-5.3, 5.9, 5.11, 5.14, 5.17, 5.22 and 5.25.

[3] Transcript of 5 September 2001 pp. 112-113.

ICTR-95-1-T
CH/4-A(5)
25 Feb. 1997

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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER 2

OR:FR

Before: Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. Frederik Harhoff
Mr. Jean-Pelé Fomété

Decision of: 31 January 1997

THE PROSECUTOR
VERSUS
OBED RUZINDANA

Case No. ICTR-95-1-T
Case No. ICTR-96-10-T

DECISION ON THE MOTION FILED BY THE PROSECUTOR ON THE PROTECTION OF VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Jonah Rahetlah

The Counsel for the Accused:

Mr. Pascal Besnier (not present)

Case No. ICTR-95-1-T
Case No. ICTR-96-10-T

THE TRIBUNAL,

SITTING AS Trial Chamber 2, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING the two indictments issued by the Prosecutor against Obed Ruzindana, pursuant to Rule 47 of the Rules of Procedure and Evidence (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed genocide, conspiracy to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva conventions and Additional Protocol II thereto;

CONSIDERING the decisions confirming these indictments, signed by Judge Navanethem Pillay on 28 November 1995 and by Judge Tafazzal H. Khan on 20 June 1996, respectively;

CONSIDERING the pre-trial motion filed on 13 December 1996 by the Prosecutor seeking an order for protective measures for victims of and witnesses to the crimes alleged in the indictments;

CONSIDERING the response to the aforementioned motion filed by the Defence on 27 January 1997;

HAVING CONVENED the two parties to a hearing of the said motion on 31 January 1997;

HAVING RECEIVED on 25 January 1997 a letter from the Defence Counsel explaining his inability to be present at the scheduled hearing, to which he annexed his written response to the Prosecutor's motion;

CONSIDERING the said response, approving of the protective measures no. 1-5, 7 and 8 as requested by the Prosecutor, but objecting against measure no. 6, in which the Prosecutor asks that the names, addresses and whereabouts of the witnesses remain undisclosed to the Defence until such time that the witnesses have been afforded protection by the Tribunal;

HAVING COMMUNICATED the contents of the Defence Counsel's written submission to the accused during the hearing in camera held on 31 January 1997;

HAVING THEN HEARD the Prosecutor at the hearing in camera held on this same day;

CONSIDERING the provisions regarding the protection of victims and witnesses in Articles 19 and 21 of the Statute of the Tribunal (the "Statute") and in Rules 69 and 75 of the Rules;

AFTER HAVING DELIBERATED:

WHEREAS, for the protection of victims and witnesses, the Prosecutor has filed a motion before the Tribunal to order the non-disclosure of their identities as well as a range of other measures for the same purpose;

WHEREAS in support of this motion, the Prosecutor has pointed out that, according to various concordant reports from UN institutions, human rights organisations, and numerous media reports, since the November 1996, there has been a considerable increase in the number of violent acts aimed at victims of and witnesses to the serious violations of international humanitarian law committed in Rwanda in 1994, acts which, in numerous cases, have led to the death of victims and witnesses and most recently also of UN staff members in Rwanda;

WHEREAS, while invoking the provisions of Rule 69(A) of the Rules and pointing to the deterioration of the security situation throughout Rwanda, the Prosecutor requests that the Tribunal issue a temporary pre-trial order for the non-disclosure to the public and to the Defence of the identity of all victims and witnesses for the prosecution, as well as all identifying information present in their previous statements and in the supporting documentation which may reveal their identities;

WHEREAS the Defence Counsel, in his written submission, has opposed the Prosecutor's request for non-disclosure of the names and addresses of the witnesses to the Defence until such time that the Tribunal is assured that the witnesses are adequately protected, arguing that the disclosure of the identity of the witnesses will thereby come to depend on an element of uncertainty, since the Prosecutor is unable to establish at which time the witnesses can be afforded such adequate protection;

WHEREAS the Judges, given the particular character of the Tribunal and the fact that they represent the principal legal systems of the world in accordance with Article 12(3)(c) of the Statute, have endeavoured to maintain a perfect balance between, on the one hand, the rights of the accused to a fair trial and, on the other hand, the rights of the victims and witnesses, while at the same time respecting the interest of the international community that justice be done in the most diligent manner possible;

A. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the public and the media

WHEREAS the non-disclosure of the identity of victims and witnesses to the public and the media is not only provided for by the general provisions of Rule 69(A) of the Rules, but also specifically in Rule 75(B) of the Rules;

WHEREAS these measures are even more comprehensible in light of the many concordant reports, issued by various sources, which describe the particularly worrisome situation at present in Rwanda and in the neighbouring countries where those persons who may have, in one way or another, borne witness to the events of 1994, are found today;

THE TRIBUNAL is therefore of the opinion that, regarding the non-disclosure to the public and the media of identity of the victims and witnesses, it is appropriate to grant the measures requested by the Prosecutor;

B. On the matter of the request for the non-disclosure of the identity of victims and witnesses to the Defence

WHEREAS Rule 69(A) of the Rules, which is invoked by the Prosecutor in requesting the non-disclosure of the identity of victims and witnesses to the Defence, is of a general nature and does not distinguish between non-disclosure to the public, to the media and to the Defence, nevertheless provides specific pre-conditions for such a measure to be applied;

WHEREAS, pursuant to Rule 69(A) of the Rules, non-disclosure by the Prosecutor of the identity of a victim or witness can only be administered if she has first obtained a court order for such measures from the Trial Chamber, and in any case, only when exceptional circumstances are shown;

WHEREAS, in this case, the Tribunal notes *ex officio* that the Prosecutor independently decided not to disclose the identity of victims and witnesses to the Defence, without first requesting an order from a Trial Chamber as required under Rules 69(A) of the Rule;

WHEREAS the Prosecutor thereby wrongfully submitted to the Defence versions in which identifying information on victims and witnesses were redacted, even if, had the Prosecutor first obtained an order to that effect, she would have have been legally entitled to do so;

WHEREAS, furthermore, the Defence Counsel has requested that all non-redacted witness statements be submitted to the Defence and the accused no later than 15 days in advance of the trial date;

WHEREAS Rule 69(C) requires that the identity of victims and witnesses be disclosed to the Defence in sufficient time to prepare for the trial;

FOR ALL THE ABOVE STATED REASONS, the Tribunal considers that there is cause to grant the Prosecutor's request for protective measures but, however, reminds the latter that in accordance with the provisions of Rules 69(C) of the Rules, the identity of the victims and witnesses shall be disclosed as soon as possible, so as to allow the Defence adequate time for the preparation of the defence and in any case, within fifteen days prior to the start of the trial on the merits;

FOR THESE REASONS,

THE TRIBUNAL

Case No. ICTR-95-1-T
Case No. ICTR-96-10-T

DECIDES the following measures:

(1) The names and addresses of persons for whom pseudonyms were used in the indictments and supporting documentation, as well as their location and all other identifying information shall not be disclosed to the public nor to the media.

(2) The public and the media shall not make video or audio recordings or broadcastings and shall not take photographs nor make sketches of victims or witnesses under the protection of the Tribunal, without the authorisation of the Trial Chamber and the parties.

(3) The names, addresses and other identifying information of the victims and witnesses, as well as their locations, shall be kept under seal and shall not be placed in any file at the Tribunal.

(4) In cases where the names, addresses and other identifying information of the victims and witnesses, as well as their locations appear in any existing files at the Tribunal, such information shall be expunged from said files.

(5) The pseudonyms given to the victims and witnesses in the indictments and the supporting documentation shall be used each time reference is made to said victims and witnesses in court, in the proceedings of the Tribunal, or during discussions between the parties.

(6) The names, addresses and other identifying information of the victims or witnesses, as well as their locations, shall not be disclosed to the Defence so long as the said victims or witnesses are not under the protection of the Tribunal. On this point, the attention of the Registrar is drawn to the urgent need to establish, if it has not already been so done, adequate protection measures for victims and witnesses before, during and after their testimonies.

(7) Subject to the provisions of Rules 69 and 75 of the Rules, the Prosecutor, in any case, shall disclose to the Defence the names of victims and witnesses, and their unredacted statements, in order to allow the Defence at least fifteen days to prepare for trial.

Arusha, 31 January 1997

Lal[illegible] Kama
Presiding Judge

Lennart Aspegren
Judge

Navanethem Pillay
Judge

Seal of the Tribunal

ICTR-96-13-I
(25.11.1997
(46 - 43)

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International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR: ENG

Before: Judge Lennart Aspegren, Presiding
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Mr. Frederik Harhoff

Decision of: 18 November 1997

THE PROSECUTOR
versus
ALFRED MUSEMA

Case No. ICTR-96-13-I

DECISION TO WITHDRAW ASSIGNED COUNSEL AND TO ALLOW THE PROSECUTOR TEMPORARILY TO REDACT IDENTIFYING INFORMATION OF HER WITNESSES

Office of the Prosecutor:
Mr. Pierre-Richard Prosper

Counsel for Accused:
Ms. Marie-Paule Honegger (not present)

LA

ICTR-96-13-I

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

SITTING as Trial Chamber I, composed of Judge Lennart Aspegren as Presiding Judge, Judge Laïty Kama and Judge Navanethem Pillay;

NOTING that the accused, Alfred MUSEMA, was arrested in Switzerland on 11 February 1995, indicted by the Tribunal pursuant to the confirmation of the indictment signed by Judge Yakov Ostrovsky on 15 June 1996 and transferred from Switzerland to the Tribunal's Detention Unit in Arusha on 20 May 1997;

TAKING INTO ACCOUNT that the Registrar, in accordance with the choice made by the accused, had assigned Ms. Marie-Paule Honegger of the Geneva Bar as his Defence Counsel on 18 December 1996;

WHEREAS the initial appearance of the accused before the Tribunal was scheduled twice, on 16 June 1997 and again on 3 September 1997, and on each occasion the initial appearance of the accused before the Tribunal had to be adjourned due to Ms. Honegger's disregard of the fixed dates for the initial appearance of her client, Alfred Musema, who on both occasions declined to accept alternate counsel;

REFERRING to the Tribunal's Warning and Notice of 31 October 1997 to Ms. Honegger pursuant to Rule 46(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), wherein the Tribunal concluded that the assigned Counsel's conduct and lack of co-operation are obstructing the proceedings and are contrary to the interests of justice, and therefore warned her that she may be sanctioned by refusal of further audience before the Tribunal, if she did not comply with the Tribunal's request to represent in person her client during his initial appearance, scheduled anew for 18 November 1997;

TAKING INTO ACCOUNT the letter of the Defence Counsel of 14 November 1997 to the Tribunal, which was received by facsimile on 15 November 1997;

TAKING NOTE of the fact that the assigned Defence Counsel, despite the said warning and notice, has not presented herself for the initial appearance of her client on 18 November 1997 in accordance with Rule 62 of the Rules, as requested by the Tribunal;

HAVING HEARD the accused today at the said initial appearance, during which he pleaded not guilty to all charges raised against him in the indictment;

CONSIDERING the provisions in Article 19 of the Statute of the Tribunal and Rules 46 and 62 of the Rules;

HAVING RECEIVED, during the initial appearance of the accused, the Prosecutor's oral request pursuant to Rule 69 of the Rules for permission to temporarily redact the names and identifying information of the Prosecutor's witnesses in the supporting material until such time as the Chamber has ordered measures for protection of her witnesses;

AFTER HAVING DELIBERATED,

Concerning the Defence Counsel

1. The right of the accused to appear initially before the Tribunal "without delay" in order to be formally charged and to enable the accused to plead guilty or not guilty to the charges is an inextricable right, which shall not be suspended or obstructed for any reason.

2. Pursuant to Rule 62 of the Rules, the Chamber shall satisfy itself that the right of the accused to counsel has been respected and shall have the indictment read out to the accused in a language he or she understands and in such a manner as to satisfy the Chamber that the accused has also understood the indictment and the charges brought against him or her.

3. In the present case, the Tribunal notes that the Registrar, on 18 December 1996, assigned a Defence Counsel to the accused and did so prior to his questioning by the Prosecutor's investigators. In the Tribunal's view, thus, the accused's right to counsel has been fully respected.

4. The Tribunal, however, has been unable to obtain the necessary co-operation of Ms. Honegger, who has twice caused the suspension of the initial appearance of the accused. For this reason, the Tribunal has been compelled to proceed and arrange for the initial appearance of the accused without the assistance of the Defence Counsel.

5. Prior to formally charging the accused by having the indictment read out to him during the initial appearance, the Tribunal clarified with the accused that his pleading guilty or not guilty to the charges without the presence of his lawyer did not deprive him of his right to counsel and further explained to him that should he fail to plead to the charges, a plea of not guilty will be entered on his behalf. After having satisfied itself that the accused had understood and accepted this, the Tribunal proceeded with the initial appearance. The Tribunal recalls that the accused would, in any event, be entitled to conduct his own defence if he so chose, by virtue of Rule 45(F) of the Rules.

6. The Tribunal notes that the accused, during his initial appearance, declared that he was satisfied with Ms. Honegger as his lead counsel and that he was prepared to accept the co-counsel suggested by her, Mr. Steven Kay of the United Kingdom.

7. The Tribunal, however, is unable to accept the reasons expressed by Ms. Honegger in her letter of 14 November 1997 to explain her absence during the initial appearance of her client. Making her presence at the Tribunal conditional upon the Tribunal's advance payment of her air ticket and her claims for prior legal services, notably, and awaiting assignment of co-counsel who is unavailable before 26 January 1998, are obviously and clearly insufficient grounds for further postponement of the initial appearance.

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8. Finding no reasonable or compelling grounds in the response by the assigned counsel for refusing to be present at the Tribunal for the initial appearance of her client, the Tribunal will give effect to the warning to the Counsel issued on 31 October 1997 according to Rule 46(C) of the Rules, by refusing her further audience before the Tribunal;

Concerning the Prosecutor's request

9. The Tribunal finds that there are good reasons to grant the Prosecutor's request to redact the identifying information relating to her witnesses.

FOR THESE REASONS,

THE TRIBUNAL

FINDS that the conduct of the assigned Defence Counsel, Ms. Marie-Paule Honegger, despite the warning issued to her on 31 October 1997, continues to obstruct the proceedings and remains contrary to the interests of Justice;

DECIDES, therefore, pursuant to Rule 46(C) of the Rules, to refuse further audience to Ms. Honegger before the Tribunal;

INSTRUCTS the Registrar to withdraw the assignment of Ms. Honegger as defence counsel for the accused, Alfred Musema, and to immediately assign a new defence counsel to him;

FURTHER INSTRUCTS the Registrar to send to the Geneva Bar a copy of this Decision and of the above mentioned Decision of 31 October 1997;

DECIDES, pursuant to Rule 69 of the Rules, to grant permission to the Prosecutor to temporarily redact the names and other identifying information of her witnesses in the supporting material until such time as the Tribunal has ordered protective measures for the Prosecutor's witnesses;

REMINDS the Prosecutor that, subject to Rule 75 of the Rules, the identity of the victims or witnesses shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Arusha, 18 November 1997

Lennart Aspegren
Presiding Judge

Laïty Kama
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
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UNITED NATIONS

TRUE COPY OF THE ORIGINAL
SEEN BY ME
DATE 24/10/03

WithdrawalCounsel/Rule46/Chamber1/eng

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